No. 05-1428

In The Supreme Court of the United States

STATE OF SOUTH DAKOTA; CITY OF OACOMA, SOUTH DAKOTA; LYMAN COUNTY, SOUTH DAKOTA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; AURENE MARTIN, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS; BILL BENJAMIN, ACTING REGIONAL DIRECTOR, GREAT PLAINS REGIONAL OFFICE, BIA; CLEVE HER MANY HORSES, SUPERINTENDENT, LOWER BRULE AGENCY, BIA; JAMES McDIVITT, DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS,

Respondents.

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

PETITIONERS' REPLY BRIEF

LAWRENCE E. LONG*
Attorney General
State of South Dakota

**Counsel of Record*

JOHN P. GUHIN
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Petitioners

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REPLY BRIEF FOR THE PETITIONERS

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion," to acquire lands "for Indians." The text of the Act contains no limitations on the exercise of the Secretary's discretion. As explained in the Petition, this standardless grant of discretion in an executive branch official to acquire land and convert it into Indian trust land constitutes an unconstitutional delegation of legislative power. As the Petition further explained, the consequences of the Secretary's unbridled power to acquire land "for Indians" is immense because the states' sovereign powers are significantly restricted on lands taken into trust under § 465. The United States' Brief in Opposition, far from contradicting these points, confirms that review of this case is warranted.

The United States proposes "intelligible principles" that purportedly set bounds on the Secretary's discretion. But, directly contrary to *Whitman v. American Trucking Associations, Inc.,* 531 U.S. 457, 472 (2001), these "intelligible principles" appear nowhere in the statute. Running away from the plain text, the United States looks instead to the Secretary's own regulations and swatches of legislative history to divine some boundaries on the Secretary's discretion. Moreover, even on their own terms, the "intelligible principles" articulated by the United States are insufficient. They place no genuine limits on the Secretary's discretion to acquire, by any means, as much land as he wants, wherever he wants, for whatever reason he wants. The United States' effort to save the statute might have been plausible were the agency power at issue narrow in scope, such as, for example, defining the term "country elevators" in 42 U.S.C. § 7411(i). *See Whitman*,

531 U.S. at 475 (providing that example). That approach is manifestly impermissible when the agency power is as sweeping as is the Secretary's power here.

1. It is not disputed that when "Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman,* 531 U.S. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis in original)). The "intelligible principles" in turn, set the "boundaries" of the "delegated authority." *See American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946). The United States proposes that the "intelligible principles" found within § 465 are that the Secretary may acquire land "when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base." U.S. Opp. 18-19. Those principles were not, however, laid down by *Congress*.

In *Whitman*, this Court declared that it had "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." 531 U.S. at 472. Nonetheless, the United States relies heavily, and nearly exclusively, on federal rulemaking to justify the constitutionality of § 465. Most tellingly, the United States turns to the text of the *regulation*, and not the text of the *statute*, to demonstrate that "Section 465 does not confer boundless discretion." U.S. Opp. 19; *see also* U.S. Opp. 4, 5, 6. The United States proudly trumpets its contention that the Secretary has "set[ ] out ascertainable standards that govern trust acquisition decisions." U.S. Opp. 20. One searches in vain, however, for any *statutory* limitation on the power to

acquire land "for the purpose of providing land for Indians."

The United States seemingly argues that a war powers case, *Lichter v. United States*, 334 U.S. 742 (1948), establishes that it is not necessary that a statute give "concrete expression" to "limiting principles" because this function can be accomplished by a mere regulation. U.S. Opp. 20. This thesis, however, is definitively undermined by the unambiguous holding of *Whitman* to the contrary.[1]

Finally, the federal treatment of the legislative history is quite revealing. As the Petition at 21-22 demonstrates, the original, carefully composed bill was entirely rewritten by its opponents, and it eliminated the restraints and checks in the statute. The United States, contrary to the main thread of its argument, embraces the heart of this thesis, asserting that the elimination of these restraints

[1] It bears adding that the regulations that purportedly "guide" the Secretary's discretion do not limit his plenary power. For example, 25 C.F.R. § 151.3(a)(2) allows the Secretary to take land into trust "[w]hen the tribe already owns an interest in the land." Therefore, to make land eligible for a trust acquisition, a tribe need only purchase the land. Further, the rules require only that the Secretary "will consider" certain other criteria. 25 C.F.R. § 151.10. The requirements, for example, that a BIA officer "consider" the "purposes" of the acquisition or the likely "jurisdictional" problems do not effectively limit the BIA's authority to take the land into trust. As a consequence, judicial review has largely focused on whether the BIA performed the ritual of "considering" the BIA factors. As found by the Eighth Circuit, the party challenging the BIA must "present evidence that the agency *did not consider a particular factor*; it may not simply point to the end result and argue generally that it is incorrect." Pet. App. 17. (Emphasis added.)

demonstrates the "broad authority" vested in the Secretary. U.S. Opp. 21. That is precisely the problem, however. The broad authority delegated in § 465 is utterly unbridled.

2. The "intelligible principles" and "boundaries" proposed by the United States fail on their own terms. A rule that the Secretary may acquire land "when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base" (U.S. Opp. 18-19) is empty of content and no limitation at all.

The purported "boundary" of allowing acquisitions for the purpose of "advancing tribal economic development" is no boundary with regard to location, purpose, or extent. As to location: the acquisition of lands for the small South Dakota tribe at issue in New York City, in California, in Hawaii, or in Nevada could certainly "advance" the tribe's economic development. As to purpose: land could be acquired for golf courses, strip joints, strip mines or apartment houses, or for any purpose, under this "boundary." And as to extent: the combined size of the acquisitions for the purpose of "advancing economic development" is unlimited, as illustrated by the career of John Rockefeller or, more recently, Donald Trump.

The "boundary" or "intelligible principle" of "restoring the ancestral tribal land base" fares no better. The undefined term "ancestral tribal land base" may mean all of the continental United States, since it was all part of the "land base" of some tribe. It may mean the 138,000,000 acres of Indian land holdings in 1887 as referred to in the United States' brief. U.S. Opp. 2. Alternatively, it might mean, for

South Dakota's tribes, any land which these tribes ever occupied. South Dakota's Native American population is mostly Sioux and some experts take the view that this tribe resided in the southeastern United States and migrated in approximately 1000 A.D. toward Minnesota. *See, e.g.*, Mary Davis, (ed.), *Native America in the Twentieth Century: An Encyclopedia* 299 (1994). The Sioux were living in Minnesota in the 1660's when they were contacted by the French (Wesley Hurt, *Sioux Indians II, Dakota Sioux Indians* (American Indian Ethnohistory, Plains Indians) 61-62 (1974)), and they thereafter moved into South Dakota. The Sioux, under this formulation, could have land taken into trust for their benefit in any states in which they resided on their way to South Dakota.

Cementing the absence of any true limits in the United States' proposed "intelligible principles" is the United States' use of the phrase "such purposes as." *See* U.S. Opp. 18 (the Secretary may acquire land under § 465 "when the acquisition would serve *such purposes as* advancing tribal economic development, ..." (emphasis added)). In other words, its three categories are merely illustrative and not comprehensive. The Secretary can presumably rely on others, though what these may be is unknown. What is known is that the United States' formulation lacks any realistic boundaries at all.

Finally, it is significant that the purported "intelligible principles" as articulated by the United States differ from the "intelligible principles" articulated in the Eighth Circuit's opinion, confirming that both are really manufactured. For the Eighth Circuit, a limiting purpose is tribal "self-support," Pet. App. 14; for the United States it is "advancing tribal economic development." U.S. Opp. 18-19. For the Eighth Circuit, a limiting purpose is "ameliorating

the damage" from the allotment policy, Pet. App. 14; for the United States it is "assisting tribal self-governance" (whatever that means) and "restoring the ancestral tribal land base." U.S. Opp. 19. For the Eighth Circuit, the two named factors completely define the "intelligible principle" found in the statute, Pet. App. 14; for the United States, as noted, the three "intelligible principles" are only illustrative – there are others, unknown and unidentified, contained within the term "such purposes as." U.S. Opp. 18.[2]

3. Were the scope of the power at issue as limited as defining the term "country elevator," perhaps the "intelligible principles" fabricated by the United States would suffice. But under *Whitman*, 531 U.S. at 475, the "degree of agency discretion that is acceptable varies according to the scope of power constitutionally conferred." *See* U.S. Opp. 22. Under § 465, the Secretary has been granted the sweeping power to take land into trust on or off reservation, and for any purpose, at any location, and without limit. Accordingly, Congress "must provide substantial guidance," *Whitman*, 531 U.S. at 475, on the exercise of that power. It has not.

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[2] Also pending before this Court is a Petition for Writ of Certiorari in the case of *State of Utah v. Shivwits Band of Paiute Indians*, No. 05-1160 (Petition for Writ of Certiorari filed March 9, 2006). The Court of Appeals in that case pronounced still a third different rendition of the intelligible principles or boundaries, including, inter alia, that of " 'rehabilitating the Indian's economic life' and 'developing the initiative destroyed by . . . oppression and paternalism' of the prior allotment policy"; a further limit was that the Secretary "must assure continued 'beneficial use by the Indian occupant and his heirs.' " *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972 (10th Cir. 2005) (quoting *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999)).

The United States argues that the power granted the Secretary is not broad for purposes of the *Whitman* rule because "the supervision of lands occupied by Indians" is "an area in which the Executive has historically exercised expansive authority." U.S. Opp. 22. That is a non-sequitur. There is *no* tradition of the United States supervising *off reservation* lands acquired in fee by tribes and individual Indians – the type of lands at issue in this very case. Moreover, the federal government's supervision of some Indian lands hardly lessens the broad impact of a congressionally-delegated power to deprive states of their sovereign powers over unknown additional amounts of off-reservation land. That impact can be felt by states and local governments in numerous ways.

When a tribe or an individual Indian acquires land in fee, it neither deprives states and localities of their authority to tax the lands, nor divests the states and localities of their historical criminal, civil, and regulatory powers over the lands and their inhabitants. This changes when those lands are taken into trust under § 465. All power to impose property taxes on the property is lost under the terms of the statute itself. 25 U.S.C. § 465 ("lands or rights" acquired in trust "shall be exempt from State and local taxation"). And under 25 C.F.R. § 1.4(a) each acquisition of land in trust has the immediate effect of invalidating the application of any state or local "laws, ordinances, codes, resolutions, rules or other regulations" which have the effect of "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights. . . ."

Some courts, moreover, have even found that the Secretary's acquisition of off reservation land in trust has the legal effect of converting that land into "Indian

country" with the corresponding loss of criminal and civil jurisdiction to the states and local units of governments. *See, e.g.*, *United States v. Roberts*, 185 F.3d 1125, 1131-1133 (10th Cir. 1999). The United States, relying, *inter alia*, on this Court's decisions in *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. at 450, 453 n.2 (1995), *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) and *United States v. John*, 437 U.S. 634, 648-49 (1978), has consistently taken this position. *See, e.g*., Brief for the Federal Appellees at 35-43, *State of South Dakota and Moody County, South Dakota v. United States Department of the Interior* (8th Cir.) (No. 06-1150).

The immediate threat to the states and local units of government is intensified because of the bonanza of gaming funds flowing into tribal coffers. The Petition identified net tribal gaming revenues of 19.4 billion dollars in *2004*. Pet. 27. The *2005* revenues, recently disclosed, indicate net tribal gaming revenues of 22.6 billion dollars, an increase of over 16 percent in a single year. *See* www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/TribalGamingRevenues05.pdf. Sixty operations now annually net 100 million dollars or more each, providing an enormous source of revenue for the purchase of lands. As noted, the mere purchase of land by a tribe makes the land eligible for trust status consideration. *See* 25 C.F.R. § 151.3(a)(2) ("land may be acquired for a tribe in trust status . . . [w]hen the tribe already owns an interest in the land.") *See also*, note 1, *supra.*

Had Congress carefully circumscribed the Secretary's discretion in converting land into trust lands for Indians, these deep inroads on state sovereignty might have been tolerable under the Constitution. As detailed above, however, even under the United States' reading of § 465,

the Secretary of the Interior is empowered to invade the jurisdiction of the states and local units of government for virtually any purpose, at any place, and by acquisitions of land in any amount. Nothing in the statute or in the federal description of its boundaries would prohibit the taking into trust of the whole of a neighborhood, suburb, city, county or even a state. This unbridled delegation of sweeping legislative power is utterly inconsistent with our structure of government, and warrants review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE E. LONG*
Attorney General
State of South Dakota

**Counsel of Record*

JOHN P. GUHIN
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Counsel for Petitioners