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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

\_\_\_\_\_  
No. 03-2647  
\_\_\_\_\_

DONALD L. CARCIERI, in his capacity as Governor  
of the State of Rhode Island; STATE OF RHODE ISLAND  
and PROVIDENCE PLANTATIONS;  
TOWN OF CHARLESTOWN, RHODE ISLAND

Plaintiffs-Appellants

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the  
United States Department of the Interior  
FRANKLIN KEEL, in his capacity as Regional Director of the  
Bureau of Indian Affairs, U.S. Department of the Interior

Defendants-Appellees

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND  
\_\_\_\_\_

**SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEES  
ON REHEARING *EN BANC***

\_\_\_\_\_  
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## TABLE OF CONTENTS

	<b>PAGE</b>
INTRODUCTION .....	1
1.    The United States has taken land in trust pursuant to 25 U.S.C. 465 for tribes that were not recognized in 1934. ....	5
2.    In enacting the 1994 amendments, Congress prohibited the Secretary from making the distinction the State urges here .....	8
CONCLUSION .....	14
CERTIFICATE OF SERVICE .....	15

**CASES**

**PAGE**

*Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) . . . . . 2, 14

*Grand Traverse Band of Ottawa and Chippewa Indians*, 369 F.3d 960  
(6<sup>th</sup> Cir. 2004) . . . . . 6

*Tcherepnin v. Knight*, 389 U.S. 332 (1967) . . . . . 4

*United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9<sup>th</sup> Cir. 1990) . . . . . 6

*United States v. Washington*, 641 F.2d 1368 (9<sup>th</sup> Cir. 1981) . . . . . 6

## STATUTES, RULES AND REGULATIONS

### PAGE

#### Federally Recognized Tribe List Act

25 U.S.C. § 479a-1 ..... 10

#### Indian Reorganization Act (“IRA”)

25 U.S.C. § 461 et seq. .... 9

25 U.S.C. § 465 ..... 2, 3, 5

25 U.S.C. § 476 ..... 10

25 U.S.C. § 476(f)-(g) ..... 9

25 U.S.C. § 479 ..... 3, 4, 7, 10

#### Non-Intercourse Act

25 U.S.C. § 177 ..... 13

#### Interior Department Regulations

25 C.F.R. 83.3(e) ..... 7

25 C.F.R. 83.7 ..... 7

25 C.F.R. 83.8 (a) ..... 7

25 C.F.R. 83.8(d) ..... 8

25 C.F.R. 151.2(b) ..... 2

**STATUTES, RULES AND REGULATIONS (continued)**

**PAGE**

43 Fed. Reg. 39361 ..... 7  
48 Fed. Reg. 6177 ..... 5

**MISCELLANEOUS**

80 Am. Jur. 2d Wills § 1033 ..... 3  
80 Am. Jur. 2d Wills § 1165 ..... 3  
140 Cong. Rec. S6144-03 (May 19, 1994), 1994 WL 196882 ..... 11  
Cohen, *Handbook of Federal Indian Law* (1942 ed.) ..... 6  
Cohen, *Handbook of Federal Indian Law* (2005 ed.) ..... 5, 7

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**INTRODUCTION**

By order dated January 16, 2007, the Court invited the parties to submit supplemental briefs with “further information” on the question “whether--as the Secretary contends--administrative practice supports the Secretary’s interpretation of the Indian Reservation [sic] Act to permit trusteeing of land of a tribe not recognized at the time that the statute was enacted (and not eligible under one of the other

provisions of that statute or separate legislation).” This supplemental brief is provided by the federal appellees pursuant to that invitation.

In this appeal, the State appellants (“State”) seek to prevent the Secretary of the Interior (“Secretary”) from accepting legal title to 32 acres of land, which are to be held in trust for the Narragansett Indian Tribe pursuant to Section 5 of the Indian Reorganization Act (“IRA”), 25 U.S.C. § 465. The State argues that the Secretary lacks statutory authority to take the land in trust for the Tribe, on the ground that the IRA authorizes the Secretary to accept lands in trust only for tribes that were both “federally recognized” and “under federal jurisdiction” on June 18, 1934. The State has further suggested (Petition for Rehearing at 14; 8/23/05 Br. at 8-13) that the Secretary himself historically interpreted the statute to prohibit trust acquisition of land for the benefit of tribes that were not recognized when the IRA was enacted in 1934. This is not correct. The Secretary, pursuant to the regulations, has consistently acquired land in trust for “tribes,” defined to include “any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, \* \* \* which is recognized by the Secretary as eligible for the special programs and services the Bureau of Indian Affairs.” 25 C.F.R. 151.2(b). This Court should not substitute the State’s narrow interpretation of section 5 of the IRA and should instead defer to the Secretary’s longstanding interpretation, which is reflected in the regulations. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)

The IRA defines “tribe,” to include “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” 25 U.S.C. § 479. The Secretary currently treats, and historically has treated, all groups that fall within the statutory definition

of “tribe” as eligible for land acquisition pursuant to section 5 of the IRA, 25 U.S.C. § 465. Section 5 authorizes the acquisition of land “for the purpose of providing land for Indians” and states that title to land so acquired 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.” The State asserts that the statute does not authorize trust land acquisition for “tribes” as defined by Interior in the regulations, because the definition of the related term “Indian” in 25 U.S.C. § 479 extends only to “persons of Indian descent who are members of any *recognized* Indian tribe *now under federal jurisdiction*, \* \* \*” (emphasis added). The State contends that this provision mandates that land may not be acquired in trust under the IRA for tribes that were not recognized on June 18, 1934.<sup>1/</sup>

As we have explained (US *En Banc* Supp. Br. 8-11), the Secretary has never adopted the State’s view that the Secretary’s authority to acquire land under section 5 may be exercised only for the benefit of tribes that were recognized on June 18, 1934, when the statute was enacted. In addition, the terms “recognized” and “now under federal jurisdiction” do not appear in the IRA definition of “tribe,” 25 U.S.C. § 479, which instead includes “any Indian tribe” (and see n.7, *infra*). The Secretary

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<sup>1/</sup> Although in some contexts the term “now” in a statute may refer to the date of enactment, Black’s Law Dictionary (5<sup>th</sup> ed.) notes that it may also mean the time at which something is done or the provision is invoked. Moreover, in some contexts, the common law consistently interprets “now” in this later sense, as the date of invocation, not the date of drafting or enactment. See 80 Am. Jur. 2d Wills § 1033; see also 80 Am. Jur. 2d Wills § 1165 (“the modern rule [is] that property acquired by the testator after he executes his will \* \* \* will pass thereunder in the absence of a contrary intention”).

accordingly interprets section 5 broadly as authority to take land into trust for all recognized tribes, and not only for tribes that were recognized in June of 1934. This construction of the statute is consistent with the “familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The State has presented no evidence to support its theory that the Secretary previously interpreted the statute more narrowly. Instead, the State argues (see Petition for Rehearing at 14-15) that the Secretary’s actions are consistent with the State’s narrow interpretation of section 5, and that the Secretary has not, in fact, exercised the authority of section 5, except for the benefit of tribes that were recognized in 1934, or where Congress has expressly authorized land acquisition for a particular tribe. The State is incorrect.

The State’s assertions of fact regarding the “recognized in 1934” status of many tribes are contrary to express findings by courts and by the Secretary. In addition, we are aware of no instance when Interior interpreted the term “tribe” in the IRA to exclude tribes that were not recognized and under federal jurisdiction in 1934. Finally, amendments to the IRA that were enacted in 1994 require all recognized tribes to be treated equally with respect to the privileges and immunities available to tribes, in the absence of a clear congressional directive to the contrary. These amendments are irreconcilable with the State’s interpretation and confirm that the Secretary’s interpretation is consistent with Congress’s understanding of the scope of section 5. The following supplemental information is submitted to correct the State’s inaccurate assertions and to assist the Court in understanding the legal context of the Secretary’s challenged decision and the practical implications of the State’s

interpretation of the IRA.

**1. The United States has taken land in trust pursuant to 25 U.S.C. 465 for tribes that were not recognized in 1934.**

The Narragansett Indian Tribe was first federally recognized in 1983, when, pursuant to regulations promulgated by the Secretary, it was acknowledged<sup>2/</sup> as a tribe that had existed continuously since first contact with Europeans. See 48 Fed. Reg. 6177. Attached as Appendix A to this brief are land records reflecting trust acquisitions made by the Secretary pursuant to 25 U.S.C. § 465 on behalf of \_\_\_ other tribes that were not “federally recognized” in 1934 but have since been acknowledged as tribes by the Secretary, either before 1978, when the acknowledgment regulations were promulgated, or pursuant to the acknowledgment process set out at 25 C.F.R. Part 83.<sup>3/</sup> The State incorrectly asserts (8/23/06 Br. at 8-12) that several of these tribes, including the Grand Traverse Band of Ottawa and Chippewa Indians, the Karuk Tribe, the Stillaquamish Tribe, the Saulte Ste. Marie Tribe of Chippewa

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<sup>2/</sup> Before 1978, the existence of American Indian groups as “tribes” was recognized on an *ad hoc* basis, through treaties, legislation, court decisions, and the provision of services. See Cohen, *Handbook of Federal Indian Law* (2005 ed.) at 140-154. “Acknowledgment” is the term now used to describe the federal government’s process for determining that a tribe exists as an entity legally entitled to the privileges, immunities, responsibilities, and obligations of such tribes, and subject to Congress’s constitutional authority over Indian tribes (Art. 1, sec.8, cl. 3). Any tribe “acknowledged” by the Secretary is a “recognized tribe” for all statutory purposes.

<sup>3/</sup> These records were located and reproduced by realty officers for four BIA regions, where such records are maintained and where tribal trust land acquisition requests are processed. They do not reflect a comprehensive listing of lands owned by the United States in trust for later-recognized tribes. The most complete such listing of which we are aware is contained in the October, 2006, GAO report attached as Appendix E.

Indians, and the Jamestown S'Klallam Tribe, were "recognized in 1934," based on the existence of statutes or treaties naming them. But "recognized" status at one time in history does not establish that a tribe remains recognized at a later date. See *United States v. Washington*, 641 F.2d 1368 (9<sup>th</sup> Cir. 1981) (Steilacoom, Duwamish, Samish, Snohomish, and Snoqualmie Tribes not "recognized tribes," despite treaties with them in the 1850's); *Grand Traverse Band of Ottawa and Chippewa Indians*, 369 F.3d 960, 969 (6<sup>th</sup> Cir. 2004) ("undisputed facts show that the federal government withdrew the Band's recognition in 1872"); see also *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9<sup>th</sup> Cir. 1990) (Indian treaty rights dependent on continuous organized tribal structure).

The Solicitor of the Interior historically has not deemed groups to be "recognized" as tribes for purposes of the IRA on the basis of prior federal recognition alone. Significantly, Interior required that groups seeking to reorganize under the IRA be functioning as tribes at the time of application to reorganize, and that they provide other indicia that they had maintained their existence as tribes. See Cohen, *Handbook of Federal Indian Law*, (1942 ed.) at 271-272; (2005 ed.) at 149-152; 1 Sol. Op. on Indian Affairs 864 (1938) (questioning whether particular treaty tribes continued to be considered "recognized tribes"). Significantly, the IRA explicitly authorized the recognition of tribes that were first organized pursuant to its provisions, and therefore could not have been recognized on June 18, 1934, by defining "the Indians resident on one reservation" as tribes. 25 U.S.C. § 479; Cohen (2005 ed.) at 151 .

We are not aware of any document listing the tribes that were recognized on

June 18, 1934. Interior published a document in 1946 in which it listed the tribes that had held elections pursuant to IRA section 18, and prepared a list tribes recognized in 1950 for submission to Congress. These documents are attached as Appendix B.<sup>4/</sup> Some groups, like the Narragansett, that were not included on these lists, but which believed they had maintained government-to-government relationships with the United States, have since sought to be acknowledged as tribes; and in 1978, Interior promulgated the Part 83 regulations to establish a uniform process for considering such requests. 43 Fed. Reg. 39361 (attached as Appendix C).<sup>5/</sup> Groups seeking acknowledgment under the Part 83 regulations must provide proof, *inter alia*, of their continuous existence as tribes from at least 1900 (25 C.F.R. 83.7), unless they can show unequivocally that they existed in a recognized government-to-government relationship with the United States more recently. 25 C.F.R. 83.8 (a). Tribes that can demonstrate previous federal acknowledgment as tribes need only prove their continuous tribal existence from the date they were last recognized to the present. 25 C.F.R. 83.8(d). Attached as Appendix D to this brief are Federal Register notices announcing the acknowledgment of ten of the tribes whose land records appear in

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<sup>4/</sup> The State mistakenly refers (St. 8/23/05 Br. at 7 n.4) to termination statutes in its discussion of administrative acknowledgment. Because only Congress has authority to reverse such legislative action, the acknowledgment regulations do not apply to tribes whose relationship to the United States was terminated by statute. See 25 C.F.R. 83.3(e), and see Cohen, *Handbook of Federal Indian Law* (2005 ed.) at pp. 163-168.

<sup>5/</sup> Interior published a list of tribes then in a government-to-government relationship with the United States, in conjunction with the publication of the Part 83 acknowledgment regulations, in 1979. See App. C.

Appendix A, none of which indicates that the tribes acknowledged were “recognized” in 1934. These records demonstrate that the State’s representations, made in its August 23, 2006, brief at 8-13, and at oral argument, to the effect that these tribes were recognized in 1934, are erroneous and should be disregarded.

The Secretary’s exercise of section 5 authority to take lands in trust for these tribes, and others recognized since 1934, demonstrates that the Secretary interprets his section 5 authority to extend to all recognized tribes, and not only to tribes recognized in 1934. A recent report of the Government Accounting Office, attached as Appendix E, provides the most current information regarding tribal acknowledgments and trust land holdings. App. E at pp. 13-19. This information further demonstrates that the Secretary takes land into trust for tribes without regard to their acknowledgment status in 1934.

**2. In enacting the 1994 amendments, Congress prohibited the Secretary from making the distinction the State urges here.**

The State has sought (Reply Br. 22) to minimize the significance of the 1994 amendments to the IRA, which added two sections prohibiting federal agencies from categorizing tribes, and requiring that all recognized tribes be afforded equal privileges and immunities.<sup>9</sup> See 25 U.S.C. § 476(f)-(g). Subsection 476(f) of the Act

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<sup>9</sup> These provisions read as follows:

- (f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984), as amended, or any other  
(continued...)