No. 05-1160

In the Supreme Court of the United States

STATE OF UTAH, ET AL., PETITIONERS

v.

SHIVWITS BAND OF PAIUTE INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the provision of the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, that authorizes the Secretary of the Interior to take real property into trust "for the purpose of providing land for Indians," 25 U.S.C. 465, is an unconstitutional delegation of legislative power.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is reported at 428 F.3d 966. The order of the district court granting final judgment in favor of respondents (Pet. App. 40-56) is unreported. The order of the district court concerning the court's jurisdiction to review the Secretary of the Interior's decision to take title to the property at issue here (App., *infra*, 1a-15a) is reported at 185 F. Supp. 2d 1245. The order of the district court denying petitioners' motion for summary judgment on constitutional grounds (Pet. App. 57-78) is not published in the Federal Supplement, but is available at 2001 WL 1806986.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2005. On January 26, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including March 9, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a policy of distributing Indians' tribal lands to individual Indians. See *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987). In addition, tribal lands that were deemed surplus were made available to settlement by non-Indians. See *ibid*. Other statutes of that era similarly provided for the allotment of land to individual Indians on particular reservations. See *id*. at 706-707; *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The allotment policy reduced Indian land holdings from 138 million acres in 1887 to 48 million acres in 1934, and led to a patchwork of ownership on Indian reservations. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); *Cohen's Handbook of Federal Indian Law* 1009 n.337 (Nell Jessup Newton et al. eds., 2005 ed.).

Congress repudiated the policy of allotment in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*).[1] In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25

[1] The relevant provisions of the IRA, as they presently appear in the United States Code (as amended), are reproduced in an appendix hereto. App., *infra*, 16a-23a.

U.S.C. 461), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2, 25 U.S.C. 462), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)), and prohibited any transfer of Indian lands (other than to the Tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations" (§ 4, 25 U.S.C. 464).

In addition, the IRA authorized or directed the Secretary to undertake specified steps aimed at improving the economic and social condition of Indians, including: acquiring real property "for the purpose of providing land for Indians" (IRA § 5, 25 U.S.C. 465); adopting regulations for forestry and livestock grazing on Indian units (§ 6, 25 U.S.C. 466); proclaiming new Indian reservations or adding to existing reservations with acquired lands (§ 7, 25 U.S.C. 467); assisting financially in the creation of Indian chartered corporations (§ 9, 25 U.S.C. 469); making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of the Tribes (§ 10, 25 U.S.C. 470); paying tuition and other expenses for Indian students at vocational schools (§ 11, 25 U.S.C. 471); and giving preference to Indians for employment in positions relating to Indian affairs (§ 12, 25 U.S.C. 472).

Finally, the IRA included provisions designed to strengthen Indian self-government. Congress authorized Indian Tribes to adopt their own constitutions and bylaws (IRA § 16, 25 U.S.C. 476), to incorporate (§ 17, 25 U.S.C. 477), and to decide, by referendum, whether to opt out of the IRA's application (§ 18, 25 U.S.C. 478).

Petitioners challenge the constitutionality of Section 5 of the IRA. The full text of that Section is as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is ac-

> quired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 465.

b. The Secretary has adopted regulations to implement his authority to acquire property under the IRA, which is carried out by the Bureau of Indian Affairs (BIA). See 25 C.F.R. Pt. 151. In this case, the BIA applied the regulations that were in effect in 1994, when the application concerning the property in question was filed. Those regulations set forth the land-acquisition policy and specify the factors that guide the Secretary's evaluation of land acquisition requests. See 25 C.F.R. 151.3(a), 151.10 (1995). The regulations provide that, subject to consideration of the specified factors, land may be acquired in trust for Indians when it is within or adjacent to the Tribe's reservation or tribal land-consolidation area, the Tribe already owns the land, or the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a) (1995). The factors the Secretary considers include "[t]he need of the individual Indian or the tribe for additional land" and "[t]he purposes for which the land will be used," as well as "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" and any other "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. 151.10(b), (c), (e) and (f) (1995).[2]

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[2] The Secretary amended the land-acquisition regulations in 1995 and 1996. See 60 Fed. Reg. 32,874 (1995); 61 Fed. Reg. 18,082 (1996). The amended regulations retain the same statement of land-acquisition policy and the factors for reviewing an application that are identified in the text. In addition, the amended regulations require the BIA to give notice of a proposed acquisition and an opportunity for comment to state and local governments. 25 C.F.R. 151.10, 151.11(d). If the land in

2. The Shivwits Band of Paiute Indians (Band) is part of a federally recognized Tribe, and appears on the Department of the Interior's list of recognized Tribes pursuant to Congress's restoration of federal recognition in 1980. See 70 Fed. Reg. 71,194, 71,196 (2005); Paiute Indian Tribe of Utah Restoration Act, 25 U.S.C. 761 *et seq.* The Band's income is meager, with revenues in 1999 of only $90,417. Pet. App. 51. The Shivwits Reservation itself is located in a remote area in southwestern Utah, approximately 12 miles northwest of the City of St. George. Pet. C.A. App. 185.

In 1993, the Band entered into discussions with Kunz & Co. (Kunz) and the BIA concerning the potential acquisition of property adjacent to Interstate 15 within the City of St. George for the purpose of pursuing economic development opportunities that would increase the Band's income. Pet. App. 3-4. Kunz proposed that, if the Band acquired the property, Kunz would rent it from the Band for a period of 20 years and construct billboards on the property. *Id.* at 3-4, 51. The land was undeveloped, but was within an area that has been undergoing rapid development. *Id.* at 3-4, 51-52. On August 9, 1994, the Band acquired two parcels of property

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question is neither within nor contiguous to a reservation, the Secretary will give increasing scrutiny to the Tribe's claim of anticipated benefits and increasing weight to any adverse impact of acquisition on the State or locality's regulatory jurisdiction or tax base as the distance of the property from the Tribe's reservation increases. 25 C.F.R. 151.11(b) and (d). Finally, the 1996 regulatory amendment provides a thirty-day period after publication of the Secretary's decision to take land into trust before title is actually acquired, 25 C.F.R. 151.12(b), so that an interested party may bring a judicial challenge to the acquisition. Such a challenge would be barred by sovereign immunity after title is acquired, due to the exception for Indian lands in the Quiet Title Act, 28 U.S.C. 2409a. See pp. 20-22, *infra*.

in a private sale and, on the following day, tendered an application to the BIA to take the property in trust and a special warranty deed for that purpose. *Id.* at 5.

In anticipation of the Band's application, the BIA sent a letter to the City of St. George on August 1, 1994, informing it that the Band was in negotiations to purchase the properties, which were identified by location and tax identification numbers, and asking whether the City supported the Band's endeavor. Pet. App. 4. The City did not respond to the BIA's letter. *Ibid.*[3] The BIA Regional Director concluded that, "since no response was received from the City" to the August 1 letter, "there would be no adverse impact on the local government" from the acquisition. *Id.* at 101. After the BIA completed an environmental assessment of the Band's proposal to lease the parcels to Kunz, it issued a Finding of No Significant Impact on August 31, 1995. *Id.* at 5. On the same day, the BIA approved the Band's request that the property be accepted into trust. *Ibid.* The Band and Kunz then signed twenty-year leases authorizing Kunz to erect and maintain five billboards on the trust lands, which the BIA approved. *Id.* at 5, 51.

On October 25, 1995, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened to bring criminal charges against Kunz if it did not cease construction of the billboards. Pet. App. 6. On November 3, 1995, the City issued a stop-

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[3] Although the regulations in force at the time of the Band's purchase—unlike those in place today, see note 2, *supra*—did not require notice to state or local authorities, the BIA did provide notice to the City in this case. The notice by letter on August 1, had, in fact, been preceded by informal oral notice to the City Manager on July 7, 1994. Pet. App. 4. The City Manager indicated at that time that the City would not provide a letter in support of the application. *Ibid.*

work order purporting to forbid Kunz from erecting the billboards. *Ibid.*

3. In response to the State and City's actions, the Band and Kunz filed suit against the State of Utah, the Utah Department of Transportation, and the City of St. George in the United States District Court for the District of Utah on November 17, 1995, seeking injunctive and declaratory relief. Pet. App. 6. On February 7, 1996, the district court entered a preliminary injunction barring petitioners from interfering with the construction of the billboards. *Id.* at 7 n.3.

Petitioners filed counter-claims against the Band and Kunz and third-party claims against the Secretary and other Department of the Interior officials and the BIA. Among other claims, petitioners sought a declaration that Section 465 is an unconstitutional delegation of Congress's legislative authority. Pet. App. 6-7.

On cross-motions for summary judgment, the district court rejected petitioners' constitutional challenge. Pet. App. 64. The court noted that the Tenth Circuit had squarely rejected the nondelegation argument in *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000), holding that Congress had placed limits on the Secretary's discretion by providing ascertainable standards against which a reviewing court could test the Secretary's exercise of that authority. Pet. App. 64. The court did, however, hold that the Secretary had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, by failing to prepare an environmental assessment of the decision to accept the land into trust, separate and apart from the environmental assessment prepared (before the land was taken into trust) with respect to the proposed lease agreements between the Band and Kunz.

Pet. App. 64-78. The court held that the decision to take the land into trust was therefore invalid and ordered the BIA to undertake an environmental assessment of the acquisition decision. *Id.* at 78. Because the court believed that the government's sovereign immunity defense, discussed below, did not apply to petitioners' NEPA claim, it did not address that issue. *Id.* at 62 n.7.

Petitioners asked the court to vacate its opinion and renewed their motion for summary judgment. The federal respondents, in turn, renewed their argument that the United States' sovereign immunity barred petitioners' claims, including those under NEPA, that challenged the Secretary's decision to take title to the property in trust for the Band. App., *infra*, 2a, 8a. In an opinion dated February 6, 2002, the district court agreed with the federal respondents that "[t]he Indian lands exception to the [Quiet Title Act, 28 U.S.C. 2409a(a) (QTA)] bars the State's claim in this case even though the State claims the right to regulate the lands in question, because * * * underlying the State's claim is a challenge to the government's title to the land." App., *infra*, 11a. Yet, despite that conclusion, the court held that "under the APA, the decision by the BIA to accept the land in trust is subject to judicial review under NEPA," *id.* at 13a, and it deferred consideration of petitioners' other claims until the NEPA process had been completed. *Id.* at 14a-15a.

After the NEPA review was finished, the BIA determined that it would neither remove the land from trust status nor deny approval of the billboard leases. Pet. App. 45. After the BIA had issued its final determination, the district court ruled on the parties' cross-motions for summary judgment. *Id.* at 40-56. The court held that the parcels were Indian country within the

meaning of 18 U.S.C. 1151, Pet. App. 45, and that there was no basis upon which the petitioners could regulate the use of the tribal trust land for outdoor advertising, *id*. at 45-55. The court therefore granted summary judgment in favor of respondents. *Id*. at 55.

4. The court of appeals affirmed. Pet. App. 1-39. The court first rejected petitioners' argument that Section 465 is an unconstitutional delegation of legislative authority. The court adhered to its decision in *Roberts* that Section 465 "itself places limits on the Secretary's discretion," including the requirement that lands be acquired for Indians as defined by Congress, the prohibition against acquiring land for Navajos outside their reservations, and the overarching statutory purposes, identified in the legislative history, of "rehabilitating the Indian's economic life and developing the initiative destroyed by . . . oppression and paternalism of the prior allotment policy." *Id.* at 11-12 (quoting *Roberts*, 185 F.3d at 1137) (internal quotation marks omitted).

The court of appeals rejected petitioners' argument that this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), required that *Roberts* be reconsidered. Pet. App. 13-14. Although the court agreed that *Whitman* makes clear that an agency cannot cure an unconstitutional delegation of power by declining to exercise some of its delegated authority, *id.* at 13, the court of appeals held that Section 465 does not violate that principle because "the statute itself provides standards for the Secretary's exercise of discretion," *id.* at 12 (quoting *Roberts*, 185 F.3d at 1136 n.8).

The court of appeals went on to hold that, "[i]n light of the QTA's Indian trust land exemption," the district court "lacked subject matter jurisdiction over [petitioners'] counterclaim and third-party claim to the extent it

sought to challenge the BIA's decision to take the property at issue into trust for the Band," and that the district court had therefore erred in considering petitioner's NEPA challenge to the land acquisition. Pet. App. 18.

Finally, the court rejected petitioners' claim that, assuming the validity of the Secretary's acquisition of the land in trust for the Band, the State and City could still assert regulatory authority over the placement of billboards on the land. Congress had not, the court held, authorized the State to regulate outdoor advertising on Indian trust land pursuant to the Highway Beautification Act of 1965, 23 U.S.C. 131(h). Pet. App. 27-28. Nor did the State possess inherent authority to regulate the maintenance of billboards in Indian country. Considering the interests of petitioners and those of respondents, *id.* at 29 (citing *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)), the court found that "there are significant federal interests at play here," whereas "the State has failed * * * to establish that its interests in regulating the land are substantial," *id.* at 30, 32. The court stressed that the Band's other sources of revenue were "not adequate . . . to properly operate functions of, or provide economic development for, the Band," that "the Band's income from the leases of the parcels at issue now constitutes its greatest source of revenue," and that the Band would have freedom at the end of the lease terms to develop the property for economic use, including possibly "for housing by Band members, the majority of whom, at the present, are forced to live off-reservation." *Id.* at 31 (internal quotation marks omitted).

Judge Lucero concurred in the panel's opinion, but wrote separately to add a discussion concerning the ap-

plication of the Highway Beautification Act to Indian lands. Pet. App. 34-39.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, as discussed below, see pp. 20-22, *infra*, this case presents a threshold jurisdictional obstacle that would prevent the Court from reaching the question on which petitioners seek review. Further review by this Court is therefore unwarranted.

1. Notably, petitioners do not contend that review by this Court is necessary to resolve a conflict among the courts of appeals. Rather, as petitioners concede (Pet. 11-12), each of the courts of appeals that has considered a constitutional challenge to Section 465 on nondelegation grounds has rejected that argument. See Pet. App. 9-14; *South Dakota* v. *United States Dep't of the Interior*, 423 F.3d 790, 795-799 (8th Cir. 2005) (*South Dakota II*), petition for cert. pending, No. 05-1428 (filed May 8, 2006); *Carcieri* v. *Norton*, 2005 WL 2216322, **8-**9 (1st Cir. Sept. 13, 2005); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 694, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).[4]

[4] The First Circuit panel's amended opinion in *Carcieri* was originally reported at 423 F.3d 45. Appellants filed a petition for rehearing en banc on November 7, 2005, which did not raise the nondelegation issue. The court thereafter requested that the opinion be withdrawn from the bound volume of the Federal Reporter. The editor's note at 423 F.3d 46-72 makes clear, however, that the decision has not been vacated or withdrawn. To date, the court has taken no action on the petition for rehearing en banc. See No. 03-2647 Docket.

[continued . . .]

Nor is the issue presented one of urgent importance. To the contrary, the statutory provision that petitioners seek to have invalidated was enacted nearly seventy years ago. For seven decades, Section 465 has provided the primary mechanism for the federal government to restore and replace tribal lands, which Congress concluded was crucial to promote tribal self-government and economic self-sufficiency. See pp. 16-19, *infra*. Congress has, moreover, revisited and amended the IRA on numerous occasions, including subsequent to the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that guide his land-acquisition policies.[5] In fact, this Court has remarked that "Section 465 provides the proper avenue" for a Tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill* v. *Oneida Indian Na-*

Petitioners observe (Pet. 7-8) that a divided panel of the Eighth Circuit had upheld a nondelegation challenge to Section 465 in *South Dakota* v. *United States Dep't of the Interior*, 69 F.3d 878 (1995) (*South Dakota I*). This Court, however, vacated the panel's decision in *South Dakota I*, and remanded the matter to the Secretary of the Interior to reconsider his administrative decision and to permit judicial review in light of newly amended regulations. *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996). Accordingly, *South Dakota I* has no precedential effect, see *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect."), and the Eighth Circuit has itself repudiated its reasoning, see *South Dakota II*, 423 F.3d at 796-797.

[5] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465 to all Tribes).

tion, 544 U.S. 197, 221 (2005). See also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998).

The Court previously declined to grant review on the delegation issue in *Roberts*, which the Tenth Circuit followed in this case, and the same disposition is warranted in this case as well.

2. Despite the uniform appellate decisions upholding the constitutionality of Section 465, petitioners urge (Pet. 11-16) that the Court should grant a writ of certiorari to review the court of appeals' application of this Court's decisions in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), and *Mistretta* v. *United States*, 488 U.S. 361 (1989). The court of appeals' application to a particular statute of well-settled principles regarding the conferral of authority on the Executive Branch does not warrant this Court's review. In any event, contrary to petitioners' contentions, the courts of appeals have carefully considered and correctly applied this Court's nondelegation precedent.

a. It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). Accord *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

Although "in 1935 [the Court] struck down two delegations for lack of an intelligible principle," the Court has "since upheld, without exception, delegations under standards phrased in sweeping terms." *Loving* v. *United States*, 517 U.S. 748, 771 (1996); see, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding a statute authorizing the War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944) (upholding a statute authorizing the Price Administrator to set prices that are "generally fair and equitable and will effectuate the purposes of [the Emergency Price Control] Act"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding a statute authorizing the Federal Communications Commission to regulate broadcasting according to the "public interest, convenience, or necessity").

In *Whitman* itself, this Court reversed the court of appeals' determination that the Clean Air Act, 42 U.S.C. 7409(b)(1), unconstitutionally delegated Congress's legislative power to the Environmental Protection Agency to set national air quality standards. 531 U.S. at 472. The Court emphasized that "[i]n the history of the Court [it has] found the requisite 'intelligible principle' lacking in only two statutes," and that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting), and citing *id.* at 373 (majority opinion)). The Court noted that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and that in the two statutes struck down on nondelegation grounds, one "provided

literally no guidance for the exercise of discretion," and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474, 475 (citing *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). The Court stressed that it had never required "that statutes provide a determinate criterion for saying how much of the regulated harm is too much." *Id.* at 475 (internal quotation marks and alteration omitted).

b. The courts of appeals have correctly (and uniformly) held that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust" to withstand constitutional challenge. *South Dakota II*, 423 F.3d at 797.

Section 465 itself contains a number of express indications of Congress's policy. That section states that the purpose of the Secretary's land-acquisition authority is "providing land for Indians," which is a narrow group of individuals defined in 25 U.S.C. 479. See 25 U.S.C. 465. Section 465 provides a limited amount of federal funds to be used for the purpose and expressly forbids the use of those funds to acquire land for Navajo Indians outside of their established reservation boundaries. *Ibid.* Finally, Section 465 specifies that lands taken into trust "shall be exempt from State and local taxation." *Ibid.*

In addition to the text of Section 465 itself, the boundaries of the Secretary's delegated authority to acquire land in trust for Indians may be discerned from the purposes of the IRA as a whole, its factual background, and the statutory context. *American Power & Light*, 329 U.S. at 104; *Lichter*, 334 U.S. at 785. Con-

gress enacted the IRA to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152-154 (1973) ("The intent and purpose of the Reorganization Act 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. 1804, 73d Cong., 2d Sess. 6 (1934)); accord *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress was particularly concerned with reversing the "disastrous" consequences of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the tribal land base and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 & n.5 (1994). Congress identified "conserv[ing] and develop[ing] Indian lands and resources" as one of the purposes of the IRA. 48 Stat. 984.

Accordingly, the IRA expressly repudiates the allotment policy, 25 U.S.C. 461, and contains several provisions designed to preserve and expand tribal lands. 25 U.S.C. 462, 463(a), 464, 465. Other provisions of the IRA likewise reflect Congress's policy of promoting the economic development and self-governance of the Indian Tribes. 25 U.S.C. 469, 470, 471, 472, 476, 477. The authority under Section 465 to acquire land in trust is intended to further those purposes.

The IRA's legislative history confirms the congressional purpose that is evident from the text. As the Eighth Circuit observed in *South Dakota II*, the repeated references in the House and Senate Reports as well as floor debates to the goal of providing land to "Indian individuals and tribes whose land holdings are insufficient for self-support," 423 F.3d at 798 (quoting S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934)), reflect that "Congress placed primary emphasis on the needs of in-

dividuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support," *ibid*.[6]

The purposes of the IRA as reflected in its text, structure, context, and history provide the intelligible principles that guide the Secretary in the exercise of his authority under Section 465. The Secretary may acquire land "for the purpose of providing land for Indians," within the intent of Section 465, when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base. Indeed, this Court has often identified those policies as the Congressional purposes that guide the Secretary's application of the IRA. See *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe*, 411 U.S. at 152 ("The intent and purpose of the Reorganization Act 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. 1804, *supra*, at 6); see also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S.

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[6] As they did in the court below, petitioners assert that this Court's decision in *Whitman* "precludes resort to legislative history" for determining whether a statute sufficiently guides the exercise of the authority it delegates. Pet. 15. However, as the court of appeals correctly observed (Pet. App. 13 n.4), *Whitman* does not address that issue in any way, and this Court has repeatedly made clear that a statute's purpose, factual background, and context are properly considered in determining whether a statute meets this test. See, *e.g.*, *American Power & Light*, 329 U.S. at 104; *Lichter*, 334 U.S. at 778-779.

134, 168 (1980) (Brennan, J., concurring in part and dissenting in part) (noting that the IRA reflects both the "policy of encouraging tribal self-government" and the "complementary interest in stimulating Indian economic and commercial development").

Consistent with this long-established focus of the IRA, the Secretary has recognized that Section 465 does not confer boundless discretion. For example, in adopting a regulatory statement of land-acquisition policy under Section 465, the Secretary expressed his understanding that "[t]he policy * * * is within the scope of existing statutory authority and * * * reflects Congressional intent." 45 Fed. Reg. 62,035 (1980). The Secretary has, moreover identified through regulation the specific factors, derived from the purposes of the IRA and the Secretary's experience in administering it, that guide his decisions to take lands into trust for Tribes and individual Indians. See 25 C.F.R. Pt. 151.[7] By setting out ascertainable standards that govern trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the limiting principles in the IRA. Cf. *Lichter*, 334 U.S. at 783 (recogniz-

[7] As discussed above, see p. 5 *supra*, the regulations set forth a "Land acquisition policy," 25 C.F.R. 151.3, which provides for acquisitions in three circumstances: when the land is within or adjacent to an existing reservation, when the land is already owned by the Tribe, or when "the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(1)-(3). The regulations then set forth particular factors to guide the Secretary's decision whether to acquire such land, including "[t]he need of the individual Indian or the tribe for additional land" (25 C.F.R. 151.10(b)), "[t]he purposes for which the land will be used" (25 C.F.R. 151.10(c)), and, if the land is outside a reservation and is to be used for a tribal business purpose, "the anticipated economic benefits associated with the proposed use" (25 C.F.R. 151.11(c)).

ing that subsequent "administrative practices" under a statute may demonstrate the "*definitive adequacy*" of the terms of the statutory authorization).

Moreover, in an area in which the Executive has historically exercised expansive authority, such as the supervision of lands occupied by Indians,[8] broader directives are especially appropriate. Cf. *Whitman*, 531 U.S. at 475 (noting that "the degree of agency discretion that is acceptable varies"); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing that Congress may accord to the President a greater degree of discretion in the area of foreign affairs than would be acceptable if only domestic affairs were involved); *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (upholding a broad conferral of authority on various Indian Tribes to regulate the introduction of liquor into Indian country on the ground that limitations on Congress's authority are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter").

3. Even if the question on which petitioners seek review otherwise warranted this Court's consideration, this case would not present a good vehicle by which to do so. As the court of appeals held, "[i]n light of the QTA's Indian trust lands exemption, * * * the district court in this case lacked subject matter jurisdiction over * * * [petitioners' third-party complaint] to the extent it sought to challenge the BIA's decision to take the property at issue into trust for the Band." Pet. App. 18. Although the court of appeals did not apply its jurisdic-

[8] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

tional holding to petitioners' claim that the Secretary's statutory authority to take the property into trust was itself unconstitutional, the court's reasoning encompasses petitioners' constitutional challenge to Section 465 and would prevent this Court from reaching the constitutional question on which petitioners seek review.

This Court has recognized that the provision of the QTA that prohibits suits that challenge the United States' title in lands held in trust for Indians, 28 U.S.C. 2409a(a), may bar a claim even if the plaintiff does not characterize it as one brought under the QTA. *United States* v. *Mottaz*, 476 U.S. 834, 841-842 (1986); *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 284-285 (1983). Several circuits, including the court of appeals in this case, have held that the Indian lands exception bars claims that are purportedly brought under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, but would have the effect of declaring a completed acquisition of lands in trust for Indians to be void. See Pet. App. 18-19; *Neighbors for Rational Dev., Inc.* v. *Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004) (QTA barred APA action challenging Secretary's acquisition of land in trust under Section 465 as violating NEPA); *Alaska* v. *Babbitt*, 75 F.3d 449, 452-453 (9th Cir. 1995) (QTA barred APA claim that Bureau of Land Management's approval of Indian's allotment under 43 U.S.C. 270-1 to 270-3 (1970) (repealed 1971), was ultra vires), cert. denied, 519 U.S. 818 (1996); *Florida* v. *United States Dep't of the Interior*, 768 F.2d 1248, 1250, 1254-1255 (11th Cir. 1985) (QTA barred APA challenge to the acquisition of land in trust for the Seminole Tribe as violating regulatory standards), cert. denied, 475 U.S. 1011 (1986). See also *Shawnee Trail Conservancy* v. *United States Dep't of Agric.*, 222 F.3d 383, 388 (7th Cir.

2000) (plaintiffs' constitutional and statutory challenge to the Forest Service's authority to restrict the use of certain roads that plaintiffs claimed were subject to public rights of way could only be brought pursuant to the QTA), cert. denied, 531 U.S. 1074 (2001).

The jurisdictional question whether the QTA bars any claim that challenges the Secretary's authority to acquire title to the land here in question does not itself warrant this Court's consideration. That threshold question should not arise in future cases in which parties seek to challenge the Secretary's acquisition of land pursuant to Section 465. The land acquisition at issue in this case proceeded pursuant to the 1994 version of the regulations. As noted above, see note 2, *supra*, the Secretary amended the governing regulations in 1995 and again in 1996. The present regulations require that notice of proposed land acquisitions be sent to state and local authorities to provide them an opportunity to comment on the acquisition's potential impacts before the Secretary makes his determination. 25 C.F.R. 151.10, 151.11(d). The regulations also provide a thirty-day period between publication of the Secretary's decision to take land into trust and when the United States takes title to any property, so that a state or local government, like petitioners, may challenge the Secretary's decision in court without the obstacle of the QTA. 25 C.F.R. 151.12(b); 61 Fed. Reg. at 18,082.

We are informed by the Department of the Interior that this is the only pending case challenging a land acquisition that preceded the 1995 and 1996 amendments to the regulations. Because the threshold jurisdictional question would likely prevent the Court from reaching the question on which petitioners seek review, and cannot be expected to arise with any frequency in the fu-

ture, this case represents a poor vehicle for this Court to resolve the question presented by petitioners, even if that question otherwise warranted review.

4. Petitioners' assertion (Pet. 17) that the Secretary's authority under Section 465 to acquire land in trust for Indians "imposes significant hardships on state and local governments nationwide" provides no basis for granting the petition.

Petitioners contend that the taking of property in trust for Indians limits the ability of state and local governments to "enforce needed land use and development restrictions uniformly," Pet. 19, leads to a loss of tax revenues, *ibid.*, and exacerbates "tensions between state and local governments on the one hand and tribes and the BIA on the other," Pet. 21. Those arguments have nothing to do with petitioners' constitutional claim that Section 465 lacks an "intelligible principle" to guide the Secretary's exercise of his authority under Section 465. Rather, petitioners' arguments represent a disagreement with the IRA's conceded policy of promoting tribal self-sufficiency and sovereignty, including Congress's explicit policy determination to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465; see *Rice* v. *Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

Moreover, petitioners ignore that the Secretary's regulations address the very concerns they raise here. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section] 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory.").

The regulations direct the BIA, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when, as was true in this case, the land to be acquired is held in unrestricted fee status, the BIA considers "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g).

Indeed, although petitioners make repeated references to what they view as the Secretary's "abuse" of his statutory authority in granting the Band's application to take the land into trust and approving the billboard leases, see Pet. 10-11, 17-19, 21, it is notable that petitioners made the strategic decision not to pursue their claim that the trust acquisition in this case violated the statutory and regulatory standards established in 25 U.S.C. 465 and 25 C.F.R. Pt. 151 (1995). In petitioners' initial complaint, they asserted, as their seventh cause of action, a claim that the "BIA has failed to comply with the requirements of the IRA * * * and the regulations applicable thereunder in accepting the lands into trust on behalf of the Shivwits band." Answer, Countercl. & Third-Party Claim para. 62. In their amended third-party claim, however, petitioners omitted that claim and inserted a new seventh cause of action under the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2) and (3). See First Amended Answer, Countercl. & Third-Party Claim paras. 61-67. In light of the fact that petitioners abandoned the legal theory by which they could have challenged directly the merits of the Secretary's applica-

tion of Section 465, petitioners' claim that only a declaration that the statute is unconstitutional can remedy the Secretary's supposed excesses rings hollow.

In any event, as the district court and court of appeals each held in addressing a separate argument raised by petitioners, the Secretary's decision to take the land into trust did, in fact, serve Congress's purposes in adopting the IRA. Pet. App. 31; *id.* at 50-52. "[T]he Band's income from the leases of the parcels at issue now constitutes its greatest source of revenue," *id.* at 31, in what is a "meager revenue stream," *id.* at 3. Most importantly, the arrangement will allow the impoverished Band, after the twenty-year leases, to own property in a rapidly developing area where it can be put to use for greater economic purposes or to meet pressing housing needs. *Id.* at 31. The arrangement approved by the Secretary, which the lower courts found to be "of vital economic importance to the Shivwits," *id.* at 54, is entirely consistent with the purposes that the IRA was intended to serve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2006

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. 2:95CV1025C

SHIVWITS BAND OF PAIUTE INDIANS; AND KUNZ & COMPANY D.B.A. KUNZ OUTDOOR ADVERTISING, A CALIFORNIA CORPORATION, PLAINTIFFS AND COUNTER-CLAIM DEFENDANTS

v.

STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, AND ST. GEORGE CITY, A UTAH MUNICIPAL CORPORATION, DEFENDANTS AND COUNTER-CLAIM AND THIRD-PARTY PLAINTIFFS

v.

BRUCE BABBITT, IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; ADA DEER, IN HER CAPACITY AS ASSISTANT SECRETARY OF INDIAN AFFAIRS; WALTER R. MILLS, IN HIS CAPACITY AS AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS; AND THE BUREAU OF INDIAN AFFAIRS, THIRD-PARTY DEFENDANTS

Feb. 6, 2002

ORDER

CAMPBELL, District Judge.

This matter is before the court on Defendants' motions to vacate order of preliminary injunction and for summary judgment. The court held a hearing on these motions on October 24, 2001. Defendants currently move to vacate this court's earlier preliminary injunction order, which prevented them from regulating the use of the land at issue in this suit. They also seek summary judgment on the question of State and local land regulation, arguing that the land is neither held in trust for the tribe nor that it is "Indian Country," either of which designation could prohibit State regulation. For the reasons discussed below, Defendants' motions to vacate and for summary judgment are DENIED.

Background

The relevant material facts to the underlying dispute in this matter remain unchanged from those before the court when it issued its August 11, 2000 order. This case involves the purchase and subsequent leasing of property adjacent to Interstate Highway 15 within the St. George, Utah limits ("subject property"). On July 16, 1993, Plaintiff Kunz and Company, doing business as Kunz Outdoor Advertising ("Kunz"), contacted Plaintiff Shivwits Band of Paiute Indians ("Shivwits") and proposed a business venture (Kunz and Shivwits are hereinafter collectively referred to as "Plaintiffs"). Kunz proposed that the Shivwits purchase the subject property with money furnished by Kunz. In exchange, the Shivwits would agree to lease the subject property

back to Kunz on favorable terms.[1] The Shivwits agreed to the proposal, were advanced money by Kunz, and bought two pieces of land on August 9, 1994. The land is located in Defendant St. George City, which is a long distance from the Shivwits Reservation. There is no activity on the land other than the outdoor advertising. On the same day, August 9, 1994, the Shivwits conveyed, by Special Warranty Deed, the subject property to the United States to be held in trust for the Shivwits. (*See* Special Warranty Deed, attached as Ex. B to the Complaint.) The United States therefore holds title to the land by virtue of this deed.

An off-reservation trust acquisition, like the one at issue here, however, must be approved by the Department of the Interior. On May 10, 1995, Shivwits, through the Bureau of Indian Affairs ("BIA"), submitted the necessary administrative documents for approval of the trust acquisition. The request that the property be accepted in trust was approved on August 31, 1995, by the local office of the BIA. Following acceptance of the subject property in trust, the parties entered into five separate leases covering the subject property. After an environmental assessment of the proposal as required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 ("NEPA"), which concluded with a Finding of No Significant Impact ("FONSI"), the Secretary of Interior approved the lease arrangement on September 11, 1995.[2]

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[1] The lease transaction involves no payment to the Shivwits for fifteen (15) years and small ($2,500 per year) payments for the next five years.

[2] The approval of the Secretary of the Interior of the lease arrangement was necessary to give the leases effect. *See* 25 U.S.C. § 415.

No one disputes that under State (Utah Outdoor Advertising Act, Utah Code Ann. § 27-12-136.1)[3] and local law (a St. George ordinance, St. George City Code, Title 9, chapter 8),[4] the placement of billboards on the subject property would be unlawful. Plaintiffs argue that the billboards are exempt from these laws because the subject property is being held by the United States in trust for the Shivwits.

On October 25, 1995, the Utah Attorney General's office, on behalf of the Utah Department of Transportation ("UDOT"), threatened criminal suit against Kunz if construction of the signs did not immediately cease. Kunz ignored the warning and continued construction. On November 3, 1995, St. George City issued a stop work order, forbidding Kunz from further construction of the signs on the ground that it violated city and State outdoor advertising regulations and Kunz had no city or State sign permits. On November 17, 1995, Plaintiffs jointly sued for declaratory judgment and preliminary and permanent injunctive relief against the State of Utah, the Utah State Department of Transportation, and the City of St. George (collectively referred to herein as "Defendants"). On November 22, 1995, Defendants jointly filed an Answer, Counterclaim and

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[3] The statute designates certain areas where outdoor advertising may be placed, and the proposed location does not meet the requirements of any of those exceptions. In addition, the signs violate State law because Plaintiffs lack a valid State permit as required by Utah Code Ann. § 27-12-136.7(1). The placement or maintenance of the signs would be a criminal misdemeanor under Utah Code Ann. § 27-12-136.12.

[4] St. George Code §§ 9-8-4(B)(4) and 9-8-2(Q) govern off-premise signs. The Plaintiffs' signs violate these Code sections in that they violate spacing requirements and would not meet any of the exceptions for allowance of signs.

Third-Party Claim against the Shivwits, Kunz, and the United States. The counterclaim and third-party claim allege that 25 U.S.C. § 465, the statute authorizing land acquisitions, is unconstitutional, the taking of the land in trust and the approval of the lease was wrongly accomplished, and that the land is subject to State and local regulations.

This court issued a preliminary injunction, dated February 7, 1996, which prohibited the Defendants from imposing any stop work order or otherwise interfering with the construction or use of the billboards. Protected by this injunction, Kunz erected five large billboards on the subject property and the billboard space has been leased by Kunz to various advertisers. The billboards continue to be used by Kunz. Subsequent to the preliminary injunction order, the court issued an order on August 11, 2000, which held that 25 U.S.C. § 465 is, in fact, constitutional, but also held that the BIA had failed to follow the procedural requirement of NEPA before making the *decision* to hold the land in trust. That order did not affect the fact that the government held the land in trust by special warranty deed, but it did invalidate the agency's decision to take the land in trust until the BIA complied with the procedural requirements of NEPA.

The Defendants' present motions to vacate preliminary injunction and for summary judgement are based on an argument that the billboards should not have been there to begin with for two alternative reasons: 1) that the court's August 11, 2000 order invalidated any trust relationship regarding the land, *de facto* and *de jure*, and that therefore the Shivwits hold the land as any other entity (rather than the government holding it in trust for the Shivwits) and that therefore the State's

and local municipalities' zoning and land use restrictions apply; and 2) that even if the court finds that the government holds the land in trust, the land is not "Indian Country" and therefore State and local land use restrictions apply.

Regarding the first ground for summary judgment outlined above, because the Indian Lands exemption in Quiet Title Act, 28 U.S.C. § 2409a(a) ("QTA"), applies, the government is immune from questions to the title presently at issue. Regarding the second ground for summary judgement argued by the Defendants, the issue as presently postured is not ripe because the BIA has not completed the NEPA process as was mandated the August 11, 2000 order, and therefore there is no final agency decision which settles the status of the land at issue. As discussed below, the court may not rule on the merits of the second argument supporting summary judgement because those issues are not ripe and doing so would be to render an advisory opinion, which the United States Constitution prohibits.

Analysis

A. *Does the Quiet Title Act Prohibit Judicial Review, thereby Suggesting that the Matter be Deferred Until the Presently Ongoing NEPA Process is Complete?*

The initial question posed by Defendants' motions is: what effect, if any, did the court's August 11, 2000 order have on the title already possessed by the government by virtue of the special warranty deed? The answer to this question is: "none." This answer results from the distinction between two government actions present here, both of which have direct bearing on this matter: 1) the government *holding* title to Indian lands (which

it already does in this case *de facto* by virtue of the special warranty deed); and 2) the agencys' (the BIA and the Department of Interior) action of *approving* the trust application. The latter action requires that the agency undertake the NEPA process as the August 11, 2000 order mandated; the former is not subject to judicial review because the Indian lands exemption of the QTA renders the government immune from suit from third parties (here, the Defendants) who challenge the government's title to Indian lands.

There is one glaring fact in this case: right now, the United States holds title to the land by warranty deed. As far as the title issue goes, the Defendants' argument rests on the assumption that the transfer was invalid at its inception because of the NEPA violation, and therefore the Shivwits, not the government, now hold title. Implicitly, if not explicitly, then, the relief for which Defendants ask depends, in part, upon this court first quieting title.

It is a well-established rule that the United States is immune from suit unless Congress expressly waives immunity. *See United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Amalgamated Sugar Co.* v. *Bergland*, 664 F.2d 818 (10th Cir. 1981). Although the Defendants filed their claims against the Secretary of the Interior and his agents, in their official capacities, the claims truly run against the United States because Defendants' claim rests on a title determination and the United States holds title by virtue of the special warranty deed. The only statute cited by the Defendants to support their claim that there has been a waiver of sovereign immunity is the Administra-

tive Procedure Act, 5 U.S.C. § 702 ("APA").[5] Although the Government does not dispute that the APA generally waives sovereign immunity, the government argues that this general waiver of sovereign immunity is superseded by the QTA, which preserves immunity in the case of suits challenging the title to "trust or restricted Indian lands" held by the United States.[6]

On the issue of immunity, both Plaintiffs and Defendants are, in part, correct. The Defendants are correct that the APA's procedural protections apply here and allow judicial review of the decision to approve the taking of land into trust (which requires NEPA compliance as recognized and mandated in the court's August 11, 2000 order). But the government is correct that its right to hold title in trust is unreviewable under the QTA. Therefore, although the BIA must complete the NEPA process, the title to the property remains with the government in trust for Shivwits.

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[5] In relevant part, 5 U.S.C. § 702 says:

> An action [in federal court] seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority, *shall not be dismissed nor relief therein be denied on the ground that it is against the United States* or that the United States is an indispensable party.

Id. (emphasis added).

[6] In relevant part, 28 U.S.C. § 2409a(a) says:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section *does not apply to trust or restricted Indian lands*. . . .

Id. (emphasis added).

The government correctly argues that this case is similar to *Florida Dept. of Business Regulation* v. *Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985), in which the court found no waiver of immunity from suit. In that case, an Indian tribe purchased certain lands containing Indian burial remains with the purpose of preserving the remains and establishing a museum. The United States, as here, took the property into trust by virtue of a deed. Along with the museum, the tribe opened a smoke shop, selling cigarettes tax free to the general public. The State of Florida sought to have the trust decision overturned under the APA on the grounds that the Secretary of the Interior had violated that law by failing to follow the Department's regulations when acquiring the land in trust. The Eleventh Circuit Court of Appeals upheld the dismissal on the grounds that the district court lacked jurisdiction to hear the case. The appellate court held that although the suit was "technically not one to quiet title, . . . Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here." *Id.* at 1254.

The Defendants argue that the Tenth Circuit decision *McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997), rejects the Eleventh Circuit's reasoning in *Florida* and demonstrates that the QTA is not a barrier to issue of title presently before this court. In *McAlpine*, the Tenth Circuit considered a case where a Native American sued the United States and BIA after his request that land be taken into trust was denied. The *McAlpine* Court then concluded that the Secretary of Interior's *denial of acquisition* of land to be held in trust is reviewable under the APA. *See McAlpine*, 112 F.3d at 1435. This guidance from the Tenth Circuit,

however, is not helpful to answer the legal issue here. As the government points out, *McAlpine* deals with a situation where the United States *did not* acquire title; this case deals with the situation where the United States *did* in fact acquire title. The acquisition of title divests this court of jurisdiction to challenges to the United States' right to title as the *Florida* Court recognized. *See Florida*, 768 F.2d at 1254-55.

Several federal courts treating similar issues have made similar distinctions. With regard to the QTA Indian lands exemption generally, "[a]s long as the United States has a 'colorable claim' to a property interest based on that property's status as trust or restricted Indian lands, the QTA renders the government immune from suit." *State v. Babbitt*, 75 F.3d 449, 451-52 (9th Cir. 1995) *cert. denied* 519 U.S. 818, 117 S. Ct. 70, 136 L. Ed. 2d 30 (1996) [hereinafter "*Alaska I*"]. In addition, the question of whether the government has a colorable claim "extends no further than 'a determination that the government had some rationale,' and that its position 'was not undertaken in either an arbitrary or frivolous manner.'" *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999). Such a limitation is consistent with the rule that "[t]he immunity of the government applies whether the government is right or wrong. The very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position." *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). Not only does the present case deal with facts quite different from those in *McAlpine*, it deals with facts that clearly show that the government now holds title by virtue of a special warranty deed, a document surely signifying at least a "colorable claim."

The Indian lands exception to the QTA bars the State's claim in this case even though the State claims the right to regulate the lands in question, because, as discussed above, underlying the State's claim is a challenge to the government's title to the land. *See Rosette Inc. v. United States*, 141 F.3d 1394 (10th Cir. 1998); *Shawnee Trail Conservancy v. United States Dept. of Ag.*, 222 F.3d 383 (7th Cir. 2000). Moreover, while no parties cite these cases, there are cases in which the Indian Lands exemption under the QTA was held to apply even though it was unclear whether the land was, or ultimately would be, held in trust for Indians. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 903 (D. Mass. 1977) (finding that government had not waived immunity even if it had not been determined that the land at issue is "trust or restricted Indian lands" within meaning of QTA exemption provision); *accord State of Alaska v. Babbitt*, 38 F.3d 1068 (9th Cir. 1994) [hereinafter "*Alaska II*"]. Indeed, other courts have explicitly held that "Congress did not intend to waive its sovereign immunity with respect to quiet title action in cases which *would* impact on Indian ownership rights." *Newman v. United States*, 504 F. Supp. 1176, 1178 (D. Ariz. 1981) (emphasis added). In *Newman*, the court found irrelevant the fact that there had been *no definative prior determination* of whether the disputed land was "trust or restricted Indian lands" with regard to the issue of whether the government enjoyed immunity under statute; rather the court found that the claim to title asserted by the government merely had to be substantial. *Id.* at 1178-79. As such, the Indian lands exemption to the QTA prohibits disturbing the government's holding title, even though the procedural posture of this case has mandated that the

BIA conduct NEPA review before issuing a decision to hold the title in trust.

Admittedly, there is an ambiguity or tension in the distinction between the act of the government holding title and the act of the BIA deciding to hold the land in trust. Under binding Supreme Court and Tenth Circuit precedent, however, such tensions and ambiguity do not suggest a different disposition of the matter and, indeed, suggest rather that such ambiguities are resolved in favor of the Shivwits. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) (quotation marks, citation, and alteration omitted). In issues arising under Indian law, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id. citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L.Ed. 941 (1912); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000); *Newman*, 504 F. Supp. at 1178-79. Interpreting the QTA as the courts above suggest is not only supported by these canons of statutory interpretation, but also by the legislative intent behind the Indian lands exception to the QTA. That history demonstrates that Congress intended to prevent prejudice to Indian rights and to prevent the abridgment of "the historic relationship between the Federal Government and the Indians without the consent of the Indians." Quiet Title Act, Pub. L. 92-562, 1972 U.S. Code Cong. & Admin. News, pp. 4547, 4557. As the *Newman* court put it: "It is clear,

therefore, that Congress did not intend to waive its sovereign immunity with respect to quiet title action in cases which *would* impact on Indian ownership rights." 504 F. Supp. at 1178 (emphasis added).

In sum, therefore, the Indian lands exception to the QTA bars disturbing the government's title in trust to the subject property in dispute. This finding leaves the matter in the following situation. The government's *claim* to title in trust remains undisturbed (indeed barred from judicial review by the QTA). Nevertheless, under the APA, the decision by the BIA to accept the land in trust is subject to judicial review under NEPA. Thus, the procedural requirements mandated by the August 11, 2000 order still stand, as does the court's preliminary injunction order. The Defendants' remedy is largely procedural. Defendants cannot challenge the status of the title in trust, as prohibited by the QTA. However, Defendants may challenge the procedures taken in reaching the *decision* by the BIA to hold the land in trust, as recognized in the court's previous order. The Defendants' remedies are limited, as is legally proper, to procedural protections and their rights, as the law dictates, find voice and representation in the NEPA process and APA review.

B. *Defendants' Remaining Arguments Supporting Summary Judgment are Not Ripe and are Barred by the Abstention Doctrine which Prohibits the Court from Issuing Advisory Opinions*

Defendants alternatively seek summary judgment on the issue of State and local land regulation, arguing that the land is neither held in trust for the tribe nor that it is "Indian Country," either of which designation might prohibit State regulation of the land. While the issue of

title, as discussed above, is settled by the QTA, the issue of the State's right to regulate cannot be answered at the present time because the Department of the Interior and the BIA have not made a decision regarding whether the land will be held in trust. Thus, at present, it is impossible for the court to determine with certainty whether the land is held (or will be held) in trust or whether it is "Indian Country" under the legal definition of that term.

The United States Constitution limits this court's jurisdiction to those involving actual "cases" and "controversies." U.S. Const. Art. III, § 2, cl. 1. The Constitution's case and controversy requirement prevents this court from issuing "advisory opinions" and from considering cases issues which are not ripe. *See Public Service Company of Colorado v. United States Environmental Protection Agency*, 225 F.3d 1144, 1148 n.4 (10th Cir. 2000) (discussing prohibition against advisory opinions); *United States v. Chavez-Palacios*, 30 F.3d 1290, 1292-93 (10th Cir. 1994) (same); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (discussing ripeness requirement); *Initiative and Referendum Institute v. Walker*, 161 F. Supp. 2d 1307, 1310-11 (D. Utah 2001) (same).

For the court to make the factual determination on the actual status of the land for regulatory purposes-as Indian Country, as Native held non-Indian Country, or as trust land (any of which category may or may not subject the land to State and local regulation)-the court must first know what the final decisions of the BIA and the Secretary of the Interior are, and this information is unavailable to the court until the NEPA process is complete. The question of whether the Defendants may regulate the land is therefore not ripe, and the court is

unable to issue an opinion on this line of argumentation due to the Constitution's prohibition of the issuance of advisory opinions.

Order

For the reasons set forth above, Defendants motions to vacate preliminary injunction order and for summary judgment are DENIED.

APPENDIX B

Act of June 18, 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 641 *et seq.*) provides in pertinent part:

§ 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

§ 463. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

* * * * *

§ 464. [As amended by Pub. L. No. 109-221, § 501(b)(1), 120 Stat. 343-344.] Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: *Provided further*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108-374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further*, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * * * *

§ 469. Indian corporations; appropriation for organizing

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

§ 470. Revolving fund; appropriation for loans

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

§ 471. Vocational and trade schools; appropriation for tuition

There is authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

§ 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or

services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

* * * * *

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

* * * * *

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for

the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

* * * * *

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

§ 478. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

§ 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.