Nos. 11-246 & 11-247

In The Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Petitioner,

v.

DAVID PATCHAK, ET AL.,

Respondents.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

DAVID PATCHAK, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Congress of American Indians ("NCAI") and the Native American Finance Officers Association ("NAFOA") submit this brief as *amici curiae* in support of Petitioners.[1]

INTEREST OF THE *AMICI CURIAE*

As the oldest and largest national organization advancing American Indian interests, NCAI represents more than 250 tribes and Alaska native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. NCAI is dedicated to protecting the rights and improving the welfare of Indian tribes, their governments, and their members. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of issues affecting Indian country, including the federal trust-acquisition policies and procedures underlying this suit.

NAFOA is a national not-for-profit organization of tribal officers, controllers, treasurers, accountants, auditors, and financial advisors. It has served as a resource for tribal leaders and finance professionals

[1] In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* notified counsel of record for all parties of their intent to file this *amicus* brief, and all parties granted consent to file. Letters reflecting the parties' consent have been filed with the Clerk.

for over 30 years. NAFOA's mission is to foster development of financial and business expertise among tribal governments and their businesses by providing educational forums and resources and by instilling finance and accounting best practices. NAFOA focuses its efforts on building economic capacity, developing effective tribal economic policy, and forging relationships with the investment banking community in an effort to promote tribal economic growth. As such, NAFOA has a particularized interest in the financial issues and investment uncertainty in Indian country that have resulted from the lower court's decision.

Together, *amici* are uniquely positioned to more fully articulate to this Court the vital role trust lands play in tribal life and federal policy, and Congress's intent in establishing the "Indian lands exception" to the waiver of the federal government's sovereign immunity in the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. The trust status of Indian lands has created certainty and stability, fostering strong tribal governments and thriving tribal economies. *Amici* will demonstrate how the lower court's decision, if not reversed, will undermine the ability of tribal governments to effectively pursue political self-governance and economic self-sufficiency, in contravention of the longstanding federal policies embodied in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq*.

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SUMMARY OF THE ARGUMENT

The ability of the United States to acquire and hold legal title to lands in trust for the benefit of Indian tribes is a core component of federal executive power, exercised pursuant to longstanding Congressional policy designed to promote tribal economic, cultural, and civic development. In 1934, Congress enacted the trust-acquisition provisions of the IRA to reverse prior policies of assimilation and allotment that had devastated tribal governments and decimated tribal land holdings. In enacting the IRA, Congress recognized that restoring and stabilizing tribal land bases is one of the most effective means to empower tribes to combat poverty and unemployment on Indian reservations. In the decades since 1934, Indian tribes have re-acquired only 10 percent of the more than 90 million acres of tribal lands lost between 1887 and 1934, but these additional lands held in trust by the United States have proven critical to realizing Congress's intent, providing numerous benefits both to tribes and to their neighboring communities.

When Congress enacted the QTA in 1972, it recognized that *post-hoc* challenges to the status of tribal lands would encroach upon the government's trust relationship with Indian tribes and would disrupt the trust-land policy that is so vital to tribal development. It purposely exempted tribal trust lands from the QTA's waiver of sovereign immunity to prevent such disruption.

The Department of the Interior designed the existing trust-acquisition process in light of that intent, carefully balancing the need for outside input with the crucial need for finality and certainty once the United States formally takes title to land. Under the existing system, state and local governments receive written notice of requested trust acquisitions, and the administrative process includes ample opportunity for public comment as well as administrative and judicial review of the agency's decision before the United States takes title. The system relies, however, on the established principle that once federal title to trust land is finalized, it is immune to collateral attack, thus preserving the certainty that is necessary to enable effective investment and land use.

The D.C. Circuit's decision, if not reversed, would destroy this carefully structured system and would bring about the very effects Congress sought to forestall by exempting Indian lands from the QTA's waiver of sovereign immunity. Under the D.C. Circuit's decision, a private party (who does not even assert a claim of title to the land in question) may bypass the administrative review process to challenge final, recorded trust-land acquisitions by the United States. Such challenges, which under the Administrative Procedure Act's ("APA") statute of limitations could be brought up to six years after a trust acquisition is finalized, would have disastrous effects. They would derail (or at best delay) development projects already begun on trust lands, thereby undermining

investments that tribes and non-Indian investors alike have made in reasonable reliance on the stability of federal title. More broadly, the mere possibility that such challenges could be brought creates systemic uncertainty over the trust status of tribal lands, which in turn drives away potential investors at a time when access to capital is already one of the primary impediments to economic development in Indian country.

The D.C. Circuit's decision frustrates long-standing and critically important federal policy promoting tribal self-governance and self-determination, and contravenes Congress's intent in exempting tribal lands from the QTA. This Court should accordingly reverse it.

ARGUMENT

I. Congress Intended the QTA's Indian Lands Exception to Protect the Stability of the Trust-Land System.

The QTA's waiver of the United States' sovereign immunity to permit suits challenging the federal government's title to land "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a).[2] As this

[2] Tribal trust land is "land held in trust by the United States for the benefit of a tribe or individual Indian." Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 15.03, at 968 (2005 ed.) [hereinafter "Cohen"]. Most tribal land in the United

(Continued on following page)

Court has recognized, Congress added this provision (sometimes called the "Indian lands exception") to the QTA because it was considered "necessary to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands," and because a "unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *United States v. Mottaz*, 476 U.S. 834, 843 n.6 (1986) (quoting H.R. Rep. No. 92-1559, at 13 (1972)). The legislative history of the QTA and the IRA elucidate why these considerations justified an exemption from the QTA's waiver of sovereign immunity.

The original drafts of the QTA did not include the Indian lands exception. After the original bill's introduction in Congress, several executive agencies that would be most affected by the proposed waiver of sovereign immunity objected to its provisions as "too broad and sweeping in scope." *See Dispute of Titles on*

States is trust land. *Id.* at 967. Statutory authority for most trust acquisitions rests on Section 5 of the IRA, 25 U.S.C. § 465, although other statutory bases, often specific to a particular tribe, exist as well. *See* Division of Real Estate Servs., Bureau of Indian Affairs, *Fee-to-Trust Handbook Version II*, at 3 (2011), *available at* http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf. Land located either within or contiguous to a tribe's existing reservation ("on-reservation") or outside the reservation's boundaries ("off-reservation") may be taken into trust, with corresponding federal regulations governing each type of acquisition. *See* 25 C.F.R. § 151.10 (on-reservation); *id.* § 151.11 (off-reservation).

Public Lands, Hearing Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs on S. 216, S. 579, and S. 721, 92d Cong. 21 (1971) (statement of Shiro Kashiwa, Assistant Attorney General, Land and Natural Res. Div., Dep't of Justice). The Department of Justice consequently drafted a new bill in consultation with the Office of the Solicitor General and other affected agencies. *See id.*

In urging passage of the Department of Justice bill, the Solicitor for the Department of the Interior explained the reasons for the Indian lands exception:

> [T]he Justice proposal specifically excludes lands held in trust for Indians and Indian restricted lands. The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R. Rep. No. 92-1559, at 13 (1972). Incorporated into the House report on the bill, this passage provides the paramount explanation of Congress's reasons for adopting the Indian lands exception – the federal government's trust relationship with the Indian tribes,

particularly as it pertains to tribal lands. *See Mottaz*, 476 U.S. at 843 n.6 (recognizing government's "'solemn obligations' . . . regarding Indian lands"). Congress has long understood that relationship, which carries with it "moral obligations of the highest responsibility," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), to impose upon the federal government an obligation to foster tribal self-sufficiency and economic development.[3]

One of the most important ways Congress has sought to fulfill that obligation is by authorizing the Secretary of the Interior, through the IRA, to acquire lands in trust for the benefit of Indian tribes. Congress recognized that stabilizing tribal land bases is crucial to tribal economic, cultural, and civic self-sufficiency. As explained by Representative Edgar Howard, the House sponsor of the IRA, the "essential and basic features" of the IRA were "[l]and reform

[3] *See*, *e.g.*, Indian Self-Determination and Education Assistance Act § 3(b), 25 U.S.C. § 450a(b) ("Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy. . . ."); Indian Health Care Improvement Act § 2(a), 25 U.S.C. § 1601(a) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."); Tribal Law and Order Act of 2010 § 202(a), Pub. L. No. 111-211 (2010) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country.").

and in a measure home rule." 78 Cong. Rec. 11,729 (1934). Congress's programmatic strategy was not only to safeguard "security of the Indian lands," but to "develop[ ] as rapidly as possible Indian use of Indian lands for self-support." *Id.* at 11,730. The ultimate goal was "to make the Indians, as a group, self-supporting." *Id.* at 11,732; *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' ") (quoting H.R. Rep. No. 73-1804, at 6 (1934)).[4]

It is this critically important and long-established statutory authority that Congress sought to protect in exempting "trust or restricted Indian lands" from attack under the QTA. 28 U.S.C. § 2409a(a). The Indian lands exception was not merely meant to protect federal title to trust lands. Rather, it was an integral part of a broader Congressional and executive strategy to revitalize tribes by protecting tribal lands, and it should be read in that context. In interpreting and applying the Indian lands exception, it is accordingly crucial for this Court to consider the broader trust-land system and the role trust lands continue to play

[4] The regulations implementing the Secretary's trust-acquisition authority similarly recognize the critical role trust lands play in tribal development, providing that "land may be acquired for a tribe in trust status . . . (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination [or] economic development." 25 C.F.R. § 151.3.

in promoting tribal economic development and self-sufficiency.

II. The United States' Ability to Securely Hold Land in Trust is Central to Restoring and Protecting Tribal Homelands and Critical to Economic Development that Benefits Both Tribes and Surrounding Non-Indian Communities.

A. The Indian Lands Exception Furthers the Federal Policy of Fostering Tribal Self-Determination, Development, and Economic Prosperity.

The federal government's trust-acquisition authority continues to serve as "the primary means to help restore and protect homelands of the nation's federally recognized tribes," with the "vast majority of land-into-trust applications" intended for "purposes such as providing housing, health care and education for tribal members and for supporting agricultural, energy and non-gaming economic development."[5] By permitting collateral attack on federal title to tribal trust lands, the lower court's decision threatens to undermine this critical means of fostering tribal development.

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[5] News Release, U.S. Dep't of the Interior, Salazar Policy on Land-into-Trust Sees Restoration of Tribal Lands as Key to Interior Strategy for Empowering Indian Tribes (July 1, 2010), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc009902.pdf.

Trust land is crucial to tribal development for several reasons. First, and most obviously, "[h]aving a land base is essential for many tribal economic development activities," and trust acquisitions are the primary means to restore and stabilize tribal lands. U.S. Gov't Accountability Office, GAO-11-543T, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands* 3 (2011). Trust status – as opposed to mere ownership – is also important, however, because transferring land into trust places it under primary tribal and federal jurisdiction. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); Cohen § 15.07[1][a], at 1010.[6] This jurisdictional change exempts the land from state and local taxation, 25 U.S.C. § 465, and carries with it several other features that make trust land attractive to investors. For example, Congress and many tribes have established various tax incentives to spur development in Indian country. *See* Cohen §§ 8.02[3], at 689-90; 21.02[4], at 1288. In addition, tribes' authority to regulate use of trust lands, *see Montana v. United States*, 450 U.S. 544, 557 (1981); Cohen § 21.02[5][b],

[6] Certain non-trust lands, for example tribal fee land within the boundaries of a reservation, may still qualify as "Indian country" and thus fall under primary federal and tribal jurisdiction. *See*, *e.g.*, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27 & n.1 (1998). Trust status, however, remains the primary and most clear-cut way to "shield[ ] the land from involuntary loss, and . . . establish[ ] it as Indian country with all the jurisdictional consequences attaching to that status." Cohen § 15.07[1][a], at 1010.

at 1290, can enable them to attract investment by, for example, establishing land-use regulations or permit requirements that are more efficient than the state or local regulations that would apply were the land held in fee. In short, "[t]rust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development efforts." Julian Schreibman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol'y Rev. 353, 384 (1996); *see also* Cohen § 21.01, at 1280 ("There are many regulatory and tax advantages to doing business in Indian country.").

Trust land is crucial to tribal economic development not only because of these specific business advantages but also because of its structural attributes. Recent scholarship confirms that "as sovereignty rises, so do the chances of successful development." Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* 8, 15-16 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2003-02, 2003) [hereinafter Cornell & Kalt, *Reloading the Dice*]. This is so because economic development depends in large part on the presence of stable legal infrastructure and institutions, as well as vesting of decision-making authority in those most affected by economic decisions – tribes themselves. *See id.*; Stephen Cornell & Miriam Jorgensen, NCAI Policy Research Ctr., *The Nature and Components of Economic Development in Indian Country* 10-13 (2007) (stating that successful

economic development "begins with jurisdiction" and relies on subsequent development of "governance infrastructure"). By holding land in trust for a tribe, the United States reaffirms tribal sovereign authority over it, which promotes stable tribal governance and, crucially, "tightens the link between [economic] decision-making and its consequences." Cornell & Kalt, *Reloading the Dice*, *supra*, at 15. More often than not, the result is improved economic outcomes. *See id.*

In enacting the IRA, Congress recognized that restoring and stabilizing tribal land bases is the bedrock of any policy to promote tribal self-sufficiency. In the decades since, the facts have borne out the wisdom of this statutory strategy – the correlation between investment on tribal land and improved socioeconomic conditions is now well documented. Indeed, as tribes in the 1990s began to "invest[ ] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other infrastructure supporting tribal self-governance, tribes made "striking" socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, Harvard Project on Am. Indian Econ. Dev., *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix-xi (2005). These gains notwithstanding, however, tribes remain among the most economically distressed groups in the United States, with the U.S. Census Bureau reporting in 2008 a poverty rate of 27% among American Indians and Alaska Natives, compared with 15% among the population as a whole. GAO-11-543T, *supra*, at 1.

Further socioeconomic improvement in Indian country depends upon continued tribal economic development, in which trust land plays a vital role. The Department of the Interior has accordingly asserted a strong commitment to "fulfill[ing] [its] trust responsibilities," which it recognizes are critical in "empower[ing] tribal governments . . . to help build safer, stronger and more prosperous tribal communities."[7] The lower court's decision, if not reversed, will undermine these efforts by allowing *post-hoc* challenges to the trust status of tribal lands, which would destabilize tribal land bases and chill investment.

B. All Levels of Government and Neighboring Non-Indian Communities Benefit from Trust Lands.

Economic development in Indian country benefits not only tribes and their members, but surrounding local communities, state governments, and the federal government as well. Indeed, while the Department of

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[7] Press Release, U.S. Dep't of the Interior, Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference.cfm. Following the federal government's removal of more than 90 million acres of tribal land during the allotment period from 1887 to 1934 and the Termination Era of the 1950s and '60s, approximately nine million total acres of tribal land have been reacquired and taken into trust. News Release, Salazar Policy, *supra* note 5.

the Interior specifically solicits comments from state and local governments detailing their concerns about the impact a given trust acquisition may have on their tax bases and jurisdiction, *see* 25 C.F.R. §§ 151.10, 151.11, many trust acquisitions enjoy enthusiastic support from surrounding state and local governments, *see* GAO-11-543T, *supra*, at 4. This is not surprising, for several reasons.

First, tribal economic development directly infuses money into the broader non-Indian community in several ways. Tribal governments and reservation businesses separately account for billions of dollars in off-reservation spending. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 604 (2004).[8] Moreover, tribal-state revenue sharing agreements and other voluntary intergovernmental service agreements provide millions of dollars in additional revenue to state and local government coffers.[9] Second, continued improvements in tribes' socioeconomic conditions

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[8] In 1998, it was shown that tribal governments and reservation businesses accounted for $1.2 billion and $4.4 billion, respectively, in off-reservation spending. Graham, 80 N.D. L. Rev. at 604.

[9] *See*, *e.g.*, Arizona Dep't of Gaming, Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties as of February 2, 2012, *available at* http://www.gm.state.az.us/tcontributions_pdf/TC_Cummulative020212.pdf (reporting $90.5 million contributed in the 2011 fiscal year and $757 million since contributions began in 2004); *see also* Schreibman, 14 Yale L. & Pol'y Rev. at 380-81.

decrease social service costs for all levels of government. *See* Schreibman, 14 Yale L. & Pol'y Rev. at 380.[10]

The trust land at issue in this case provided just such concrete benefits to the governments, businesses, and communities surrounding the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' gaming development in Michigan.[11] The opening of the Band's gaming facility in 2011 directly created 900 new jobs and indirectly created an additional estimated 1,000 jobs – a tremendous boon in a severely economically depressed area. *See* Wayland Br. 8-9. Operation of the Band's casino is expected to generate some $30 million in annual spending directed primarily toward local vendors, as well as millions of dollars in increased revenue for surrounding local businesses. *See id.* Under a revenue-sharing plan with the State of Michigan and 10 public agencies, the Band already has begun contributing much-needed funds to local government. Its first distributions under the plan in June 2011 included $514,871 to local governments and more than $2 million to the State. *Id.* at 11. The

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[10] Congress recognized this very fact when it passed the IRA. As Congressman Howard explained, the federal government's success or failure in promoting tribal development, "[a]s it raises or lowers the Indian in the social and economic scale, and thereby tends to make him self-supporting or a public charge, . . . is of direct interest to the American taxpayer." 78 Cong. Rec. 11,726.

[11] *See generally* Brief of Wayland Township, et al., as *Amici Curiae* in Support of Petitioners [hereinafter "Wayland Br."], filed at the petition stage of this matter.

Band's operations can thus be expected to generate millions of dollars in crucial revenue for local governments and local businesses well into the future.

This is only one example of a successful and mutually beneficial development plan executed through the cooperation of a tribe and its neighbors. Tribes and communities all over the country are pursuing projects that yield not only economic benefits but provide governmental and other services to tribes and surrounding communities. Below, *amici* offer five examples that illustrate the range of productive uses to which tribes all over the country are putting trust lands today.

C. Five Case Studies in Successful Economic and Civic Uses of Lands Held in Trust for Indian Tribes Are Illustrative.

The size, scope, and type of developments occurring on trust land varies greatly, as reflected in a 2006 Government Accountability Office report that examined all non-gaming trust acquisitions granted in 2005.[12] U.S. Gov't Accountability Office,

[12] The majority of the more than 560 federally recognized Indian tribes do not engage in any form of gaming business. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 Lewis & Clark L. Rev. 943, 945 (2008). Indeed, of the more than 1,900 trust land applications pending in 2010, over 95 percent were for non-gaming purposes. News Release, Salazar Policy, *supra* note 5.

GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications* 45-49 (2006). The proposed uses for these trust lands included, among other things, water treatment plants for constituent bands of the Minnesota Chippewa Tribe, tribal schools for the Muckleshoot Indian Tribe in Washington and the Saginaw Chippewa Indian Tribe in Michigan, agriculture for tribes in Wyoming, Kansas, and Montana, community recreation and potential commercial development for the Ho-Chunk Nation of Wisconsin, a fire station and EMT Community Service Center for the Sac & Fox Nation of Missouri in Kansas and Nebraska, and housing for various tribes in California, Connecticut, Minnesota, Wisconsin, Michigan, and Washington. *Id.*

The following case studies illustrate the variety of ways that trust lands help tribes further their economic, civic, and cultural goals:

1. The Chickasaw Nation. The experience of the Chickasaw Nation in Oklahoma, listed in the GAO report noted above, shows how trust acquisitions can be effectively used for an array of economic, governmental, and cultural purposes that empower the tribe's self-governance and benefit its members as well as the surrounding non-Indian community. Through cession of lands in the early 19th century – and ultimately forcible removal on the infamous Trail of Tears in 1837 – the Chickasaw were displaced from their ancestral homelands in and around what are now the states of Mississippi, Alabama, Tennessee,

and Kentucky.[13] *See* Barry Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples* 371-72 (2000). The Chickasaw settled in the Indian Territory (modern-day Oklahoma) and, by an 1837 treaty, were resettled in a district within the Choctaw nation. Treaty with the Choctaws and Chickasaws, art. I, Jan. 13, 1837, 11 Stat. 573. The Chickasaw Nation's governmental independence was restored in 1855, *see* Pritzker, *supra*, at 372; *see also* Treaty with the Choctaws and Chickasaws, art. 2, June 22, 1855, 11 Stat. 611, but its land base was radically fractured through allotment around the turn of the 20th century, *see* Cohen § 4.07[1][c], at 305, "a situation that severely hampered political and economic development well into the century." Pritzker, *supra*, at 372.

Despite these circumstances, the Chickasaw Nation today is recognized as a model of tribal economic development, with successful business endeavors that include information technology, medical and dental staffing, aviation and space technology, construction, manufacturing, banking, and property management, as well as gaming and tourism. *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 11 (Native Nations Inst. & Harvard Project on Am. Indian

[13] The treaties by which this cession occurred include the Treaty with the Chickasaws, July 23, 1805, 7 Stat. 89; Treaty with the Chickasaws, Sept. 20, 1816, 7 Stat. 150; Treaty with the Chickasaws, Oct. 19, 1818, 7 Stat. 192; and Treaty with the Chickasaws, Oct. 20, 1832, 7 Stat. 381.

Econ. Dev., Joint Occasional Papers on Native Affairs Working Paper No. 1, 2010); *see also Diversifying Native Economies: Oversight Hearing Before the Comm. on Natural Res. of the U.S. House of Representatives*, 110th Cong. 109 (2007) [hereinafter *Diversifying Native Economies*] (statement of Neal McCaleb, Chairman of the Board of Directors, Chickasaw Nation Industries, Inc.). The Chickasaw Nation's strategic rebuilding of its land base through trust acquisitions underlies this remarkable renaissance. In 2005, for example, the Secretary took a number of parcels into trust for the Nation to put to a variety of uses: tribal government offices; a tribal community center; expansion of a chocolate factory owned by the Nation; operation of a convenience store, gas station, restaurant, video arcade, and associated parking space; and a sand and gravel processing plant. *See* GAO-06-781, *supra*, at 45-47. Such acquisitions have empowered the Nation both to build a diverse economic base and to make crucial investments in its government infrastructure and public services.

The Chickasaw Nation's development efforts have provided benefits well beyond the Nation itself. As of 2007, the Nation employed some 10,400 workers, both Indian and non-Indian, with an annual payroll of nearly $200 million, estimated to generate more than $7.5 million in state tax revenues. *See Diversifying Native Economies*, *supra*, at 110-11.

2. The Jamestown S'Klallam Tribe. The Jamestown S'Klallam Tribe, located on Washington's Olympic Peninsula, has also reinvigorated its economy

and improved its ability to effectively self-govern through strategic trust acquisitions. In the process it has conferred substantial benefits on the surrounding community.

The S'Klallam ceded their ancestral lands to the United States in 1855 in the Treaty of Point No Point. *See* Treaty with the S'Klallams art. I, Jan. 26, 1855, 12 Stat. 933. Many tribal members were reluctant to relocate to the reservation created under the treaty, however. The Jamestown S'Klallam community was formed when, in 1874, some of these members cooperated to purchase and settle on a 210-acre plot of land closer to their traditional fishing areas.[14] After passage of the IRA in 1934, the Tribe was given the choice to relocate or remain on its land and forgo federal recognition; it chose the latter.[15] In the 1970s, however, the Tribe concluded that the benefits of federal recognition were necessary to its continued economic development and self-sufficiency. It accordingly sought and obtained recognition in 1981.[16]

With federal recognition came the ability to place lands into federal trust. The Jamestown S'Klallam have made extremely effective use of that ability not only for economic projects, but also as a tool

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[14] *See Jamestown S'Klallam History*, Jamestown S'Klallam Tribe, http://www.jamestowntribe.org/history/hist_jst.htm (last visited Feb. 9, 2012).

[15] *See id.*

[16] *See id.*

for community development, with particular focus on infrastructure that has benefited both the Tribe and the surrounding community. For example, *amici* are informed that, when the local non-tribal fire department lost its lease, the Tribe placed tribal property into trust and built a fire station for the use of the local fire district. It charges the district below-market rent for the facility, which provides emergency services for all residents of East Clallam County. As a result, the cost of fire protection insurance in the area has decreased significantly. The Tribe has also constructed a 150,000-gallon reservoir on its trust lands (to be expanded to 350,000 gallons in 2012) with five associated fire hydrants that serve the neighboring community of Blyn, Washington.

3. The Confederated Tribes of the Warm Springs Reservation. Trust land acquisitions can also play a critical role in natural resource conservation, as illustrated by the Confederated Tribes of the Warm Springs Reservation of Oregon. For many years this Tribe has placed lands in federal trust in order to protect and enhance the off-reservation fishing, hunting, and traditional food-gathering rights reserved by the Tribe in an 1855 treaty. *See* Treaty with Indians in Middle Oregon, art. I, June 25, 1855, 12 Stat. 963. In the late 1970s, for example, the Tribe purchased from the Burlington Northern Railroad an 888-acre off-reservation treaty fishing site at Shears Falls on the Deschutes River, in order to prevent it from being bought for private development. The Tribe placed the land into trust in 1980, with a guarantee from the

Tribe of continued public access to the fishery, thus preserving the site for continued and uninterrupted use by both Treaty Indian and non-Indian fishermen alike.

Following this early success, trust acquisitions continue to play a vital role in the Tribe's efforts to preserve natural resources. *Amici* are advised that the Tribe recently succeeded in placing into trust another 197-acre fishing site along the Metolius River. The land's newly acquired trust status ensures that the Tribe can continue to manage the property to preserve and enhance its value as fish and wildlife habitat, and as an area where tribal members may exercise their treaty rights. The Tribe has a number of other off-reservation fee lands it acquired for the specific purpose of protecting and enhancing fish and wildlife resources, and hopes to transfer these parcels into trust in the future.

4. The Poarch Band of Creek Indians. The Poarch Band of Creek Indians provides another example of how critical the fee-to-trust process is to restoring tribal government and spurring community growth. The Poarch Creeks are descendents of a segment of the original Creek Nation, which once covered almost all of Alabama and Georgia and has a documented history going back to first European contact. Unlike many eastern Indian tribes, the Poarch Creeks were not removed from their tribal lands during the removal period in the 1830s and have lived together for almost 200 years in and around their reservation in Poarch, Alabama.

Like many tribes in the southern and eastern United States, the Poarch Band lost most of its land in the late 19th and early 20th centuries. When the Tribe was finally restored to federal recognition under the IRA in 1984, 49 Fed. Reg. 24,083 (June 11, 1984), it lacked a jurisdictional land base to provide for its members and to grow its economy. In 1985, however, the Bureau of Indian Affairs ("BIA") declared the Tribe's lands in and around Poarch to be a reservation under the IRA, thus restoring the Tribe's jurisdiction and ensuring its ability to self-govern. 50 Fed. Reg. 15,502 (Apr. 18, 1985).[17] The BIA has since taken additional adjacent lands into trust for the Tribe.

These restored trust lands are now the seat of the Poarch Band's government and central to its growing economy. The Tribe's tribal headquarters, health clinic, and police department are all located on reservation trust lands, and this governmental infrastructure benefits not only the Tribe but the surrounding community. For example, *amici* are advised that the Band has a cross-deputization agreement with Escambia County, and the Band's police officers provide assistance to the Escambia County Sheriff's Department, the Atmore Police Department, and the Alabama State Troopers. Tribal police officers also provide 24-hour police and dispatch coverage for a 17-mile radius from their headquarters. Without a trust land base,

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[17] *See generally History of the Poarch Band of Creek Indians*, Poarch Band of Creek Indians, http://www.poarchcreekindians.org/xhtml/culture.htm (last visited Feb. 9, 2012).

the Tribe could not provide these services to its members or the surrounding community.

The Tribe has enacted laws that govern its trust lands in a wide range of areas, including crime and domestic abuse, judicial procedure, historic preservation, environmental protection, building codes, housing, workers' compensation, water and sewage treatment, taxes, employment rights, and tort claims. These laws enable the Tribe to exercise its sovereignty on trust lands and develop resources that benefit the Tribe and the surrounding community, including a Boys and Girls Club, a Head Start program, several housing subdivisions, recreational facilities, a cultural center and museum, a gravel pit, and an industrial park.

5. Keweenaw Bay Indian Community. The Keweenaw Bay Indian Community, situated in Michigan's Upper Peninsula, provides a final example of effective use of tribal trust lands for cultural and economic development, and of a tribe's commitment and unique contribution to an entire region surrounding its reservation boundaries.

The United States entered into a treaty with the Community in 1854, promising to create a permanent homeland for tribal members on reservation lands. *See* Treaty with the Chippewa, art. 2, Sept. 30, 1854, 10 Stat. 1109. Despite this promise, from the late 1800s through 1939, over 20,000 acres of tribal reservation land were taken from the Tribe as a result of government misappropriation, tax sales, and other improper transactions. *See* Charles E. Cleland et al.,

Faith in Paper: The Ethnohistory and Litigation of Upper Great Lakes Indian Treaties 311-12 (2011). As a result, the Community has sought to restore its land holdings through a number of trust acquisitions. Among other uses, the Community operates a tribal government center, cultural center, police department headquarters, community college, and early childhood care center on its trust lands.

In addition, the Community operates two FCC-licensed radio stations on trust lands, which *amici* are informed serve approximately 80,000 listeners across eight counties in western Michigan's Upper Peninsula and in Wisconsin.[18] The Community's public affairs "Keep it in the UP" program, which it promotes through both its 50,000-watt station WCUP and its 100,000-watt station WGLI, seeks to develop customer loyalty to local tribal and non-tribal businesses as a means to drive economic growth and self-sufficiency not only on the Community's reservation but throughout the region.[19] The Community radio stations also devote airtime to local news and other public-affairs programming, making a significant

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[18] *See Eagle Country Coverage Map*, Eagle Country, http://www.keepitintheup.com/eagle-country.html (last visited Feb. 9, 2012); *The Rockin' Eagle Coverage Map*, The Rockin' Eagle, http://www.keepitintheup.com/rockin-eagle.html (last visited Feb. 9, 2012).

[19] *See* Keep It In The UP!, www.keepitintheup.com (last visited Feb. 9, 2012).

contribution to the cultural and civic infrastructure of the western Upper Peninsula.

As all of these examples illustrate, restoration and stabilization of tribal land bases through trust acquisitions play a very real and vital role in strengthening tribal governments and economies. Tribes across the country continue to use trust lands in myriad ways that benefit not only the tribes themselves but local communities and the nation as a whole. If not reversed, the lower court's decision threatens the viability of these beneficial development activities (to the extent they are situated on trust lands acquired within six years of a plaintiff's filing suit), as well as the development of future activities. By allowing *post-hoc* challenges to federal title, the lower court's decision undermines the very foundation of some of the most positive recent developments – and some of the most promising future opportunities – in Indian country.

III. The Existing Trust-Acquisition System Effectively Balances the Need for Input from Affected Communities and Governments with the Need for Finality and Certainty.

The Department of the Interior has carefully designed the trust-acquisition process to strike a balance between the need to take account of outside input and the need for finality once acquisition is complete. By placing time limits on the opportunity to comment and to challenge proposed trust acquisitions, the process is also designed to provide the

certainty with respect to title and trust status that is vital to productive use of any land.

The BIA's trust-acquisition process provides written notice to state and local governments, as well as the opportunity for public comment on proposed acquisitions, administrative review of any decision, and ultimately judicial review of the Secretary's final decision to place land into trust – but before the United States finally takes title.

When a tribe submits a request for a trust acquisition, the Secretary is required to "notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation." 25 C.F.R. § 151.10. These governmental entities are given 30 days to submit "comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." *Id.*

The BIA notifies the applicant tribe of any comments submitted and provides an opportunity for the tribe to respond. *See id.* It also "encourages tribes to . . . work with the local and state governments to arrive at . . . cooperative agreements" so that concerns may be resolved before the BIA reaches a decision. Larry E. Scrivner, Acting Director, Office of Trust Responsibilities, Bureau of Indian Affairs, *Acquiring Land Into Trust for Indian Tribes*, 37 New Eng. L. Rev. 603, 606 (2003). When the comment and review process is complete, the BIA publishes a Notice of Decision in the Federal Register or a local newspaper

and provides the opportunity for administrative review of the decision through the Interior Board of Indian Appeals. *See Fee-to-Trust Handbook*, *supra* note 2, at 14.

After administrative appeals, if any, are exhausted, there remains an opportunity for judicial review. When the agency reaches a final determination to take a parcel of land into trust, the BIA publishes notice in the Federal Register or in "a newspaper of general circulation serving the affected area." 25 C.F.R. § 151.12(b). The Secretary does not formally acquire title in the name of the United States until 30 days after publication of this notice. *Id.* The Department of the Interior specifically designed this 30-day window to provide the opportunity for "judicial review before transfer of title to the United States," because the Department has long held the view that "[t]he Quiet Title Act . . . precludes judicial review after the United States acquires title." 61 Fed. Reg. 18,082 (Apr. 24, 1996).[20]

The trust-acquisition process is thus carefully crafted to allow for outside input prior to the land being taken into trust. Indeed, the process involves no fewer than three formal notifications to state and local governments as well as the opportunity to challenge a

[20] If a party does file suit within the 30-day notice period, the transfer of title is stayed. *See Fee-to-Trust Handbook*, *supra* note 2, at 15; *see also* 25 C.F.R. § 151.12(b).

trust application during the initial decision-making process, through administrative appeals, and through subsequent judicial review.

Moreover, the process works in practice, as illustrated by a recent trust acquisition under the IRA by the Eastern Regional Office of the Bureau of Indian Affairs. *Amici* are informed that this acquisition, referred to as the "Red River parcel," was made for the benefit of the Tunica-Biloxi Indian Tribe, located in Louisiana. The Tribe submitted its trust application in February 2005. The BIA notified the Governor of Louisiana and local governments of the request and solicited their comments, as contemplated by the regulations. The state and the local parish submitted comments. Notably, the Governor expressed concern that the land should not be used for gaming, and that the Tribe should continue to contribute levee protection funds after removal of the land from state jurisdiction.

As is often the case, the Tribe, parish, and state worked together to resolve these objections to the state's satisfaction during the administrative process. After nearly six years of careful review and negotiation, the United States took the Red River parcel into trust on October 27, 2011. No party pursued an administrative appeal and no one sought judicial review before the government took title.

The existing trust-acquisition process is thus carefully designed to account for the various competing interests at stake in any acquisition, and provides

ample opportunities for outside comment upon and review of the BIA's actions. In light of those opportunities, there is no justification to subvert Congress's intent to exempt Indian lands from attack once the United States takes title. The system as it stood before the D.C. Circuit's decision effectively balanced the need for outside input with the vital need for certainty and stability in title, which are necessary for effective investment in real property.

IV. The Decision Below Undermines the Trust-Land System the Indian Lands Exception was Meant to Protect.

When Congress adopted the QTA's Indian lands exception, it was conscious of the federal government's weighty trust obligations to Indian tribes and of the resulting decades-long federal policy related to tribal trust lands. In exempting tribal lands from the QTA's waiver of sovereign immunity, Congress sought not merely to protect federal title, but to protect this vital federal policy.

The Court of Appeals' decision undermines that purpose by clouding the United States' title to tribal trust lands, thereby sowing instability and uncertainty with respect to the jurisdictional and regulatory attributes of trust land that are crucial to its development. The decision creates an unassuageable fear that the United States could be divested of title to land already taken into trust and developed. This is precisely the kind of uncertainty the GAO has identified

as threatening to suffocate economic development and economic activity on trust land. *See* GAO-11-543T, *supra*, at 3-5. Regardless of whether any such challenges are ever brought, much less succeed, the mere *possibility* of such suits being filed is enough to scare away investors wary of committing capital to development projects in which some level of uncertainty already exists, both because of unique (and to some investors unfamiliar) aspects of doing business in Indian country and because of the uncertainty inherent in all capital investments.

Thus, the decision below, if affirmed, threatens to critically undermine investments already made, chill future investments on existing trust lands, and stymie proposed developments for the approximately 1,900 trust acquisition applications pending before the Department of the Interior and for all future trust applications to be filed.

A. Access to Capital is Critical to Tribal Development But Severely Diminished by Instability.

It is widely recognized that inadequate access to capital is among the most significant impediments to tribal development. *See* Community Dev. Fin. Institutions Fund, U.S. Dep't of the Treasury, *Report of the Native American Lending Study* 1-2 (2001) ("lack of access to capital" was the "one significant factor" identified as the reason behind economic problems in Native American communities); Cornell & Kalt,

Reloading the Dice, *supra*, at 6 (identifying the fact that "Tribes and individuals lack access to financial capital" as the first reason for "continuing reservation poverty"). The Director of the Office of Indian Energy and Economic Development succinctly summarized this problem in a statement to Congress: "Without capital, there is no enterprise, without enterprise, there are no private sector jobs." *Economic Development, Hearing Before the Senate Comm. on Indian Affairs*, 109th Cong. 108 (2006) (statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Econ. Dev., Dep't of Interior). In fact, it has been reported that "[u]pwards of $50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development." Clarkson, 12 Lewis & Clark L. Rev. at 945.

It is similarly well recognized that uncertainty is one of the primary roadblocks to access to capital, and that legal and jurisdictional stability is critical to overcoming this barrier. "Investors' risks are raised, for example, by uncertainty in tax and/or regulatory policy, and by insecurity in the enforcement of contracts and agreements." Cornell & Kalt, *Reloading the Dice*, *supra*, at 24-25. "The central problem is to create an environment in which investors – whether tribal members or outsiders – feel secure, and therefore are willing to put energy, time, and capital into the tribal economy." *Id.* at 25; *see also Report of the Native American Lending Study*, *supra* at 4 (listing areas of "uncertainty" relating to legal infrastructure

and government operations as among the barriers to capital access).

Questions regarding land title and jurisdictional status create the very kind of uncertainty that diminishes the availability of capital. Indeed, the GAO recently raised this very concern – that "land in trust issues may create uncertainty" affecting economic activity on tribal land. GAO-11-543T, *supra*, at 3.

B. The D.C. Circuit's Decision Undermines the Stability the Existing Trust-Acquisition Process Provides.

As set forth above, the existing trust-acquisition process strikes a careful balance between the need for input from those affected and the need for finality and certainty. The D.C. Circuit's decision upsets that balance. If affirmed, it will cast an enduring shadow of uncertainty over the United States' title to all trust lands for six years after acquisition, creating the very kind of instability and uncertainty that drives investors away.

Challenges to trust acquisitions have heretofore been limited to the 30-day window between notice of an acquisition and actual transfer of title to the United States. *See supra* Part III. The lower court's decision now opens the possibility of a spate of challenges to trust acquisitions based on variegated legal theories, brought by a wide array of potential plaintiffs, and subject only to the APA's six-year statute of limitations. The decision is devastating to tribal

development efforts – and to surrounding non-Indian communities and businesses that cooperate in and depend upon them – for two reasons.

First, the lower court's decision would allow discontented parties to bypass the carefully structured administrative process and potentially to divest the United States of title to trust lands years after acquisition. In the meantime, tribes and non-tribal investors, businesses, and communities will often have pursued development projects at great effort and expense in reliance on federal title and the trust status of the land. Unforeseen *post-hoc* divestment of federal title will inevitably halt such projects, not only crippling tribal economic development efforts, but also undermining broader regional development plans and working a harsh forfeiture upon outside investors. Indeed, just such a result is threatened in this case. *See* Wayland Br., *supra* note 11, at 14-15. This Court has recognized in other contexts the significance of private parties' "distinct investment-backed expectations." *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). Such reasonable expectations, founded on the strength of federal title, merit protection here too.

Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956 (10th Cir. 2004) illustrates the potential for *post-hoc* challenges not only to frustrate private investment, but also to "seriously disrupt ongoing federal programs" situated on trust lands. *Mottaz*, 476 U.S. at 847. In 1993, the Secretary took the old Albuquerque Indian School grounds into trust

for nineteen Indian Pueblos, which sought to construct commercial office space and a hotel on the property through a lease to a federal Indian corporation chartered for that purpose. *See Neighbors for Rational Dev., Inc. v. Albuquerque Area Dir., Bureau of Indian Affairs*, 33 I.B.I.A. 36, 37-38 (1998). Neighbors for Rational Development challenged the lease on "a veritable laundry list" of National Environmental Policy Act grounds, ultimately losing at every step. *Id.* at 43. Only then, after years of administrative proceedings, did the group file a federal court action challenging the trust acquisition itself. *See Neighbors*, 379 F.3d at 959. Although the 10th Circuit correctly concluded that the QTA barred the challenge, *see id.* at 965, Neighbors had already inflicted significant costs on the development project, having delayed the commencement of construction until some ten years after the acquisition and five years after the exhaustion of administrative challenges.

Even more deleterious than this potential to undermine distinct investments in existing projects, however, is the systemic effect of the lower court's decision. If not reversed, the decision will cripple tribal development efforts because the mere possibility of a *post-hoc* collateral attack on the trust status of land – not the merits or actual success of any particular suit – breeds the uncertainty that is so noxious to investment. Investors will balk at the prospect of committing millions of dollars to finance a major development project if there exists some significant and long-enduring possibility that, after a parcel is

taken into trust, the United States' title to the land will suddenly be challenged in court. Thus, the lower court's decision not only threatens to destroy investments already made, but it has a chilling effect that likely will forestall desperately needed investment in the future.

This uncertainty is exacerbated by the fact that nothing in the D.C. Circuit's decision limits the grounds for potential challenges so long as, perversely, the plaintiffs do not assert the most readily cognizable interest – a claim to title in the land. Under the lower court's rationale, a plaintiff claiming that a trust acquisition is *ultra vires* or otherwise unlawful for any reason – statutory or otherwise – could proceed with his suit so long as the plaintiff himself did not claim title to the land.

Further compounding this problem is the D.C. Circuit's equally expansive and unprecedented holding on prudential standing, which would permit challenges to the United States' title under the IRA by any person alleging injury to rights protected by a different federal statute. Because the list of possible plaintiffs in such an APA action is now vast, tribes and developers will be unable to eliminate the possibility of such lawsuits by proactive negotiation and compromise.

For all these reasons, it is critical that this Court reverse the decision of the lower court so that tribal development on trust land, which provides so many benefits to tribes, their members, surrounding

communities, and the nation as a whole, may continue as Congress intended.

CONCLUSION

For the foregoing reasons, *amici curiae* NCAI and NAFOA urge the Court to reverse the decision of the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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