No. 07-526

IN THE
Supreme Court of the United States

DONALD L. CARCIERI,
Governor of Rhode Island, ET AL.,
Petitioners,

v.

DIRK KEMPTHORNE,
Secretary of the Interior, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

Joint Appendix

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 18, 2007
CERTIORARI GRANTED FEBRUARY 25, 2008

TABLE OF CONTENTS

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

General Docket
United States Court of Appeals

Court of Appeals Docket #: 03-2647	**Docketed:** 12/08/2003
Nature of Suit: 2890 Other Statutory Actions	**Termed:** 07/20/2007
Carcieri, et al v. Norton, et al	
Appeal From: District Court of Rhode Island, Providence	

* * *

12/08/2003	CIVIL CASE docketed. Opening forms sent. Notice filed by Appellants Donald L. Carcieri, State of Rhode Island and Providence Plantations and Town of Charlestown Rhode Island. Appearance form due 12/22/03. Docketing Statement due 12/22/03. Transcript Report/Order due 12/22/03. [03-2647]
	* * *
02/13/2004	BRIEF filed by Appellants Donald L. Carcieri, State of Rhode Island and Providence Plantations and Town of Charlestown, Rhode Island. Length: 92 pages, 22,000 words. Copies: 10. Delivered by mail. Certificate of service date 2/6/04. [837256-1] Appellee brief due 3/15/04. Reply brief due 3/29/04. [03-2647]
	* * *

02/17/2004	BRIEF filed by Amicus Curiae States of Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, State of North Dakota, State of South Dakota, Utah and Vermont in support of Appellant State of Rhode Island. Length: 27 pages, 6,560 words. Copies: 10. Delivered by mail. Certificate of service date 2/13/04. [838201-1] [03-2647]
	* * *
04/14/2004	BRIEF filed by Appellees Franklin Keel and Gale A. Norton. Length: 62 pages, 13,700 words. Copies: 11. Delivered by mail. Certificate of service date 4/13/04. [857657-1] [03-2647].
	* * *
04/21/2004	BRIEF filed by Amicus Curiae Absentee Shawnee Tribe, Akiak Native Community, Cahto Tribe, Cheyenne River Sioux, Coeur d'Alene Tribe, Confederated Salish, Confederated Tribes, Eastern Pequot, Eastern Shawnee, Ely Shoshone Tribe, Fallon Paiute-Shosho, Ft. McDermitt Paiute, Grand Traverse Band, Inupiat Community, Kenaitze Indian, Kickapoo Tribe, Lac Courte Oreilles, Lovelock Paiute, Lummi Nation, Moapa Paiute Band, Curiae Modoc Tribe of OK, Narragansett Indian, Native Village, Nez Perce Tribe, Oneida Tribe, Prairie Band, Pueblo of Laguna, Pueblo of

	Santa Ana, Pueblo of Taos, Seminole Tribe of FL, Shoshone-Paiute, Sisseton-Wahpeton, St. Regis Mohawk, Suquamish Tribe, Tanana Chiefs, Te-Moak Tribe, Tuolumne Band, United South and Eastern, Washoe Tribe of NV, Yomba Shoshone Tribe and Oglala Sioux Tribe in support of appellees. Length: 31 pages, 6,942 words. Copies: 11. Delivered by mail. Certificate of service date 4/20/04. [860785-1] [03-2647]
	* * *
04/27/2004	BRIEF filed by Amicus Curiae The Mississippi Band of Choctaw Indians in support of appellees. Length: 25 pages, 6,546 words. Copies: 11. Delivered by mail. Certificate of date 4/26/04. [861742-1] [03-2647]
	* * *
05/04/2004	BRIEF filed by Amicus Curiae Natl Coalition Against Gambling Expansion in support of appellants. Length: 26 pages, 6,737 words. Copies: 11. Delivered by mail. Certificate of service date 4/5/04. [864628-1] [03-2647]
	* * *
05/26/2004	REPLY BRIEF filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI. Length: 72 pages, 16,700 words. Copies:

	11. Delivered by mail. Certificate of service date 5/20/04. [872082-1] [03-2647]
	* * *
09/17/2004	CASE ARGUED 09/17/04. Torruella, Howard, DiClerico, JJ.
	* * *
02/09/2005	OPINION filed by Judge Juan R. Torruella, Judge Jeffrey R. Howard and Judge Joseph A. DiClerico. Signed by Judge Juan R. Torruella, Authoring Judge. PUBLISHED. [959195-1] [03-2647]
02/09/2005	JUDGMENT entered by Judge Juan R. Torruella, Judge Jeffrey R. Howard and Judge Joseph A. DiClerico. This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel. Upon consideration whereof, it is now ordered, adjudged and decreed as follows: The district court's grant of summary judgment in favor the Secretary is affirmed. [959198-1] [03-2647]
	* * *
03/29/2005	PETITION filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI for rehearing en banc. [976061-1]. Certificate of

	Service dated 3/25/05. [03-2647]
	* * *
05/26/2005	ORDER entered by Judge Juan R. Torruella, Judge Jeffrey R. Howard and Judge Joseph A. DiClerico. Pursuant to Fed. R. App. P. 35(e) and 1st Cir. R. 35(e), the Secretary of the Department of the Interior is directed to file a response to the state appellants' petition for rehearing en banc. This response shall not exceed 15 pages and shall be submitted no later than 20 days from the issuance of this order. The Secretary's brief shall address the state appellants' arguments concerning the application of the Indian Reorganization Act of 1934 to the Narragansett Indian Tribe, including specifically any support the Secretary has for the assertion made at oral argument and supported by the Brief of Amici Curiae National Congress of American Indians et al., that "all the Secretaries of the Interior for the last 70 years have read the word 'now' to mean the present, as at the time of a tribe's application," and that trust acquisitions for scores of tribes would be implicated if this Court were to accept the state appellants' argument. The State shall file a reply, not to exceed 15 pages, within 10 calendar days of service of the Secretary's response to the petition for

	rehearing en banc. The State is directed to file supplemental briefing, not to exceed 15 pages, and submitted no later than 20 days from the issuance of this order, regarding the State's alternative argument, that even if additional land may be taken into trust on behalf of the Narragansetts, the trust must be restricted to preserve Rhode Island's civil and criminal laws and jurisdiction. The Secretary shall file a reply, not to exceed 15 pages, within 10 calendar days of service of the State's supplemental brief. [03-2647]
	* * *
06/15/2005	RESPONSE to Petition for Rehearing En Banc filed by Appellees Franklin Keel and Gale A. Norton [976061-1]. Certificate of service dated 6/13/05. [976061-1] [03-2647]
	* * *
06/16/2005	SUPPLEMENTAL BRIEF filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI. Length: 15 pages. Copies: 10. Delivered by mail. Certificate of service date 6/15/05. [1005219-1] [03-2647]
	* * *
07/11/2005	SUPPLEMENTAL BRIEF filed by Appellees Franklin Keel and Gale A. Norton. Length: 15 pages. Copies: 10.

	Delivered by mail. Certificate of service date 7/8/05. [1014255-1] [03-2647]
	* * *
07/12/2005	REPLY filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI to appellees' response to appellants' petition for rehearing en banc. Certificate of service dated 7/11/05. [1014237-1] [03-2647]
	* * *
07/19/2005	BRIEF supporting defendant-appellees and opposing rehearing en banc filed by Amicus Curiae Absentee Shawnee Tri, Amicus Curiae Akiak Native Communi, Amicus Curiae Cahto Tribe, Amicus Curiae Cheyenne River Sioux, Amicus Curiae Coeur d'Alene Tribe, Amicus Curiae Confederated Salish, Amicus Curiae Confederated Tribes, Amicus Curiae Eastern Pequot, Amicus Curiae Eastern Shawnee, Amicus Curiae Ely Shoshone Tribe, Amicus Curiae Fallon Paiute-Shosho, Amicus Curiae Ft. McDermitt Paiute, Amicus Curiae Grand Traverse Band, Amicus Curiae Inupiat Community, Amicus Curiae Kenaitze Indian, Amicus Curiae Kickapoo Tribe, Amicus Curiae Lac Courte Oreilles, Amicus Curiae Lovelock Paiute, Amicus Curiae Lummi Nation, Amicus Curiae Moapa Paiute Band, Amicus Curiae Modoc Tribe of

	OK, Amicus Curiae Narragansett Indian, Amicus Curiae Native Village of, Amicus Curiae Nez Perce Tribe, Amicus Curiae Oneida Tribe, Amicus Curiae Prairie Band of, Amicus Curiae Pueblo of Laguna, Amicus Curiae Pueblo of Santa Ana, Amicus Curiae Pueblo of Taos, Amicus Curiae Seminole Tribe of FL, Amicus Curiae Shoshone-Paiute, Amicus Curiae Sisseton-Wahpeton, Amicus Curiae St. Regis Mohawk, Amicus Curiae Suquamish Tribe, Amicus Curiae Tanana Chiefs, Amicus Curiae Te-Moak Tribe, Amicus Curiae Tuolumne Band, Amicus Curiae United South and Eas, Amicus Curiae Washoe Tribe of NV, Amicus Curiae Yomba Shoshone Tribe and Amicus Curiae Oglala Sioux Tribe. Length: 17 pages. Copies: 11. Delivered by mail. Certificate of service date 6/14/05. [1017062-1] [03-2647]
	* * *
09/01/2005	RESPONSE to amicus brief opposing rehearing filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI. Length: 15 pages. Copies: 10. Delivered by mail. Certificate of service date 8/23/05. [1032640-1] [03-2647]
	* * *
09/13/2005	ORDER entered by Boudin, Chief

	Judge, Torruella, Selya, Lynch, Lipez, and Howard, Circuit Judges, and DiClerico, Jr., District Judge. The appellants filed a petition for en banc rehearing, which we also construe as a petition for panel rehearing. See First Circuit Internal Operating Procedure X. The petition for panel rehearing is granted, and the petition for rehearing en banc is denied without prejudice as moot. A new period for petitioning for en banc review will begin to run following the entry of a new panel opinion and a new judgment. Accordingly, the panel's opinion issued February 9, 2005, is withdrawn, and the judgment entered February 9, 2005 is vacated. [03-2647]
09/13/2005	CASE Reopened. [03-2647]
09/13/2005	OPINION filed. Judge Jeffrey R. Howard, Judge Joseph A. DiClerico Signed Judge Juan R. Torruella, Authoring Judge, Judge Jeffrey R. Howard, Dissenting Judge PUBLISHED [1036117-1] [03-2647]
09/13/2005	JUDGMENT entered. The district court's grant of summary judgment in favor of the Secretary is affirmed. [1036118-1] [03-2647]
	* * *
11/07/2005	PETITION filed by Appellants Donald

	L. Carcieri, State of Rhode Island and Town of Charlestown, RI for rehearing en banc. [1055890-1] [03-2647] Certificate of Service dated 10/28/05. [03-2647]
	* * *
12/05/2006	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. The petition for rehearing en banc is granted. The panel opinion and partial dissenting opinion of this court of September 13, 2005, are withdrawn, and the judgment of this court of September 13, 2005, is vacated. The parties are permitted, if they wish to do so, to file simultaneous supplemental briefs within 21 days from the date of this order, consisting of not more than 25 pages per side. Fourteen copies of any supplemental brief should be provided, including one copy in WordPerfect format on a computer readable disk. [Amici may also file supplemental briefs by the same deadline, limited to 15 pages.] Copies of briefs previously filed are already available to all of the judges. This case will be heard on January 9, 2007, at 2:00 p.m., En Banc Courtroom, 7th Floor, John Joseph Moakley United States Courthouse, One Courthouse

	Way, Boston, Massachusetts. TORRUELLA, Circuit Judge, dissenting from the order. I respectfully register my objection to the precipitous manner in which the date for this hearing is set. This matter has been pending before this Court since a motion for en banc review was filed on November 7, 2005, and it is only within the past week that a vote has been taken to hear the appeal en banc. Considering the brief time between this order and the appointed hearing date, and given the intervening holiday season, I do not believe the parties are given adequate time for the preparation of supplementary briefs and for amici curiae to enter an appearance. [03-2647]
12/05/2006	CASE Reopened. [03-2647]
	* * *
12/27/2006	En Banc SUPPLEMENTAL BRIEF filed by Appellee Franklin Keel and Appellee Gale A. Norton. Length: 25 pages, Copies: 13, delivered by First Class Mail. Certificate of service date 12/26/06. [1199048-1] [03-2647]
	* * *
12/27/2006	En Banc SUPPLEMENTAL BRIEF filed by Appellant Donald L. Carcieri, Appellant State of RI, and Appellant Charlestown, RI. Length: 15 pages,

	Copies: 13, delivered by First Class Certificate of service date 12/26/06. [1199051-1] [03-2647]
	* * *
12/27/2006	En Banc SUPPLEMENTAL BRIEF filed by Amicus Curiae National Congress of American Indians, individual Indian Tribes, and tribal organizations. Length: 15 pages, Copies: 14, delivered by First Class Mail. Certificate of service date 12/26/06. [1199056-1] [03-2647]
	* * *
01/09/2007	CASE ARGUED EN BANC 1/9/07. Boudin, Ch. J., Torruella, Selya, Lynch, Lipez, Howard, JJ. [03-2647]
01/16/2007	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. One of the issues addressed in the briefs and in the oral argument heard in this case on January 9, 2007, is (in shorthand terms) whether—as the Secretary contends—administrative practice supports the Secretary's interpretation of the Indian Reservation Act to permit trusteeing of land of a tribe not recognized at the time that the statute was enacted (and not eligible under one of the other

	provisions of that statute or separate legislation). Some information on this issue has already been presented by the parties and amici but, it was suggested, further information may be available. If the Secretary or other parties or amici aligned with the Secretary wish to submit further information on this issue, leave to file such a supplemental brief or briefs—limited to this issue—is granted and such a brief or briefs may be filed within 21 days of the date of this order. A responsive brief or briefs may be filed by the State of Rhode Island or other parties or amici aligned with the State's position within 21 days after the deadline fixed for the Secretary. Each brief is limited to 15 pages but supporting documents, such as administrative rulings, may be appended without page limit. Fourteen copies of each brief shall be filed, as well as one copy on a computer readable disk. See 1st Cir. R. 32.0. Additionally, counsel are directed to Fed. R. App. P. 32 regarding brief format (except as to page count). It is so ordered. [03-2647]
	* * *
02/07/2007	Post Argument En Banc SUPPLEMENTAL BRIEF filed by Amicus Curiae National Congress of American Indians, individual Indian Tribes, and tribal organizations in

	support of Defendants-Appellees. Length: 14 pages (3,873 words), Copies: 11, delivered by Overnight Mail. Certificate of service date 2/6/07. [1211684-1] [03-2647]
	* * *
02/07/2007	Post Argument En Banc SUPPLEMENTAL BRIEF filed by Appellee Franklin Keel and Appellee Gale A. Norton. Length: 14 pages, Copies: 14, delivered by First Class Mail. Certificate of service date 2/6/07. [1211926-1] [03-2647]
	* * *
02/27/2007	Post-Argument SUPPLEMENTAL BRIEF filed by Amicus Curiae States of Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, North Dakota, South Dakota and Utah in support of the state of Rhode Island. Length: 13 pages, Copies: 15, delivered by mail. Certificate of service date 2/26/07. [1219657-1] [03-2647]
	* * *
03/01/2007	Post En Banc Oral Argument SUPPLEMENTAL BRIEF filed by Appellant Donald L. Carcieri, Appellant State of RI, and Appellant Charlestown, RI. Length: 27 pages, Copies: 13, delivered by First Class Mail. Certificate of service date 2/27/07.

	[1220434-1] [03-2647]
	* * *
07/20/2007	OPINION filed. Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard, Signed Judge Sandra L. Lynch, Authoring Judge, Judge Jeffrey R. Howard, Dissenting Judge, and Senior Judge Bruce M. Selya, Dissenting Judge. PUBLISHED. [1269346-1] [03-2647]
07/20/2007	JUDGMENT entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The decision of the district court is affirmed. Costs are awarded to the Secretary of the Interior. [1269354-1] [03-2647]
08/13/2007	MOTION For A Stay Of Mandate Pending Supreme Court Disposition filed by Appellant Donald L. Carcieri, Appellant State of RI, and Appellant Charlestown, RI. Certificate of service

	dated 8/10/07. [03-2647]
	* * *
08/16/2007	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. The issuance of mandate is hereby stayed for appellants pending the timely filing of a petition for a writ of certiorari and, if a timely petition is filed, pending a resolution of the petition by the United States Supreme Court. If the petition for certiorari is denied, mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellants are directed promptly to notify the clerk of this court both of the filing of any such petition for certiorari and the disposition. [03-2647]
	* * *

U.S. District Court
District of Rhode Island (Providence)
CIVIL DOCKET FOR CASE#: 1:00-CV-00375-ML

Carcieri, et al v. Norton et al
Assigned to: Judge Mary M Lisi
Demand: $0
Case in other court: 03-02647
03-02647
Cause: 05:702 Administrative Procedure Act
Date Filed: 07/31/2000
Date Terminated: 09/29/2003
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
07/31/2000	1	COMPLAINT filed; FILING FEE $150.00 RECEIPT # 45444 (McCabe, F) (Entered: 08/01/2000)
08/01/2000		CASE assigned to Judge Mary M. Lisi. Assigned to Magistrate Judge Lovegreen (McCabe, F) (Entered: 08/01/2000)
08/30/2000		CASE reassigned to Judge Ernest C. Torres. Assigned to Magistrate Judge Robert W. Lovegreen (Webb, J) (Entered: 08/30/2000)
* * *		

09/22/2000	4	MOTION by Lincoln Almond, State of Rhode Island, Town of Charlestown for Temporary Restraining Order (Mercurio, A) (Entered: 09/22/2000)
		* * *
09/30/2000	7	ORDER granting [4-1] motion for Temporary Restraining Order (signed by Judge Ernest C. Torres) (Webb, J) (Entered: 10/05/2000)
		* * *
11/20/2000	9	ANSWER to Complaint by Bruce Babbitt, Franklin Keel (Attorney Charles Jakosa), (Mercurio, A) (Entered: 11/20/2000)
		* * *
01/15/2002	50	MOTION by Franklin Keel, Gale A. Norton for Summary Judgment (Mercurio, A) (Entered: 01/16/2002)
		* * *
01/16/2002	53	JOINT MOTION by Lincoln Almond, State of Rhode, Town of Charlestown for Summary Judgment (Mercurio, A) (Entered: 01/16/2002)
		* * *

02/15/2002	57	MOTION by Franklin Keel, Gale A. Norton for Summary Judgment (Mercurio, A) (Entered: 02/19/2002)
		* * *
07/18/2002	63	ORDER transferring case to Judge Lisi (signed by Judge Ernest C. Torres) (mailed to counsel of record) (Mercurio, A) Modified on 07/18/2002 (Entered: 07/18/2002)
		* * *
09/29/2003	72	MEMORANDUM and ORDER granting [57-1] motion for Summary Judgment, denying [53-1] joint motion for Summary Judgment, granting [50-1] motion for Summary Judgment—mailed to counsel of record (signed by Judge Mary M. Lisi) (Barletta, B) (Entered: 09/29/2003)
09/29/2003	73	JUDGMENT for Franklin Keel, Gale A. Norton against State of Rhode, Town of Charlestown (pursuant to the Memorandum and Order denying plaintiffs' Motion for Summary Judgment and Granting defendants' motion for summary judgment—mailed to counsel of record) (Barletta, B) (Entered: 09/29/2003)
		* * *

11/24/2003	75	Stipulation staying execution of judgment until ten days from the issuance of a mandate from the First Circuit Court of Appeals signed by Judge Mary M. Lisi—faxed to counsel of record (Barletta, B) (Entered: 11/24/2003)
11/26/2003	76	NOTICE OF APPEAL by State of Rhode, Town of Charlestown. Fee Status: paid—Appeal record due on 12/26/03 (Duhamel, J) (Entered: 11/26/2003)
* * *		

L-C
31475-27
12494-27
FGT

May 5, 1927

Mr. John Noka,

Shannock, Rhode Island.

Dear Sir:

Receipt is acknowledged of your letter of April 25, 1927, in which you request the Federal Government to take charge of the affairs of the Narragansett Indians.

The Narragansett Indians are and have been under [the] jurisdiction of different states of New England. The federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs.

There is, therefore, no possible way in which this Office can furnish you with any assistance, and all communications in regard to your affairs should be taken up with the proper state officials.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner.

L-C
31295-27
13494-27

Jun. 29, 1927

Mr. Daniel Sekater,
196 High Street,
Westerly, Rhode Island.

My dear Mr. Sekater:

Receipt is acknowledged of your letter of June 22, 1927, in which you request information as to what is to be done in regard to the Narragansett Indians.

The Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of different States of New England.

There is therefore no possible way in which this Office can furnish the Narragansett tribe with any assistance, and all matters in regard to your affairs should be taken up with the proper State officials.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner.

L-C
14516-37
FGT

Mar. 18, 1937

Hon. John M. O'Connell

House of Representatives

My dear Mr. O'Connell:

Receipt is acknowledged of your letter of March 8, with reference to settlement of the purported claim of the Narragansett Tribe of Indians of Rhode Island.

We have had correspondence directly with Mr. Daniel Sekater relative to the matter. Under date of June 29, 1927, Mr. Sekater was advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs. He was further advised that there was no possible way in which this Office could furnish the Narragansett Tribe with any assistance.

The situation has not changed since the above mentioned letter was written.

The Narragansett Indians dealt with the Crown of Great Britain through the Colonial Government and their affairs were practically disposed of at the time of the Revolutionary War and before the organization of the Federal Government under the Constitution of the United States. These Indians could, therefore, have no claim against the Federal Government. If they have a claim for two million

dollars it would be against the State of Rhode Island and not the United States of America.

Sincerely yours,

(Signed) [Illegible]

Commissioner

EXECUTION COPY 2/28/78

JOINT MEMORANDUM OF UNDERSTANDING CONCERNING SETTLEMENT OF THE RHODE ISLAND INDIAN LAND CLAIMS

All parties to *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al,* C.A. No.75-0006 (USDC, DRI) and *Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management,* C.A. No. 75-0005 (USDC, DRI) (together called the "Lawsuits") and the other undersigned persons interested in the settlement of Indian land claims within the State of Rhode Island hereby agree to the following principles and provisions of settlement which are, except for the provisions of Section 18 below, to be considered as inseparable, dependant requirements and which are all conditioned upon requisite, favorable and timely action by the appropriate executive and legislative branches of the governments of the State of Rhode Island and the United States of America:

1. That a state chartered corporation (the "State Corporation") will be created with an irrevocable charter for the purpose of acquiring, managing and permanently holding the lands defined in Sections 2 and 3 below (the "Settlement lands"); the State Corporation will be controlled by a board of directors, the majority whose members will be chosen by a Rhode Island corporation known as "The Narragansett Tribe of Indians" (the "Indian Corporation") or its successor and the remaining members chosen by the State of Rhode Island.

2. That the State of Rhode Island will contribute the Indian Cedar Swamp, the Indian Burial Hill, the land around Deep Pond, and an easement from Kings Factory Road to Watchaug

Pond to the State Corporation. These public portions of the Settlement Lands total approximately 900 acres. Contribution of the State land around Deep Pond is subject to the restrictions set forth below in Section 17.

3. That the Settlement Lands will also include approximately 900 acres of land located within the area outlined in red on the map attached hereto marked Exhibit A. The Settlement Lands shall specifically include those lands held by the defendants named in the Lawsuits which are enumerated on the schedule attached hereto as Exhibit B. These privately held portions of the Settlement Lands shall be acquired at fair market value established without regard to the pendency of the Lawsuits. No private landowner shall be required to convey any land hereunder without his or her consent, which shall be deemed to have been given upon execution of a mutually acceptable option agreement (the "Option"). Any landowner executing an Option shall be paid a nonrefundable option fee by the federal government equal to 5% of the purchase price for a 2-year option. The optionee shall have the right to renew the option for one additional year for a renewal fee paid by the federal government of 2.5% of the purchase price.

4. That the parties to the Lawsuits will support efforts to obtain deferral of both state and federal income taxes resulting from the conveyance of privately held portions of the Settlement Lands.

5. That the federal government will provide the funds, in an amount not in excess of 3.5 million dollars, to acquire the privately held portions of the Settlement Lands.

6. That Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claim. This Federal legislation shall be in form and substance as set forth in the proposed statutory language attached hereto as Exhibit C, unless otherwise agreed by counsel for the private Defendants in the Lawsuit. This legislation shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island.

7. That the Settlement Lands shall be subject to a special federal restriction against alienation, provided that nothing in the federal restriction or in any other aspect of this memorandum shall affect the ability of the State Corporation to grant or otherwise convey (whether voluntary or involuntary, including any eminent domain or condemnation proceedings) easements for public or private purposes.

8. That the Settlement Lands will be held in trust by the State Corporation for the benefit of the descendants of the 1880 Rhode Island Narragansett Roll.

9. That the Settlement Lands will not be subject to local property taxation.

10. That the federal government will reimburse the private defendants in the lawsuits for costs incurred or paid for legal services and disbursements in connection with the lawsuits with respect to any lands involved in the Lawsuits which are not specified in Exhibit B and for which an Option is not executed.

11. That the State Corporation will have the right (after consultation with appropriate state officials) to establish its own regulations concerning hunting and fishing on the Settlement Lands without being subject to state regulations, but shall impose minimum standards for safety of persons and protection of wildlife and fish stock.

12. All the Settlement Lands contributed by the State will be permanently held for conservation purposes by the State Corporation.

13. That, except as otherwise specified in this Memorandum, all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes.

14. That all settlement lands will be subject to a professionally prepared land use plan (the "Land Use Plan") mutually acceptable to the State Corporation and the Town Council. Acceptance of the Land Use Plan shall not be unreasonably withheld by the Town Council. At least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses by the Land Use Plan. Town Council acceptance of the Land Use Plan shall be a condition precedent to the acquisition of the Settlement Lands by the State Corporation. The Town Council, after its acceptance of the Land Use Plan, shall amend the zoning ordinance of the Town of Charlestown in a manner consistent with the Land Use Plan as it applies to the Settlement Lands. Thereafter, the zoning ordinance, as amended to conform with the Land Use Plan, shall control the use of the Settlement Lands and shall not be further amended in a manner

inconsistent with the Land Use Plan without the consent of the State Corporation.

15. That the plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this Memorandum, but will have the same right to petition for such recognition and services as other groups.

16. That the Town of Charlestown will be reimbursed for future services provided in connection with the Settlement Lands with funds provided by the Indian corporation.

17. That contribution by the State of the land around Deep Pond is conditioned upon required and appropriate Federal approval of any conveyance of said land in such manner so as not to affect, in any adverse manner, any benefits received by the State under the Pittman-Robertson Act (16 U.S.C. §669-669i) and the Dingell-Johnson Act (16 U.S.C. §777-777k), and further conditioned upon the retention of permanent State control of and public access to an adequate fishing area within said land.

18. That implementation of all provisions of the Memorandum, except those of Sections 6, 10 and 19, and the payment of the option fees provided for in Section 3 above shall be contingent upon a prompt determination by the Department of the Interior that the Plaintiff in the Lawsuits have a credible claim to the lands involved in the Lawsuits. Plaintiff shall have an opportunity for judicial review of any adverse determination by the Department of the Interior.

19. The Plaintiffs in the Lawsuits agree to cause the Lawsuits to be dismissed with prejudice at the time the portion of the Federal legislation which eliminates title problems pursuant to Section 6 above become effective.

WITNESS the execution hereof under seal as of this twenty-eighth day of February, 1978.

HONORABLE J. JOSEPH GARRAHY,
Governor of State of Rhode Island and Providence Plantations

/s/

TOWN OF CHARLESTOWN, RHODE ISLAND
TOWN COUNCIL

By: /s/

PLAINTIFF: NARRAGANSETT TRIBE OF INDIANS,
By their attorneys,
NATIVE AMERICAN RIGHTS FUND

By: /s/
Thomas N. Tureen

DEFENDANTS: EDWARD WOOD, RHODE ISLAND DIRECTOR OF ENVIRONMENTAL MANAGEMENT

By: /s/
William Granfield Brody,
Assistant Attorney General,
State of Rhode Island

(David F. Giuliano
(Paul E. Bennett
(Alfred Testa

By GOODWIN, PROCTER & HOAR,
their attorneys,

By: /s/
Donald P. Quinn

(Robert E. Cherry
(Castle Realty Company
(Glenn F. Godden
(Mildred L. Godden
(John S. Johnson
(Alice Johnson
(Ethel W. Duguid
(Providence Boys Club
(Greater Providence Young Mens Christian Association
(Sarah J. Browning
(William F. Arnold
(Ruth Arnold
(Thomas L. Arnold
(William Arnold
(Frank W. Arnold
(Thomas L. Arnold, William Arnold, Frank W. Arnold and the Washington Trust Company as trustees for the Estate of Frank Arnold
(Thomas L. Arnold, Laurence Whittemore and the Washington Trust Company as trustees for the Thomas L. Arnold Trust
(Hope W. Hallock
(Edna May McKenzie
(Lloyd E. Fitzgerald
(Joyce M. Fitzgerald
(Edward A. Whipple
(Pauline Whipple

By TILLINGHAST, COLLINS & GRAHAM,
their attorneys,

By: /s/

SOUTHERN RHODE ISLAND LAND DEVELOPMENT CORP.,
By its attorney,

By: /s/
Archibald B. Kenyon, Jr.

FRANKLIN SHORES, INC.,
by its attorney,

By: /s/
John P. Toscano, Jr.

EDNA MAE REED, by her attorney,

By: /s/
Harold B. Soloveitzik

CARL M. RICHARD, by his attorney,

By: /s/
Francis Castrovillari

OLD STONE BANK, by its
attorney,

By: /s/
Frank Ray

OLD COLONY CO-OPERATIVE
BANK,
by its attorney,

By: /s/
ARCHIBALD B. KENYON, JR.

EXHIBIT A

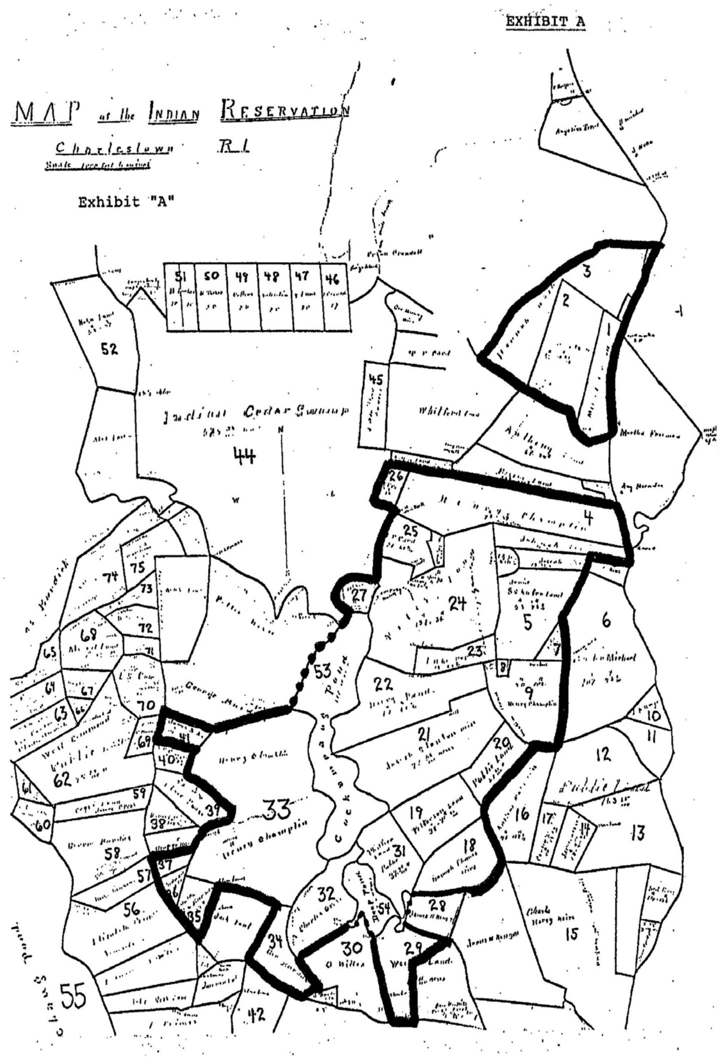
EXHIBIT A
MAP of the INDIAN RESERVATION
Charlestown R.I.
Exhibit "A"
Indian Cedar Swamp
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EXHIBIT B

Providence Boys' Club (with the exception of approximately 100 acres of land adjoining Schoolhouse Pond and Lot No. 17)

Greater Providence Young Mens' Christian Association

Hope W. Hallock

Edna May McKenzie

Southern Rhode Island Land Development Corporation

Franklin Shores, Inc.

Edna Mae Reed

Carl M. Richard (including only lots numbered 5, 7, 8 and 9 and provided further that this land shall be held permanently for conservation purposes and neither the State Corporation, Indian Corporation nor any beneficiary thereof shall have standing in any zoning or other administrative or judicial proceeding involving land presently owned by Castle Realty Company)

Approximately 12 acres of Land of David F. Giuliano

2/13/78 EXHIBIT C

RHODE ISLAND
INDIAN CLAIMS STATUTE

SEC. 1 (a) Any transfer of lands or waters located within the State of Rhode Island from, by or on behalf of any Indian, Indian nation or tribe of Indians, including but not limited to a transfer pursuant to any statute of the State of Rhode Island, was and shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of lands or waters from, by or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Ch. 33, §4, 1 Stat. 138, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve and ratify any such transfer effective as of the date of the said transfer.

(b) To the extent that any transfer of lands or waters described in subsection (a) may involve lands or waters to which any Indian, Indian nation or tribe of Indians had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer.

(c) By virtue of the approval and ratification of a transfer of lands or waters effected by subsection (a) or an extinguishment of aboriginal title effected thereby, all claims against the United States, any state or subdivision thereof, or any other person or entity, by any Indian, Indian nation or tribe of Indians, including but not limited to claims for trespass damages or claims for use and occupancy, arising subsequent to the transfer and that are based upon any interest in or right involving

such lands or waters, shall be regarded as extinguished as of the date of the transfer.

(d) As used in this section, the phrase "lands or waters" shall include any interest in or right involving lands or waters, and the term "transfer" shall include but not be limited to any sale, grant, lease, allotment, partition, conveyance, or any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or conveyance, or any event or events that resulted in a change in possession or control of lands or waters.

Book 102 – Page 383

DEED

KNOW ALL MEN BY THESE PRESENTS, that the NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND, P.O. BOX 268, Charlestown, RI 02813, for good and valuable consideration, does hereby grant, bargain, remise, release and forever convey unto the UNITED STATES OF AMERICA AS GRANTEE IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND it successors and assigns forever, with WARRANTY COVENANTS, all the right title, interest, claim and demand which the said NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND now has or of right ought to have, or claim, in and to that parcel or tract of land situated in the Town of Charlestown, County of Washington, in the State of Rhode Island, bounded and described as follows:

> Beginning at a maple tree near the Tyas Bridge, so-called, being the northeasterly corner of land conveyed by Charles Cross to George F. Burdick by deed dated December 28, 1867 and recorded in the office of the Town Clerk of the Town of Charlestown in Deed Book 9 at Page 270, and running thence in a southeasterly direction bounding southwesterly on said; Burdick land along the westerly side of a cart path or old Indian Trail to a stake and stones and land now or formerly of Othniel Wilcox et al; thence turning and running northeasterly bounding southeasterly on said last named land to Deep Pond, so-called; thence turning and running in a

northerly direction on a meandering line bounding easterly on Deep Pond till it comes to land sold by Charles Cross to Henry A. Barker by deed dated June 29, 1898 and recorded in said office in Book 13 at Page 467; thence turning and running in a northwesterly direction bounding northeasterly on said Barker land to a point in the shore of School House Pond, sometimes called Cockampaug Pond, where the Kings Factory Brook, so-called, connects with said Pond; thence turning and running in a southwesterly direction bounding northwesterly on land now or formerly of Henry Champlin and in part on land of said Burdick to said maple tree at Tyas Bridge and the point and place of beginning; said last course following the center line of said Brook.

TOGETHER WITH all the right, title and interest of the Grantor in and to said Deep Pond, Cockampaug Pond and Kings Factory Brook and the waters of the same, and TOGETHER WITH right of way to School House Pond as reserved in deed from Charles Cross to Henry A. Barker dated June 29, 1898 and recorded in Charlestown Record Book 13 at Page 467. Said premises are conveyed subject to any existing or used right-of-ways or ancient trails across said property.

Being the same premises conveyed by Deed from Benjamin C. Gavitt and wife, Bessie C. Gavitt to State of Rhode Island and Providence Plantations, dated

September 30, 1957 and recorded October 2, 1957 at 10:05 a.m.

TO HAVE AND TO HOLD the same, with all right, privileges and appurtenances thereunto appertaining, unto and to the use of it the said NARRAGANSETT INDIAN TRIBE, its successors and assigns forever.

TOGETHER WITH and subject to all easements and restrictions as set forth in Title 37, Chapter 18, Section 14 of the Rhode Island General Laws as amended.

Book 102 – Page 384

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987.

NARRAGANSETT INDIAN TRIBE

BY: /s/

In Presence Of: /s/

/s/

/s/

/s/ /s/

/s/

/s/

/s/

/s/

/s/

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before me personally appeared the above persons being the Chief Sachem and Tribal Council of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/
Notary Public
Rogeriee Thompson

Pursuant to the delegation from the Assistant Secretary—Indian Affairs to the Eastern Area Director, the undersigned hereby accepts the lands conveyed by this deed on behalf of the United States of America pursuant to Section 5 of the Indian Reorganization Act (Act of June 18, 1934, C. 576, 48 STAT. 986, 25 U. S. C. 465). This action does not alter the applicability of state law conferred by the Rhode Island Indian Claims Settlement Act, Public Law 95-395, 25 U. S. C. 1701 et. seq.

/s/ 9-12-88
B. D. Ott Date
Area Director
Eastern Area Office

Book 102 – Page 385

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987.

NARRAGANSETT INDIAN TRIBE

BY: /s/
Chief-Sachem

BY: /s/
First Councilperson

In Presence Of:

/s/

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before me personally appeared David K. Mars and Dawn Dove being the Chief Sachem and First Councilperson respectively of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/
Notary Public
Rogeriee Thompson

RECEIVED FOR RECORD ON SEPTEMBER 13, 1988
AT 11:05 A.M. AND RECORDED BY:
/s/
Deputy Town Clerk

I, hereby certify the above to
be a true copy and have
affixed the seal of the town
of Charlestown this 10th day
of September 2003
/s/

[SEAL] United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Area Office
Suite 260
3701 North Fairfax Drive
Arlington, Virginia 22203

IN REPLY REFER TO: MAR 6 1998

Trust Services
Branch of Realty

Honorable Matthew Thomas
Chief Sachem, Narragansett Indian Tribe
P.O. Box 268
Charlestown, Rhode Island 02813

Dear Mr. Thomas:

This letter is to inform you of the intent of the Secretary of the Interior to accept the property known as Assessor's Plat 117, Lot 119 of Charlestown, Rhode Island into trust for the use and benefit of the Narragansett Tribe of Indians of Rhode Island.

After consideration of the requirements under the provisions of 25 Code of Federal Regulations, (CFR), Part 151, Land Acquisitions, Sub-sections .10 and .11, and new procedures as established under Final Rule, 25 Code of Federal Regulations, Part 151.12 (61 FR 18082-83), it has been determined to be in the best interest of the Tribe that the subject property be accepted into trust.

This letter will also serve as a letter of notification to the following interested parties:

1. Governor Lincoln Almond
   State of Rhode Island and Providence
   Plantations

State House
Providence, Rhode Island 02908-1196

2. Mr. George Hibbard, Town Administer
Charlestown Town Hall
4540 South County Trail
Charlestown, Rhode Island 02813

3. Mr. Ken Swain, Town Assessor
Charlestown Town Hall
4540 South County Trail
Charlestown, Rhode Island 02813

The property is adjacent to the Tribe's current trust lands and was acquired for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the Department of Housing and Urban Development (HUD).

The application was reviewed pursuant to the regulations cited at 25 CFR 151.10 (copy enclosed)

This decision may be appealed to the Interior Board of Indian Appeals (IBIA) within thirty (30) days of receipt of this letter and an Appellant is required to file an opening brief within thirty (30) days after receipt of the IBIA's Notice of Docketing pursuant to regulations cited in 43 Code of Federal Regulations, Part 4.

The IBIA is located at the following address:

U. S. Department of the Interior
Interior Board of Indian Appeals
Office of Hearing and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

If you have any questions regarding this matter, please contact Mr. Bill Wakole, Area Realty Officer at (703) 235-2726.

Sincerely,

/s/ Franklin Keel
Franklin Keel
Eastern Area Director

Enclosure

IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

TOWN OF CHARLESTOWN, RHODE ISLAND
and
GOVERNOR, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-88-A and 98-89-A Decided June 29, 2000

Appeal from a decision to take land into trust for the Narragansett Indian Tribe of Rhode Island.

Affirmed.

1. Indians: Generally—Statutory Construction: Generally—Statutory Construction: Indians

   The interpretation of a statute settling Indian land claims is controlled by the language of the particular statute concerned.

APPEARANCES: James E. Purcell, Esq., Normand G. Benoit, Esq., and Eugene G. Bernardo II, Esq., Providence, Rhode Island, for the Governor; Bruce N. Goodsell, Esq., for the Town; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director; John F. Killoy, Jr., Wakefield, Rhode Island, and Matthew S. Jaffe, Esq., Washington,

D.C., for the Narragansett Indian Tribe; Kevin W. Meisner, Esq., Uncasville, Connecticut, for amicus curiae Mohegan Tribe of Indians of Connecticut.[1]

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Town of Charlestown, Rhode Island (Town), and Governor, State of Rhode Island and Providence Plantations (Governor), seek review of a March 6, 1998, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), deciding to take Assessor's Plat 117, Lot 119, located in Charlestown, Rhode Island, into trust status for the Narragansett Indian Tribe of Rhode Island (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The Board previously addressed a trust land acquisition dispute between the Town and the Tribe in *Town of Charlestown, Rhode Island v. Eastern Area Director* (*Charlestown I*), 18 IBIA 67 (1989). It repeats here part of the background discussion from *Charlestown I*.

> In January 1978, the tribe filed two lawsuits in the United States District Court for the District of Rhode Island concerning its claim to approximately 3,200 acres of public and private land within the boundaries of the Town. A settlement was reached by the parties on February 28, 1978. In

[1] The Mohegan Tribe of Indians of Connecticut was granted amicus curiae status, but chose not to file a brief.

implementation of the settlement agreement, both Congress and the Rhode Island Legislature enacted legislation. Rhode Island Indian Claims Settlement Act of 1978, *as amended*, 25 U.S.C. §§ 1701-1716 * * * (Settlement Act [or Rhode Island Settlement Act]); Narragansett Indian Land Management Corporation Act of 1979, *as amended*, R.I. Gen. Laws §§ 37-18-1 through 37-18-15. Pursuant to the settlement agreement and the implementing Federal and State legislation, approximately 900 acres of State-owned land and approximately 900 acres of privately-owned land [settlement lands] were to be transferred to the Narragansett Indian Land Management Corporation (corporation), which was, to be chartered by the State.

The tribe received Federal acknowledgement in 1983. By notice published in the *Federal Register* on February 10, 1983, the Assistant Secretary—Indian Affairs issued a determination pursuant to 25 CFR Part 83 that the tribe existed as an Indian tribe. 48 FR 6177 (Feb. 10, 1983). In 1985, the Rhode Island Legislature enacted legislation providing for expiration of the corporation and transfer of settlement lands to the Federally acknowledged tribe. P.L. 1985, ch. 386, R.I. Gen. Laws §§ 37-18-12 through 37-18-14.

18 IBIA at 68.

In *Charlestown I*, the Town objected to trust acquisition of the settlement lands. The Board affirmed the decision to acquire the lands in trust because it found "nothing in the Settlement Act that precludes trust acquisition of the settlement lands or imposes any requirements for their acquisition beyond those contained in 25 CFR Part 151." *Id.* at 71.

As relevant to this appeal, by application dated July 17, 1997, the Tribe requested that BIA take a parcel of land containing approximately 32 acres into trust for it. This parcel was not part of the settlement lands, but rather had been acquired from private developers in 1991 by the Narragansett Indian Wetuomuck Housing Authority (NIWHA). NIWHA made the purchase with funds from the Department of Housing and Urban Development (HUD) for the purpose of providing low-income housing. NIWHA transferred title to the parcel to the Tribe, and the Tribe leased the parcel back to NIWHA. The parcel is separated by a road from other trust lands owned by the Tribe. The application for trust acquisition stated at pages 4-5:

> NIWHA specifically purchased this parcel of land because it was far more suitable for Tribal housing than the Tribe's existing trust lands. As stated by NIWHA to HUD, some of the Tribe's trust lands are unsuitable for development as they are located over the Tribe's sole-source aquifer, are wetlands associated with Indian Cedar Swamp, Schoolhouse Pond and Deep Pond, or are listed on, or eligible for

> listing on, the National Register of Historic Places. Further, only 225 acres of the Tribe's Settlement Lands are available for development.[2]
>
> This parcel of land, however, is quite suitable for development. In fact, the prior owners sought and obtained clearance from various State and local entities to construct a residential subdivision on the property.
>
> Moreover, in order for the Tribe and NIWHA to obtain funding for the development of low-income housing for Tribal members, HUD must be satisfied that there exists an imminent need to "remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income . . ." *See*, United States Housing Act of 1937, 42 U.S.C. Sec. 1401 and 1437; and the Indian Housing Act of 1988, 42 U.S.C. Sec. 1437(a)(a) [sic; probably should be sec. 1437aa].

Despite opposition from both the Town and the Governor, by letter dated March 6, 1998, the Area

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[2] Section 12 of the settlement agreement required that all of the State-contributed settlement lands "be permanently held for conservation purposes." Section 14 required the development of a land use plan for all of the settlement lands under which "[a]t least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses."

Director notified the Tribe of his intent to take the parcel into trust.

Appellants appealed separately to the Board, but filed a joint opening brief. The Board granted a request from the Area Director to supplement the administrative record, and authorized Appellants to file a supplemental opening brief. Appellants did so. The Area Director and the Tribe filed separate answer briefs.

After the conclusion of briefing, Appellants submitted a copy of *Connecticut v. Babbitt*, 26 F.Supp.2d 397 (D. Conn. 1998). In their transmittal letter, they made additional arguments based on *Connecticut v. Babbitt* and requested a stay of this appeal pending the issuance of a decision in *Connecticut v. Babbitt* by the United States Court of Appeals for the Second Circuit. Both the Area Director and the Tribe responded to Appellants' new arguments and opposed a stay, contending that *Connecticut v. Babbitt* was not dispositive here. Appellants repeated their request for a stay. The Board denied Appellants' request.

Discussion and Conclusions

Decisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based on an exercise of discretion. Rather, it reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." *City of Eagle Butte, South Dakota v. Aberdeen Area Director*, 17 IBIA 192, 196; 96 I.D. 328, 330 (1989). *See also McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997); *Town of Ignacio,*

Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-39 (1999); *City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102, 103-04 (1999). In regard to BIA discretionary decisions, the appellant bears the burden of proving that the Area Director did not properly exercise his discretion. *Lincoln City*, 33 IBIA at 104, and cases cited therein.

However, the Board has full authority to review any legal challenges that are raised in a trust acquisition case. In regard to BIA's legal determinations, the appellant bears the burden of proving that the Area Director's decision was in error or not supported by substantial evidence. *Id.*

Appellants here challenge several legal conclusions which the Area Director reached as well as his exercise of discretion. The Board first addresses those arguments that clearly challenge the Area Director's decision on legal grounds.

Appellants argue that the acquisition of land in trust without the consent of the State is unconstitutional under Article I, sec. 8, cl. 17, of the United States Constitution and under the Eleventh Amendment. The Board interprets this argument as seeking a determination that 25 U.S.C. § 465, the statutory authority for this trust acquisition, is unconstitutional.

The Board has stated on many occasions that, as part of the Executive Branch of Government, it lacks authority to declare an act of Congress unconstitutional. *See*, *e.g.*, *Lincoln City*, 33 IBIA at 105; *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 133 (1998). The Board lacks jurisdiction to address this argument.

Appellants contend that the Secretary lacks authority to take any land into trust for the Tribe other than the 1,800 acres which were authorized in the Settlement Act. They argue:

> [The Settlement Act] precludes a finding that land outside of the Settlement Lands, (or lands, as in this instance, which were once identified by the Tribe as potential private settlement lands), may be deemed "Indian country" or may be intended to become unrestricted sovereign Indian trust land. The Settlement Act fully and completely resolved the Tribe's land claims and established the boundary of the Tribe's Indian country in Rhode Island. In other words, it has always been the position of [Appellants] that [25 U.S.C. § 1705(a)(3)[3]] extinguished all of the Tribe's claims and limited the boundaries of its Indian country to the Settlement Lands themselves. It was Congress' plain intent in the Settlement Act to set definite limits to the Tribe's Indian country, and to extinguish any claim to greater boundaries. Such Congressional intent must prevail, barring a specific act of Congress expanding such boundaries.

Appellants' Opening Brief at 10.[4]

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[3] This provision is quoted in text below.

[4] The State of Rhode Island made the same argument in *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d

Appellants contend that their position is supported by *Connecticut v. Babbitt*, *supra*. The question in *Connecticut v. Babbitt* was whether the Connecticut Indian Land Claims Settlement Act of 1983 (Connecticut Settlement Act), Pub. L. No. 98-134, 97 Stat. 851, 25 U.S.C. §§ 1751-1760, allowed the Secretary to acquire lands in trust for the Mashantucket Pequot Tribe beyond those authorized as settlement lands in the Connecticut Settlement Act.

The court began its discussion in *Connecticut v. Babbitt* by noting:

> Congress has enacted numerous settlement acts. See 25 U.S.C. § 1701 et seq. One of them contains a provision expressly precluding the federal government from relying on any other authority to acquire land in trust for the benefit of the Indians. See Maine

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[Footnote continued from previous page]

908 (1st Cir. 1996). The court specifically declined to address the argument, stating:

> "The importance of this dispute over whether the Settlement Act terminates the Tribe's ability to increase the territory over which it possesses sovereignty is manifest. * * * Nonetheless, we leave this question * * * for another day. * * * [W]hile it is at heart a question of statutory interpretation, we nonetheless prefer to address the Settlement Act question at a time when the parties, and the court below, have addressed it more fully."

89 F.3d at 914.

> Indian Claims Settlement Act, 25 U.S.C. § 1724(e).[5] Another contains a provision expressly preserving the federal government's authority to take land into trust for the benefit of the Indians under [25 U.S.C.] § 465. See Washington Indian (Puyallup) Land Claims Settlement Act, 25 U.S.C. § 1773c.[6] The [Connecticut] Settlement Act does not contain such an express provision one way or the other.

26 F.Supp.2d at 400. The court found that the question before it, like the question now before the Board, was "whether the area under the sovereignty of the Tribe can be expanded against the wishes of the State and the Towns without congressional approval." *Id.*

---

[5] 25 U.S.C. § 1724(e) provides in pertinent part: "Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine."

[6] 25 U.S.C. § 1773c provides:

> "In accepting lands in trust (other than those described in section 1773b of this title [the settlement lands]), for the Puyallup Tribe or its members, the Secretary shall exercise the authority provided him in [25 U.S.C. § 465], and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations, as those standards now exist or as they may be amended in the future."

The primary statutory provision at issue in *Connecticut v. Babbitt* was 25 U.S.C. § 1754(b)(8). That subsection provides:

> Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

The court concluded that the phrase "acquired under this subsection" was ambiguous as to whether it referred to *any* lands acquired outside the settlement lands or whether it referred only to lands that were both outside the settlement lands and acquired with Federal funds provided pursuant to the Connecticut Settlement Act. The court therefore looked to extrinsic aids to statutory construction. It ultimately held that the legislative history supported an interpretation of the subsection and the Connecticut Settlement Act as prohibiting the trust acquisition of any lands except the settlement lands.

Appellants urge the Board to reach the same conclusion as to 25 U.S.C. § 1705(a)(3). Subsection 1705(a) provides in pertinent part:

> If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title [concerning the enactment of specified State legislation], he shall

> publish such findings in the Federal Register and upon such publication—
>
> * * * * * *
>
> (3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presented or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

[1] Although it finds several similarities between the Connecticut and the Rhode Island Settlement Acts, the Board concludes that the specific language used in 25 U.S.C. § 1754(b)(8) and 25 U.S.C. § 1705(a)(3) is too dissimilar to be directly analogous. The Board concludes that *Connecticut v. Babbitt*, while instructive as to the type of individualized statutory interpretation necessary in the present appeal, is not dispositive here. It therefore considers Appellants' substantive argument.

Appellants contend that 25 U.S.C. § 1705(a)(3) did two things: (1) it resolved, or extinguished, the Tribe's land claims, and (2) it limited to the settlement lands the boundaries of the trust land which the Tribe could hold.

In making this argument, Appellants do not analyze the language of 25 U.S.C. § 1705(a)(3), or any other section of the Settlement Act. Nor do they refer to the legislative history. Instead, they discuss the background of the enactment of the Settlement Act. They assert that the agreement on which the Settlement Act was based was intended "to end the dispute and resolve not only the Tribe's land claims, but also establish the boundaries of the Tribe's new settlement land in Rhode Island." Appellants' Opening Brief at 12. They further argue that the Tribe "agreed to the extinguishment of any further right to claim lands within Rhode Island as part of their original 'Indian country.'" *Id.* The Board agrees with these statements, which are merely different ways of saying that the Settlement Act extinguished the Tribe's aboriginal land claims and established the settlement lands.

However, Appellants go a step further and contend that it "was Congress' plain intent in the Settlement Act to set definite limits to the Tribe's Indian country, and to extinguish any claim to greater boundaries." *Id.* at 10. Appellants here argue that Congress prohibited the Tribe from acquiring any lands in trust other than the settlement lands.

Both the Area Director and the Tribe disagree with this aspect of Appellants' interpretation of subsection 1705(a)(3). They contend that the subsection merely extinguished the Tribe's right to

sue for additional lands under a claim of aboriginal title.

The Board has carefully read subsection 1705(a)(3) in light of Appellants' arguments. It finds that the subsection explicitly refers to the extinguishment of aboriginal title and of any claims arising under aboriginal title. However, the subsection does not in any way refer to the acquisition of lands other than the settlement lands. The Board finds no support in the language of the subsection for Appellants' reading of it as precluding the trust acquisition of other lands for the Tribe in the event the Tribe were to be Federally acknowledged.

As mentioned above, Appellants cite nothing from the legislative history of the Settlement Act in support of their position. The section of the bill which became 25 U.S.C. § 1705 is discussed in H.R. Rep. No. 1453, 95th Cong., 2d Sess. (House Report), *reprinted in* 1978 U.S. Code Cong. and Admin. News 1948, 1955:

> Section 6 provides for the extinguishment of (1) aboriginal title to land and (2) all claims based upon any interest in or right involving such lands (including but not limited to claims for trespass or claims for use and occupancy), on behalf of the Narragansett Indians, regardless of where such land is located * * *.

See also, *Id.* at 1951. Like the statute itself, the House Report fails to mention any intent to place restrictions on the Tribe's ability to acquire lands outside the settlement lands or to preclude the trust acquisition of such lands if the Tribe were to be

Federally acknowledged. In its review of the legislative history, the Board found nothing which suggested that Congress intended to impose such limitations.

The settlement agreement which preceded enactment of the State and Federal implementing legislation is included as an appendix to the House Report. It states in section 15:

> [T]he plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this [settlement agreement], but will have the same right to petition for such recognition and services as other groups.

One of the services provided to recognized tribes is the holding of land in trust. Another service, unless otherwise restricted, is the consideration of requests to acquire land in trust. Section 15 of the settlement agreement would have been a logical place for the parties to set out any restrictions which they intended to place on the Secretary's authority to acquire additional land in trust for the Tribe. The fact that no such restrictions appear here—or elsewhere in the settlement agreement—suggests that none were intended.

Based upon the language of the statute and its legislative history, the Board concludes that 25 U.S.C. § 1705(a)(3) does not prohibit the Secretary from acquiring lands other than the settlement lands in trust for the Tribe.

Citing *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130 (1998), Appellants argue that the Area Director erred by failing to consider the possible use of this parcel for gaming purposes under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2121. This argument appears to have two aspects, one of which challenges the decision on legal grounds, while the other challenges the Area Director's exercise of discretion. The Board addresses these aspects of the argument separately.

Appellants note that the Tribe has attempted unsuccessfully to develop a gaming operation in Rhode Island, and contend that BIA "must be constructively presumed to be aware of" the Tribe's activities in furtherance of its interest in having a gaming operation. Opening Brief at 22. They argue that BIA must always consider the possibility of gaming in any trust acquisition "unless the trust taking specifically precludes a future gaming use." *Id.* at 23. Appellants contend that 25 C.F.R. § 1.4(b) authorizes such a restriction.

25 C.F.R. § 1.4(b) provides in pertinent part:

> The Secretary * * * may in specific cases or in specific geographical areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section [*i.e.*, those "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights"] as he shall determine to be in

> the best interest of the Indian owner or owners in achieving the highest and best use of such property.

The Area Director requested an interpretation of 25 C.F.R. § 1.4(b) from the Solicitor's Office when the Governor raised this argument before him. In a November 5, 1997, memorandum, the Southeast Regional Solicitor advised the Area Director that the regulation could not be applied as the Governor argued. The Regional Solicitor stated:

> This regulation is narrowly written. It does not purport to effect changes in the fundamental jurisdictional status of the Indian land. For example, the Bureau may not presume to make Indian land subject to state civil and criminal jurisdiction. This is a prerogative that has been reserved to Congress, and it may not be usurped administratively. *See* 25 U.S.C. § 1321 *et seq*. (consent of the United States is granted to the states to assert criminal and civil jurisdiction over Indian lands upon the consent of the affected tribe); *see also Kennerly v. District Court of Montana*, 400 U.S. 423, 424 n.1 (1971), where the Court held that even a tribe may not grant civil jurisdiction to a state in a manner that has not been authorized by Congress.
>
> Therefore, we must conclude that the Bureau does not possess authority under 25 CFR 1.4(b) to make the lands now proposed for trust acquisition subject to the civil and criminal

> jurisdiction of the State of Rhode Island. The most that the Bureau can do, after consultation with the tribe, is to apply certain land use laws and regulations to tribal lands. It is important to note that if the Bureau acts upon the discretionary authority contained in 25 CFR 1.4(b), the laws and regulations are not applicable by virtue of their own force, and we entertain serious doubts about the ability of the state or local government to enforce them. Rather, such laws and regulations would be enforceable by the tribe and the Bureau.

Regional Solicitor's Nov. 5, 1997, Memorandum at 2.

This memorandum was included in the supplemental administrative record. Appellants had an opportunity to address the analysis in the memorandum in both their supplemental opening brief and in a reply brief. They did not do so. The Board finds that Appellants have failed to carry their burden of proving error in the legal interpretation of 25 C.F.R. § 1.4(b).

Furthermore, Appellants ignore the fact that 25 C.F.R. § 1.4(b) is discretionary. They have not even attempted to show that the Area Director did not properly exercise his discretion in declining to take any action under this regulation.

Appellants continue their *Ruidoso* argument by contending that the Area Director did not properly consider this trust acquisition application under the standard which the Board set out in *Ruidoso*. They assert that

> there is a distinct possibility, considering the unlikely prospect that the housing project can or will ever be brought to fruition as it is presently proposed,[7] and with the failure of the * * * Tribe to achieve its gaming objective elsewhere in the state, that this parcel, if taken into trust free of the civil and criminal laws and jurisdiction of the State of Rhode Island * * * may well be selected for future IGRA gaming activities.

Appellants' Opening Brief at 22.

In *Ruidoso*, there was evidence that, despite its statements concerning how it intended to use the property it sought to acquire in trust, the tribe might actually have been considering using the property for gaming purposes. The Board held:

> In order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property.

32 IBIA at 139. *See also Lincoln City*, 33 IBIA at 107.

The Board has held that mere speculation by a third party that a tribe might, at some future time,

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7 This suggestion is addressed further below.

attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust. *See*, *e.g.*, *Lake Montezuma Property Owners Association, Inc. v. Phoenix Area Director*, 34 IBIA 235, 238 (2000); *Town of Ignacio*, 34 IBIA at 41.

Appellants have not cited anything in this case which suggests that the Tribe intends to use this parcel for a purpose other than housing. Their speculations do not carry their burden of proving that the Area Director did not properly exercise his discretion by considering only the proposed use of this parcel which the Tribe articulated.

Appellants raise two arguments based on the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1465. They first argue that, before deciding whether to acquire this land in trust, the Area Director was required by 16 U.S.C. § 1456(c) to obtain a determination from the Rhode Island Coastal Resources Management Council (CRMC) that the Tribe's proposed construction of a 50-unit housing development was consistent with CRMC's coastal zone regulations.[8] Appellants contend that because the Area Director did not obtain this

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[8] 16 U.S.C. § 1456(c)(1)(C) provides:

> "Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455 (d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the state agency agree to a different schedule."

determination, he violated 25 C.F.R. § 151.10(b), (c), and (f).[9]

The Board interprets this to be an argument that the Area Director did not properly exercise his discretion under 25 C.F.R. § 151.10(b), (c), and (f) because he did not prepare a Federal Consistency

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[9] 25 C.F.R. § 151.10 provides in pertinent part:

> "The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:
>
> * * * * * *
>
> "(b) The need of the * * * tribe for additional land;
>
> "(c) The purposes for which the land will be used;
>
> * * * * * *
>
> "(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> "(f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> "(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> "(h) The extent to which the applicant has provided information that allows the Secretary to comply with [the National Environmental Policy Act and Departmental provisions relating to hazardous substances determinations]."

Determination for a 50-unit housing development before deciding to acquire this parcel in trust.

The Tribe responds that it "fully acknowledges that the development of its housing project must comply with the CZMA." Tribe's Answer Brief at 24. It contends, however, that the question before the Board is not whether the housing development comports with the coastal zone regulations, but "whether the BIA complied with the CZMA in its action to accept the land in trust for the Tribe." *Id.* The Tribe continues in footnote 16: "[T]here is a significant difference between the act of accepting the land in trust and the future construction and occupancy of the homes." The Tribe states that the CRMC "considered all relevant factors at a *public hearing* and determined that the act of taking the land in trust by the BIA did not violate the requirements of the CZMA." *Id.*

Although they had an opportunity to do so by filing a reply brief, Appellants did not respond to or dispute the Tribe's assertion that the appropriate State agency has determined that the trust acquisition of this land does not require a Federal Consistency Determination under the CZMA.

The Board agrees with the Tribe that there is a distinction between the trust acquisition and the ultimate use of the land. It finds that Appellants have failed to show that the Area Director erred in the exercise of his discretion under 25 C.F.R. § 151.10(b), (c), and (f) by not preparing a Federal Consistency Determination for the proposed housing project before deciding to acquire the parcel in trust.

Appellants continue their CZMA argument by contending that the Area Director violated 25 C.F.R. § 151.10(e), (f), (g), and possibly (h) because, without

the Federal Consistency Determination required under the CZMA, "HUD approval and funding of a 50 unit development is seriously flawed." Appellants' Opening Brief at 8.

Although it is somewhat at a loss as to how to characterize this argument, the Board finds that the determinative factor here is that it does not have review authority over decisions made by HUD. If the land is ultimately used for the construction of less than 50 residential units, and if HUD believes that that different usage causes a problem for it, then the matter must be resolved between HUD and the Tribe. This argument is not, however, relevant to the question of whether the Area Director properly exercised his discretion in determining to acquire the land in trust.

Appellants contend that the Area Director erred because the Tribe's trust acquisition application proposed a deed description that failed to provide for drainage easements held by the Town.

Citing *Narragansett Indian Tribe v. Narragansett Electric Co.*, 878 F. Supp. 349, 365 (D.R.I. 1995), the Tribe acknowledges that the "Town clearly has a deeded property interest in the easement which is inalienable without its consent." Tribe's Answer Brief at 27. However, the Tribe notes that, in an August 22, 1996, letter from the President of the Town Council to the Area Director, the Town recognized that the Tribe's plans for the property require re-engineering and relocation of the drainage easement.

The Area Director states: "The Bureau is always amenable to working with interested parties to ensure that their interests are protected. It is a certainty in this case that had the Town indicated its

concern to the Bureau, the deed would have been redrafted. * * * [T]he Town of Charlestown is issued an open invitation to confer with the Bureau and [counsel] with regard to deed language." Area Director's Answer Brief at 8.

Again, Appellants did not respond to or dispute these statements.

The Board finds that, whether this argument is characterized as a legal challenge to the trust acquisition decision or as an attack on the Area Director's exercise of his discretion, Appellants have failed to show that the Area Director erred in his consideration of the trust acquisition application because of the wording of the deed in regard to the Town's drainage easement.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's March 6, 1998, decision is affirmed.[10]

/s/
Kathryn A. Lynn
Chief Administrative Judge

I concur:

/s/
Anita Vogt
Administrative Judge

10 All motions not previously addressed are denied.

* * *

CERTIORARI GRANTED

07-526 CARCIERI, GOV. OF RI, ET AL. V. KEMPTHORNE, SEC. OF INTERIOR

The Motion of Citizens Equal Rights Foundation, et al. for leave to file a brief as *amici curiae* out of time is denied. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

* * *