Indian and U.S. Federal Gaming Law
UNLV Boyd School of Law
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TRIBAL TRUST LANDS AND THEIR ACQUISITION

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I. Size and Scope of Indian Gaming Operations.

A. Gross Gaming Revenue – over $32 Billion

B. EBITDA – 40% to 50%

C. Locations – why growth of off-reservation proposals

D. Non-Indian Casino Growth

II. Can I Open an Indian Casino?

- Glendale, Arizona
- Spokane, Washington
- Sacramento, California
- Kenosha, Wisconsin
- El Paso, Texas
- Detroit, Michigan
- San Francisco, California
- Portland, Oregon
- Long Island, New York
- Boston, Massachusetts
- Vanderbilt, Michigan

A. Exclusivity for State Revenue vs. Expansion

B. Recipe – Market + Tribe + Host Community

Donald L. CARCIERI, Governor of Rhode Island, et al., Petitioners,

v.

Ken L. SALAZAR, Secretary of the Interior, et al.

No. 07–526.

Argued Nov. 3, 2008.

Decided Feb. 24, 2009.

Background: State, Governor, and town petitioned for review of decision of the Department of the Interior (DOI) to accept in trust a 31–acre parcel of land for use by Indian tribe. The United States District Court for the District of Rhode Island, Mary M. Lisi, J., 290 F.Supp.2d 167, granted summary judgment for DOI and appeal was taken. The Court of Appeals for the First Circuit, Sandra L. Lynch, Circuit Judge, 497 F.3d 15, affirmed. Certiorari was granted.

Holding: The United States Supreme Court, Justice Thomas, held that Secretary of the Interior's authority under the Indian Reorganization Act (IRA) to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when the IRA was enacted.

Reversed.

Justice Breyer filed concurring opinion.

Justice Souter filed opinion concurring in part and dissenting in part in which Justice Ginsburg joined.

Justice Stevens filed dissenting opinion.

1. Statutes ⚿190

When interpreting a statute, the Supreme Court must first determine whether the statutory text is plain and unambiguous.

2. Statutes ⚿190

If the statutory text is plain and unambiguous, the Supreme Court must apply the statute according to its terms.

3. Indians ⚿152

Secretary of the Interior's authority under the Indian Reorganization Act (IRA) to take land into trust for the purpose of providing land for Indians was limited to Indian tribes that were under federal jurisdiction when the IRA was enacted; phrase "now under Federal jurisdiction" in the IRA definition of Indian referred to an Indian tribe that was under federal jurisdiction at the time of the IRA's enactment. Indian Reorganization Act, §§ 5, 19, 25 U.S.C.A. §§ 465, 479.

4. Statutes ⚿179

When Congress has enacted a definition with detailed and unyielding provisions the Supreme Court must give effect to that definition even when it could be argued that the line should have been drawn at a different point.

5. Statutes ⚿159, 161(1)

Absent a clearly expressed congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.

Syllabus *

The Indian Reorganization Act (IRA), enacted in 1934, authorizes the Secretary of Interior, a respondent here, to acquire land and hold it in trust "for the purpose of providing land for Indians," 25 U.S.C.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

§ 465, and defines "Indian" to "include all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction," § 479. The Narragansett Tribe was placed under the Colony of Rhode Island's formal guardianship in 1709. It agreed to relinquish its tribal authority and sell all but two acres of its remaining reservation land in 1880, but then began trying to regain its land and tribal status. From 1927 to 1937, federal authorities declined to give it assistance because they considered the Tribe to be under state, not federal jurisdiction. In a 1978 agreement settling a dispute between the Tribe and Rhode Island, the Tribe received title to 1,800 acres of land in petitioner Charlestown in exchange for relinquishing claims to state land based on aboriginal title; and it agreed that the land would be subject to state law. The Tribe gained formal recognition from the Federal Government in 1983, and the Secretary of Interior accepted a deed of trust to the 1,800 acres in 1988. Subsequently, a dispute arose over whether the Tribe's plans to build housing on an additional 31 acres of land it had purchased complied with local regulations. While litigation was pending, the Secretary accepted the 31–acre parcel into trust. The Interior Board of Indian Appeals upheld that decision, and petitioners sought review. The District Court granted summary judgment to the Secretary and other officials, determining that § 479's plain language defines "Indian" to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date; and concluding that, since the Tribe is currently federally recognized and was in existence in 1934, it is a tribe under § 479. In affirming, the First Circuit found § 479 ambiguous as to the meaning of "now under Federal jurisdiction," applied the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694, and deferred to the Secretary's construction of the provision to allow the land to be taken into trust.

Held: Because the term "now under federal jurisdiction" in § 479 unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934, and because the Narragansett Tribe was not under federal jurisdiction in 1934, the Secretary does not have the authority to take the 31–acre parcel into trust. Pp. 1063 – 1068.

(a) When a statute's text is plain and unambiguous, *United States v. Gonzales,* 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132, the statute must be applied according to its terms, see, *e.g., Dodd v. United States,* 545 U.S. 353, 359, 125 S.Ct. 2478, 162 L.Ed.2d 343. Here, whether the Secretary has authority to take the parcel into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction," which, in turn, depends on whether "now" refers to 1998, when the Secretary accepted the parcel into trust, or 1934, when Congress enacted the IRA. The ordinary meaning of "now," as understood at the time of enactment, was at "the present time; at this moment; at the time of speaking." That definition is consistent with interpretations given "now" by this Court both before and after the IRA's passage. See *e.g., Franklin v. United States,* 216 U.S. 559, 569, 30 S.Ct. 434, 54 L.Ed. 615; *Montana v. Kennedy,* 366 U.S. 308, 310–311, 81 S.Ct. 1336, 6 L.Ed.2d 313. It also aligns with the word's natural reading in the context of the IRA. Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of § 479 at the time of enactment. The Secretary's additional arguments in support of his contention that "now" is ambiguous are unpersuasive.

There is also no need to consider the parties' competing views on whether Congress had a policy justification for limiting the Secretary's trust authority to tribes under federal jurisdiction in 1934, since Congress' use of "now" in § 479 speaks for itself and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391. Pp. 1067 – 1068.

(b) The Court rejects alternative arguments by the Secretary and his *amici* that rely on statutory provisions other than § 479 to support the Secretary's decision to take the parcel into trust for the Narragansetts. Pp. 13–15.

497 F.3d 15, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, BREYER, and ALITO, JJ., joined. BREYER, J., filed a concurring opinion. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined. STEVENS, J., filed a dissenting opinion.

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For U.S. Supreme Court Briefs, see:

2008 WL 2367224 (Pet.Brief)

2008 WL 2367223 (Pet.Brief)

2008 WL 2355773 (Pet.Brief)

2008 WL 3883433 (Resp.Brief)

2008 WL 4294652 (Reply.Brief)

2008 WL 4278525 (Reply.Brief)

2008 WL 4294666 (Reply.Brief)

Justice THOMAS delivered the opinion of the Court.

The Indian Reorganization Act (IRA or Act) authorizes the Secretary of the Interior, a respondent in this case, to acquire land and hold it in trust "for the purpose of providing land for Indians." Ch. 576, § 5, 48 Stat. 985, 25 U.S.C. § 465. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." § 479. The Secretary notified petitioners—the State of Rhode Island, its Governor, and the town of Charlestown, Rhode Island—that he intended to accept in trust a parcel of land for use by the Narragansett Indian Tribe in accordance with his claimed authority under the statute. In proceedings before the Interior Board of Indian Appeals (IBIA), the District Court, and the Court of Appeals for the First Circuit, petitioners unsuccessfully challenged the Secretary's authority to take the parcel into trust.

In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase "now under Federal jurisdiction" in § 479. Petitioners contend that the term "now" refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were "under Federal jurisdiction" in 1934. The respondents argue that the word "now" is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are "under Federal jurisdiction" at the time that the land is accepted into trust.

We agree with petitioners and hold that, for purposes of § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust. We reverse the judgment of the Court of Appeals.

I

At the time of colonial settlement, the Narragansett Indian Tribe was the indigenous occupant of much of what is now the State of Rhode Island. See Final Determination of Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177 (1983) (hereinafter Final Determination). Initial relations between colonial settlers, the Narragansett Tribe, and the other Indian tribes in the region were peaceful, but relations deteriorated in the late 17th century. The hostilities peaked in 1675 and 1676 during the 2–year armed conflict known as King Philip's War. Hundreds of colonists and thousands of Indians died. See E. Schultz & M. Tougias, King Philip's War 5 (1999). The Narragansett Tribe, having been decimated, was placed under formal guardianship by the Colony of Rhode Island in 1709. 48 Fed.Reg. 6177.[1]

Not quite two centuries later, in 1880, the State of Rhode Island convinced the Narragansett Tribe to relinquish its tribal authority as part of an effort to assimilate tribal members into the local population. See *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (C.A.D.C.1998). The Tribe also agreed to sell all but two acres of its remaining reservation land for $5,000. *Ibid.* Almost immediately, the Tribe regretted its decisions and embarked on a campaign to regain its land and tribal status. *Ibid.* In the early 20th century, members of the Tribe sought economic support and other assistance from the Federal Government. But, in correspondence spanning a 10–year period from 1927 to 1937, federal officials declined their request, noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government.

Having failed to gain recognition or assistance from the United States or from the State of Rhode Island, the Tribe filed suit in the 1970's to recover its ancestral land, claiming that the State had misap-

1. The Narragansett Tribe recognized today is the successor to two tribes, the Narragansett and the Niantic Tribes. The two predecessor Tribes shared territory and cultural traditions at the time of European settlement and effectively merged in the aftermath of King Philip's War. See Final Determination, 48 Fed. Reg. 6177.

propriated its territory in violation of the Indian Non–Intercourse Act, 25 U.S.C. § 177.[2] The claims were resolved in 1978 by enactment of the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U.S.C. § 1701 *et seq.* Under the agreement codified by the Settlement Act, the Tribe received title to 1,800 acres of land in Charlestown, Rhode Island, in exchange for relinquishing its past and future claims to land based on aboriginal title. The Tribe also agreed that the 1,800 acres of land received under the Settlement Act "shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." § 1708(a); see also § 1712(a).

The Narragansett Tribe's ongoing efforts to gain recognition from the United States Government finally succeeded in 1983. 48 Fed.Reg. 6177. In granting formal recognition, the Bureau of Indian Affairs (BIA) determined that "the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." *Id.*, at 6178. The BIA referred to the Tribe's "documented history dating from 1614" and noted that "all of the current membership are believed to be able to trace to at least one ancestor on the membership lists of the Narragansett community prepared after the 1880 Rhode Island 'detribalization' act." *Ibid.* After obtaining federal recognition, the Tribe began urging the Secretary to accept a deed of trust to the 1,800 acres conveyed to it under the Rhode Island Indian Claims Settlement Act. 25 CFR § 83.2 (2008) (providing that federal recognition is needed before an Indian tribe may seek "the protection, services, and benefits of the Federal government"). The Secretary acceded to the Tribe's request in 1988. See *Town of Charlestown, Rhode Island v. Eastern Area Director, Bur. of Indian Affairs,* 18 IBIA 67, 69 (1989).[3]

In 1991, the Tribe's housing authority purchased an additional 31 acres of land in the town of Charlestown adjacent to the Tribe's 1,800 acres of settlement lands. Soon thereafter, a dispute arose about whether the Tribe's planned construction of housing on that parcel had to comply with local regulations. *Narragansett Indian Tribe v. Narragansett Elec. Co.,* 89 F.3d 908, 911–912 (C.A.1 1996). The Tribe's primary argument for noncompliance—that its ownership of the parcel made it a "dependent Indian community" and thus "Indian country" under 18 U.S.C. § 1151—ultimately failed. 89 F.3d, at 913–922. But, while the litigation was pending, the Tribe sought an alternative solution to free itself from compliance with local regulations: It asked the Secretary to accept the 31–acre parcel into trust for the Tribe pursuant to 25 U.S.C. § 465. By letter dated March 6, 1998, the Secretary notified petitioners of his acceptance of the Tribe's land into trust. Petitioners appealed the Secretary's decision to the IBIA, which upheld the Secretary's decision. See *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs,* 35 IBIA 93 (2000).

2. Title 25 U.S.C. § 177 provides, in pertinent part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

3. The Tribe, the town, and the Secretary previously litigated issues relating to the Secretary's acceptance of these 1,800 acres, and that matter is not presently before this Court. See generally *Town of Charlestown, Rhode Island,* 18 IBIA 67; *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685 (C.A.1 1994); *Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16 (C.A.1 2006).

Petitioners sought review of the IBIA decision pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. The District Court granted summary judgment in favor of the Secretary and other Department of Interior officials. As relevant here, the District Court determined that the plain language of 25 U.S.C. § 479 defines "Indian" to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date. *Carcieri v. Norton,* 290 F.Supp.2d 167, 179–181 (D.R.I.2003). According to the District Court, because it is currently "federally-recognized" and "existed at the time of the enactment of the IRA," the Narragansett Tribe "qualifies as an 'Indian tribe' within the meaning of § 479." *Id.,* at 181. As a result, "the secretary possesses authority under § 465 to accept lands into trust for the benefit of the Narragansetts." *Ibid.*

The Court of Appeals for the First Circuit affirmed, first in a panel decision, *Carcieri v. Norton,* 423 F.3d 45 (2005), and then sitting en banc, 497 F.3d 15 (C.A.1 2007). Although the Court of Appeals acknowledged that "[o]ne might have an initial instinct to read the word 'now' [in § 479] . . . to mean the date of [the] enactment of the statute, June 18, 1934," the court concluded that there was "ambiguity as to whether to view the term . . . as operating at the moment Congress enacted it or at the moment the Secretary invokes it." *Id.,* at 26. The Court of Appeals noted that Congress has used the word "now" in other statutes to refer to the time of the statute's application, not its enactment. *Id.,* at 26–27. The Court of Appeals also found that the particular statutory context of § 479 did not clarify the meaning of "now." On one hand, the Court of Appeals noted that another provision within the IRA, 25 U.S.C. § 472, uses the term "now or hereafter," which supports petitioners' argument that "now," by itself, does not refer to future events. But on the other hand, § 479 contains the particular application date of "June 1, 1934," suggesting that if Congress had wanted to refer to the date of enactment, it could have done so more specifically. 497 F.3d, at 27. The Court of Appeals further reasoned that both interpretations of "now" are supported by reasonable policy explanations, *id.,* at 27–28, and it found that the legislative history failed to "clearly resolve the issue," *id.,* at 28.

Having found the statute ambiguous, the Court of Appeals applied the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and deferred to the Secretary's construction of the provision. 497 F.3d, at 30. The court rejected petitioners' arguments that the Secretary's interpretation was an impermissible construction of the statute. *Id.,* at 30–34. It also held that petitioners had failed to demonstrate that the Secretary's interpretation was inconsistent with earlier practices of the Department of Interior. Furthermore, the court determined that even if the interpretation were a departure from the Department's prior practices, the decision should be affirmed based on the Secretary's "reasoned explanation for his interpretation." *Id.,* at 34.

We granted certiorari, 552 U.S. ——, 128 S.Ct. 1443, 170 L.Ed.2d 274 (2008), and now reverse.

II

[1, 2] This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States v. Gonzales,* 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). If it is, we must apply the

statute according to its terms. See, *e.g., Dodd v. United States,* 545 U.S. 353, 359, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005); *Lamie v. United States Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

[3] The Secretary may accept land into trust only for "the purpose of providing land for Indians." 25 U.S.C. § 465. "Indian" is defined by statute as follows:

> "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.... 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...." § 479 (emphasis added).

The parties are in agreement, as are we, that the Secretary's authority to take the parcel in question into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction." *Ibid.* That question, in turn, requires us to decide whether the word "now under Federal jurisdiction" refers to 1998, when the Secretary accepted the 31–acre parcel into trust, or 1934, when Congress enacted the IRA.

We begin with the ordinary meaning of the word "now," as understood when the IRA was enacted. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267, 272, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994); *Moskal v. United States,* 498 U.S. 103, 108–109, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). At that time, the primary definition of "now" was "[a]t the present time; at this moment; at the time of speaking." Webster's New International Dictionary 1671 (2d ed.1934); see also Black's Law Dictionary 1262 (3d ed.1933) (defining "now" to mean "[a]t this time, or at the present moment" and noting that " '[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect ..." (emphasis added)). This definition is consistent with interpretations given to the word "now" by this Court, both before and after passage of the IRA, with respect to its use in other statutes. See, *e.g., Franklin v. United States,* 216 U.S. 559, 568–569, 30 S.Ct. 434, 54 L.Ed. 615 (1910) (interpreting a federal criminal statute to have "adopted such punishment as the laws of the State in which such place is situated *now* provide for the like offense" (citing *United States v. Paul,* 6 Pet. 141, 8 L.Ed. 348 (1832) (internal quotation marks omitted))); *Montana v. Kennedy,* 366 U.S. 308, 310–311, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961) (interpreting a statute granting citizenship status to foreign-born "children of persons who *now* are, or have been citizens of the United States" (internal quotation marks omitted; emphasis deleted)).

It also aligns with the natural reading of the word within the context of the IRA. For example, in the original version of 25 U.S.C. § 465, which provided the same authority to the Secretary to accept land into trust for "the purpose of providing land for Indians," Congress explicitly referred to current events, stating "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of [the] Navajo Indian Reservation ... in the event that the proposed Navajo boundary extension measures *now*

pending in Congress ... become law." IRA, § 5, 48 Stat. 985 (emphasis added).[4] In addition, elsewhere in the IRA, Congress expressly drew into the statute contemporaneous *and* future events by using the phrase "now or hereafter." See 25 U.S.C. § 468 (referring to "the geographic boundaries of any Indian reservation now existing or established hereafter"); § 472 (referring to "Indians who may be appointed ... to the various positions maintained, now or hereafter, by the Indian Office"). Congress' use of the word "now" in this provision, without the accompanying phrase "or hereafter," thus provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of this provision at the time of enactment. In correspondence with those who would assist him in implementing the IRA, the Commissioner of Indian Affairs, John Collier, explained that:

> "Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988), provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act* ...." Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (emphasis added).[5]

Thus, although we do not defer to Commissioner Collier's interpretation of this unambiguous statute, see *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992), we agree with his conclusion that the word "now" in § 479 limits the definition of "Indian," and therefore limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted.

4. The current version of § 465 provides "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation ... 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."

5. In addition to serving as Commissioner of Indian Affairs, John Collier was "a principal author of the [IRA]." *United States v. Mitchell*, 463 U.S. 206, 221, n. 21, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). And, as both parties note, he appears to have been responsible for the insertion of the words "now under Federal jurisdiction" into what is now 25 U.S.C. § 479. See Hearings on S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self–Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 266 (1934). Also, the record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. App. 23a–24a. Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it. See *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (explaining that an Executive Branch statutory interpretation that lacks the force of law is "entitled to respect ... to the extent that those interpretations have the 'power to persuade' " (internal quotation marks omitted)).

The Secretary makes two other arguments in support of his contention that the term "now" as used in § 479 is ambiguous. We reject them both. First, the Secretary argues that although the "use of 'now' can refer to the time of enactment" in the abstract, "it can also refer to the time of the statute's application." Brief for Respondents 18. But the susceptibility of the word "now" to alternative meanings "does not render the word ... whenever it is used, ambiguous," particularly where "all but one of the meanings is ordinarily eliminated by context." *Deal v. United States,* 508 U.S. 129, 131–132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993). Here, the statutory context makes clear that "now" does not mean "now or hereafter" or "at the time of application." Had Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§ 468 and 472, or it could have omitted the word "now" altogether. Instead, Congress limited the statute by the word "now" and "we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Second, the Secretary argues that § 479 left a gap for the agency to fill by using the phrase "shall include" in its introductory clause. Brief for Respondents 26–27. The Secretary, in turn, claims to have permissibly filled that gap by defining " 'Tribe' " and " 'Individual Indian' " without reference to the date of the statute's enactment. *Id.*, at 28 (citing 25 CFR §§ 151.2(b), (c)(1) (2008)). But, as explained above, Congress left no gap in 25 U.S.C. § 479 for the agency to fill. Rather, it explicitly and comprehensively defined the term by including only three discrete definitions: "[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... [3] all other persons of one-half or more Indian blood." *Ibid.* In other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of "Indian" set forth in § 479.[6] Had it understood the word "include" in § 479 to encompass tribes other than those satisfying one of the three § 479 definitions, Congress would have not needed to enact these additional statutory references to specific Tribes.

The Secretary and his *amici* also go beyond the statutory text to argue that Congress had no policy justification for limiting the Secretary's trust authority to those tribes under federal jurisdiction in 1934, because the IRA was intended to strengthen Indian communities as a whole, regardless of their status in 1934. Petitioners counter that the main purpose of § 465 was to reverse the loss of lands that Indians sustained under the General Allotment Act, see *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 650, n. 1, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001), so the statute was limited to tribes under federal jurisdiction at that time because they were the tribes who lost their lands. We need not consider these competing policy views, because Congress' use of the word "now" in § 479 speaks for itself and "courts must presume that a legislature says in a statute

6. See, *e.g.,* 25 U.S.C. § 473a ("Sections ... 465 ... and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska"); § 1041e(a) ("The [Shawnee] Tribe shall be eligible to have land acquired in trust for its benefit pursuant to section 465 of this title ..."); § 1300b–14(a) ("[Sections 465 and 479 of this title are] hereby made applicable to the [Texas] Band [of Kickapoo Indians] ..."); § 1300g–2(a) ("[Sections 465 and 479] shall apply to the members of the [Ysleta Del Ser Pueblo] tribe, the tribe, and the reservation").

what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).[7]

III

The Secretary and his supporting *amici* also offer two alternative arguments that rely on statutory provisions other than the definition of "Indian" in § 479 to support the Secretary's decision to take this parcel into trust for the Narragansett Tribe. We reject both arguments.

[4] First, the Secretary and several *amici* argue that the definition of "Indian" in § 479 is rendered irrelevant by the broader definition of "tribe" in § 479 and by the fact that the statute authorizes the Secretary to take title to lands "in the name of the United States in trust for the *Indian tribe* or individual Indian for which the land is acquired." § 465 (emphasis added); Brief for Respondents 12–14. But the definition of "tribe" in § 479 itself refers to "any *Indian* tribe" (emphasis added), and therefore is limited by the temporal restrictions that apply to § 479's definition of "Indian." See § 479 ("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" (emphasis added)). And, although § 465 authorizes the United States to take land in trust for an Indian tribe, § 465 limits the Secretary's exercise of that authority "for the purpose of providing land for Indians." There simply is no legitimate way to circumvent the definition of "Indian" in delineating the Secretary's authority under §§ 465 and 479.[8]

Second, *amicus* National Congress of American Indians (NCAI) argues that 25 U.S.C. § 2202, which was enacted as part of the Indian Land Consolidation Act (ILCA), Title II, 96 Stat. 2517, overcomes the limitations set forth in § 479 and, in turn, authorizes the Secretary's action. Section 2202 provides:

> "The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)." (Alteration in original.)

NCAI argues that the "ILCA independently grants authority under Section 465 for the Secretary to execute the challenged trust acquisition." NCAI Brief 8. We do not agree.

The plain language of § 2202 does not expand the power set forth in § 465, which requires that the Secretary take land into

7. Because we conclude that the language of § 465 unambiguously precludes the Secretary's action with respect to the parcel of land at issue in this case, we do not address petitioners' alternative argument that the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U.S.C. § 1701 *et seq.*, precludes the Secretary from exercising his authority under § 465.

8. For this reason, we disagree with the argument made by Justice STEVENS that the term "Indians" in § 465 has a different meaning than the definition of "Indian" provided in § 479, and that the term's meaning in § 465 is controlled by later-enacted regulations governing the Secretary's recognition of tribes like the Narragansetts. See *post*, at 4–6, 9–11 (dissenting opinion). When Congress has enacted a definition with "detailed and unyielding provisions," as it has in § 479, this Court must give effect to that definition even when "'it could be argued that the line should have been drawn at a different point.'" *INS v. Hector*, 479 U.S. 85, 88–89, 107 S.Ct. 379, 93 L.Ed.2d 326 (1986) *(per curium)* (quoting *Fiallo v. Bell*, 430 U.S. 787, 798, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977)).

trust only "for the purpose of providing land for Indians." Nor does § 2202 alter the definition of "Indian" in § 479, which is limited to members of tribes that were under federal jurisdiction in 1934.[9] See *supra*, at 1063 – 1067. Rather, § 2202 by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe. § 478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application"). As a result, there is no conflict between § 2202 and the limitation on the Secretary's authority to take lands contained in § 465. Rather, § 2202 provides additional protections to those who satisfied the definition of "Indian" in § 479 at the time of the statute's enactment, but opted out of the IRA shortly thereafter.

[5] NCAI's reading of § 2202 also would nullify the plain meaning of the definition of "Indian" set forth in § 479 and incorporated into § 465. Consistent with our obligation to give effect to every provision of the statute, *Reiter*, 442 U.S., at 339, 99 S.Ct. 2326, we will not assume that Congress repealed the plain and unambiguous restrictions on the Secretary's exercise of trust authority in §§ 465 and 479 when it enacted § 2202. "We have repeatedly stated . . . that absent 'a clearly expressed congressional intention,' . . . [a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), and *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936)).

IV

We hold that the term "now under Federal jurisdiction" in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed.Reg. 6177. Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." Pet. for Cert. 6. The respondents' brief in opposition declined to contest this assertion. See Brief in Opposition 2–7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court's Rule 15.2. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

Justice BREYER, concurring.

I join the Court's opinion with three qualifications. *First*, I cannot say that the statute's language by itself is determinative. Linguistically speaking, the word "now" in the phrase "now under Federal

9. NCAI notes that the ILCA's definition of "tribe" "means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." § 2201. But § 2201 is, by its express terms, applicable only to Chapter 24 of Title 25 of the United States Code. *Ibid.* The IRA is codified in Chapter 14 of Title 25. See § 465. Section 2201, therefore, does not itself alter the authority granted to the Secretary by § 465.

jurisdiction," 25 U.S.C. § 479, may refer to a tribe's jurisdictional status as of 1934. But one could also read it to refer to the time the Secretary of the Interior exercises his authority to take land "for Indians." § 465. Compare *Montana v. Kennedy,* 366 U.S. 308, 311–312, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961) ("now" refers to time of statutory enactment), with *Difford v. Secretary of HHS,* 910 F.2d 1316, 1320 (C.A.6 1990) ("now" refers to time of exercise of delegated authority); *In re Lusk's Estate,* 336 Pa. 465, 467–468, 9 A.2d 363, 365 (1939) (property "now" owned refers to property owned when a will becomes operative). I also concede that the Court owes the Interior Department the kind of interpretive respect that reflects an agency's greater knowledge of the circumstances in which a statute was enacted, cf. *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). Yet because the Department then favored the Court's present interpretation, see *infra,* at 1059 – 1060, that respect cannot help the Department here.

Neither can *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), help the Department. The scope of the word "now" raises an interpretive question of considerable importance; the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty; and nothing in that history indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word "now." These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity. See *United States v. Mead Corp.,* 533 U.S. 218, 227, 229–230, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

Second, I am persuaded that "now" means "in 1934" not only for the reasons the Court gives but also because an examination of the provision's legislative history convinces me that Congress so intended. As I read that history, it shows that Congress expected the phrase would make clear that the Secretary could employ § 465's power to take land into trust in favor only of those tribes in respect to which the Federal Government already had the kinds of obligations that the words "under Federal jurisdiction" imply. See Hearings on S. 2755 et al.: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self–Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, pp. 263–266 (1934). Indeed, the very Department official who suggested the phrase to Congress during the relevant legislative hearings subsequently explained its meaning in terms that the Court now adopts. See Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (explaining that § 479 included "persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act").

Third, an interpretation that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it at first appears. That is because a tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. See Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22–24; Quinn, Federal Acknowledgment of American In-

dian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356–359 (1990). The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934—even though the Department did not know it at the time.

The statute, after all, imposes no time limit upon recognition. See § 479 ("The term 'Indian' . . . shall include all persons of Indian descent who are members of *any recognized* Indian tribe now under Federal jurisdiction . . ." (emphasis added)). And administrative practice suggests that the Department has accepted this possibility. The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855. Consequently, the Department concluded that land could be taken into trust for the Tribe. See Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 6–7. Similarly, in 1934 the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for Western Dist. of Mich.*, 369 F.3d 960, 961, and n. 2 (C.A.6 2004). But later the Department recognized the Tribe, considering it to have existed continuously since 1675. 45 Fed.Reg. 19321 (1980). Further, the Department in the 1930's thought that an anthropological study showed that the Mole Lake Tribe no longer existed. But the Department later decided that the study was wrong, and it then recognized the Tribe. See Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758, 2762–2763 (Feb. 8, 1937) (recognizing the Mole Lake Indians as a separate tribe).

In my view, this possibility—that later recognition reflects earlier "Federal jurisdiction"—explains some of the instances of early Department administrative practice to which Justice STEVENS refers. I would explain the other instances to which Justice STEVENS refers as involving the taking of land "for" a tribe with members who fall under that portion of the statute that defines "Indians" to include "persons of one-half or more Indian blood," § 479. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, pp. 706–707 (Shoshone Indians), 724–725 (St. Croix Chippewas), 747–748 (Nahma and Beaver Indians) (1979).

Neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934. Nor have they claimed that any member of the Narragansett Tribe satisfies the "one-half or more Indian blood" requirement. And I have found nothing in the briefs that suggests the Narragansett Tribe could prevail on either theory. Each of the administrative decisions just discussed involved post–1934 recognition on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre–1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office. I can find no similar indication of 1934 federal jurisdiction here. Instead, both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934. And until the 1970's there was "little Federal

contact with the Narragansetts as a group." Memorandum from Deputy Assistant Secretary—Indian Affairs (Operations) to Assistant Secretary—Indian Affairs, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island Pursuant to 25 CFR 83, p. 8 (July 29, 1982). Because I see no realistic possibility that the Narragansett Tribe could prevail on the basis of a theory alternative to the theories argued here, I would not remand this case.

With the qualifications here expressed, I join the Court's opinion and its judgment.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part and dissenting in part.

Save as to one point, I agree with Justice BREYER's concurring opinion, which in turn concurs with the opinion of the Court, subject to the three qualifications Justice BREYER explains. I have, however, a further reservation that puts me in the dissenting column.

The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, "any recognized Indian tribe now under Federal jurisdiction." Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice BREYER makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time. See Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.

During oral argument, however, respondents explained that the Secretary's more recent interpretation of this statutory language had "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same." Tr. of Oral Arg. 42. Given the Secretary's position, it is not surprising that neither he nor the Tribe raised a claim that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present. The error was shared equally all around, and there is no equitable demand that one side be penalized when both sides nodded.

I can agree with Justice BREYER that the current record raises no particular reason to expect that the Tribe might be shown to have been under federal jurisdiction in 1934, but I would not stop there. The very notion of jurisdiction as a distinct statutory condition was ignored in this litigation, and I know of no body of precedent or history of practice giving content to the condition sufficient for gauging the Tribe's chances of satisfying it. So I see no reason to deny the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the "jurisdiction" phrase that might favor their position here.

I would therefore reverse and remand with opportunity for respondents to pursue a "jurisdiction" claim and respectfully dissent from the Court's straight reversal.*

* Depending on the outcome of proceedings on remand, it might be necessary to address the second potential issue in this case, going to the significance of the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.* There is no utility in confronting it now.

Justice STEVENS, dissenting.

Congress has used the term "Indian" in the Indian Reorganization Act of 1934 to describe those individuals who are entitled to special protections and benefits under federal Indian law. The Act specifies that benefits shall be available to individuals who qualify as Indian either as a result of blood quantum or as descendants of members of "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. In contesting the Secretary of the Interior's acquisition of trust land for the Narragansett Tribe of Rhode Island, the parties have focused on the meaning of "now" in the Act's definition of "Indian." Yet to my mind, whether "now" means 1934 (as the Court holds) or the present time (as respondents would have it) sheds no light on the question whether the Secretary's actions on behalf of the Narragansett were permitted under the statute. The plain text of the Act clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of "Indian tribe." [1] Because the Narragansett Tribe is an Indian tribe within the meaning of the Act, I would affirm the judgment of the Court of Appeals.

I

This case involves a challenge to the Secretary of the Interior's acquisition of a 31–acre parcel of land in Charlestown, Rhode Island, to be held in trust for the Narragansett Tribe.[2] That Tribe has existed as a continuous political entity since the early 17th century. Although it was once one of the most powerful tribes in New England, a series of wars, epidemics, and difficult relations with the State of Rhode Island sharply reduced the Tribe's ancestral landholdings.

Two blows, delivered centuries apart, exacted a particularly high toll on the Tribe. First, in 1675, King Philip's War essentially destroyed the Tribe, forcing it to accept the Crown as sovereign and to submit to the guardianship of the Colony of Rhode Island. Then, in 1880, the State of Rhode Island passed a "detribalization" law that abolished tribal authority, ended the State's guardianship of the Tribe, and attempted to sell all tribal lands. The Narragansett originally assented to detribalization and ceded all but two acres of its ancestral land. In return, the Tribe received $5,000. See Memorandum from the Deputy Assistant Secretary–Indian Affairs (Operations) to Assistant Secretary–Indian Affairs (Operations) 4 (July 19, 1982) (Recommendation for Acknowledgment).

1. In 25 U.S.C. § 479, Congress defined both "Indian" and "tribe." Section 479 states, in relevant part:

"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 .... 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."

Notably the word "now," which is used to define one of the categories of Indians, does not appear in the definition of "tribe."

2. In 1991, the Narragansett Tribe purchased the 31–acre parcel in fee simple from a private developer. In 1998, the Bureau of Indian Affairs notified the State of the Secretary's decision to take the land into unreserved trust for the Tribe. The Tribe "acquired [the land] for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the Department of Housing and Urban Development (HUD)." App. 46a.

Recognizing that its consent to detribalization was a mistake, the Tribe embarked on a century-long campaign to recoup its losses.[3] Obtaining federal recognition was critical to this effort. The Secretary officially recognized the Narragansett as an Indian tribe in 1983, Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177, and with that recognition the Tribe qualified for the bundle of federal benefits established in the Indian Reorganization Act of 1934 (IRA or Act),[4] 25 U.S.C. § 461 *et seq*. The Tribe's attempt to exercise one of those rights, the ability to petition the Secretary to take land into trust for the Tribe's benefit, is now vigorously contested in this litigation.

II

The Secretary's trust authority is located in 25 U.S.C. § 465. That provision grants the Secretary power to take "in trust for [an] Indian tribe or individual Indian" "any interest in lands ... for the purpose of providing land for Indians."[5] The Act's language could not be clearer: To effectuate the Act's broad mandate to revitalize tribal development and cultural self-determination, the Secretary can take land into trust for a tribe or he can take land into trust for an individual Indian.

Though Congress outlined the Secretary's trust authority in § 465, it specified which entities would be considered "tribes" and which individuals would qualify as "Indian" in § 479. An individual Indian, § 479 tells us, "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" as well as "all other persons of one-half or more Indian blood." A tribe, § 479 goes on to state, "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Because federal recognition is generally required before a tribe can receive federal benefits, the Secretary has interpreted this definition of "tribe" to refer only to recognized tribes. See 25 CFR § 83.2 (2008) (stating that recognition "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes"); § 151.2 (defining "tribe" for the purposes

3. Indeed, this litigation stems in part from the Tribe's suit against (and subsequent settlement with) Rhode Island and private landowners on the ground that the 1880 sale violated the Indian Non–Intercourse Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (25 U.S.C. § 177), which prohibited sales of tribal land without "treaty or convention entered into pursuant to the Constitution."

4. The IRA was the cornerstone of the Indian New Deal. "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). See generally F. Cohen, Handbook of Federal Indian Law § 1.05 (2005) (hereinafter Cohen); G. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–45 (1980).

5. Section 465 reads more fully:

"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.

.....

"Title to any lands or rights acquired pursuant to this Act ... 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."

of land acquisition to mean "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 from the Bureau of Indian Affairs").[6]

Having separate definitions for "Indian" and "tribe" is essential for the administration of IRA benefits. The statute reflects Congress' intent to extend certain benefits to individual Indians, *e.g.,* 25 U.S.C. § 471 (offering loans to Indian students for tuition at vocational and trade schools); § 472 (granting hiring preferences to Indians seeking federal employment related to Indian affairs), while directing other benefits to tribes, *e.g.,* § 476 (allowing tribes to adopt constitutions and bylaws); § 470 (giving loans to Indian-chartered corporations).

Section 465, by giving the Secretary discretion to steer benefits to tribes and individuals alike, is therefore unique. But establishing this broad benefit scheme was undoubtedly intentional: The original draft of the IRA presented to Congress directed the Secretary to take land into trust only for entities such as tribes. Compare H.R. 7902, 73d Cong., 2d Sess., 30 (1934) ("Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust *for the Indian tribe or community for whom the land is acquired*" (emphasis added)), with 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to this Act ... 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*" (emphasis added)).

The Secretary has long exercised his § 465 trust authority in accordance with this design. In the years immediately following the adoption of the IRA, the Solicitor of the Department of the Interior repeatedly advised that the Secretary could take land into trust for federally recognized tribes and for individual Indians who qualified for federal benefits by lineage or blood quantum.

For example, in 1937, when evaluating whether the Secretary could purchase approximately 2,100 acres of land for the Mole Lake Chippewa Indians of Wisconsin, the Solicitor instructed that the purchase could not be "completed until it is determined whether the beneficiary of the trust title should be designated as a band or whether the title should be taken for the individual Indians in the vicinity of Mole Lake who are of one half or more Indian blood." Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758 (Feb. 8, 1937). Because the Mole Lake Chippewa was not yet recognized by the Federal Government as an Indian tribe, the Solicitor determined that the Secretary had two options: "Either the Department should provide recognition of this group, or title to the purchased land should be taken on behalf of the individuals who are of one half or more Indian blood." *Id.*, at 2763.

The tribal trust and individual trust options were similarly outlined in other post–1934 opinion letters, including those deal-

6. The regulations that govern the tribal recognition process, 25 CFR § 83 *et seq.* (2008), were promulgated pursuant to the President's general mandate established in the early 1830's to manage "all Indian affairs and ... all matters arising out of Indian relations," 25 U.S.C. § 2, and to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," § 9. Thus, contrary to the argument pressed by the Governor of Rhode Island before this Court, see Reply Brief for Petitioner Carcieri 9, the requirement that a tribe be federally recognized before it is eligible for trust land does not stem from the IRA.

ing with the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Island Indians of Michigan. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, pp. 706–707, 724–725, 747–748 (1979). Unless and until a tribe was formally recognized by the Federal Government and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold.

Modern administrative practice has followed this well-trodden path. Absent a specific statute recognizing a tribe and authorizing a trust land acquisition,[7] the Secretary has exercised his trust authority—now governed by regulations promulgated in 1980 after notice-and-comment rulemaking, 25 CFR § 151 *et seq.;* 45 Fed.Reg. 62034—to acquire land for federally recognized Indian tribes like the Narragansett. The Grand Traverse Band of Ottawa and Chippewa Indians, although denied federal recognition in 1934 and 1943, see Dept. of Interior, Office of Federal Acknowledgement, Memorandum from Acting Deputy Commissioner to Assistant Secretary 4 (Oct. 3, 1979) (GTB–V001–D002), was the first tribe the Secretary recognized under the 1980 regulations, see 45 Fed.Reg. 19322. Since then, the Secretary has used his trust authority to expand the Tribe's land base. See, *e.g.,* 49 Fed.Reg. 2025–2026 (1984) (setting aside a 12.5–acre parcel as reservation land for the Tribe's exclusive use). The Tunica–Biloxi Tribe of Louisiana has similarly benefited from administrative recognition, 46 Fed.Reg. 38411 (1981), followed by tribal trust acquisition. And in 2006, the Secretary took land into trust for the Snoqualmie Tribe which, although unrecognized as an Indian tribe in the 1950's, regained federal recognition in 1999. See 71 Fed.Reg. 5067 (taking land into trust for the Tribe); 62 Fed. Reg. 45864 (1997) (recognizing the Snoqualmie as an Indian tribe).

This brief history of § 465 places the case before us into proper context. Federal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land. No party has disputed that the Narragansett Tribe was properly recognized as an Indian tribe in 1983. See 48 Fed. Reg. 6177. Indeed, given that the Tribe has a documented history that stretches back to 1614 and has met the rigorous criteria for administrative recognition, Recommendation for Acknowledgment 1, 7–18, it would be difficult to sustain an objection to the Tribe's status. With this in mind, and in light of the Secretary's longstanding authority under the plain text of the IRA to acquire tribal trust land, it is perfectly clear that the Secretary's land

7. Although Congress has passed specific statutes granting the Secretary authority to take land into trust for certain tribes, it would be a mistake to conclude that the Secretary lacks residual authority to take land into trust under 25 U.S.C. § 465 of the IRA. Some of these statutes place explicit limits on the Secretary's trust authority and can be properly read as establishing the outer limit of the Secretary's trust authority with respect to the specified tribes. See, *e.g.,* § 1724(d) (authorizing trust land for the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe of Maine, and the Penobscot Tribe of Maine). Other statutes, while identifying certain parcels the Secretary will take into trust for a tribe, do not purport to diminish the Secretary's residual authority under § 465. See, *e.g.,* § 1775c(a) (Mohegan Tribe); § 1771d (Wampanoag Tribe); § 1747(a) (Miccosukee Tribe). Indeed, the Secretary has invoked his § 465 authority to take additional land into trust for the Miccosukee Tribe despite the existence of a statute authorizing and directing him to acquire certain land for the Tribe. See Post–Argument En Banc Brief for National Congress of American Indians et al. as *Amici Curiae* 7 and App. 9 in No. 03–2647(CA1).

acquisition for the Narragansett was entirely proper.

III

Despite the clear text of the IRA and historical pedigree of the Secretary's actions on behalf of the Narragansett, the majority holds that one word ("now") nestled in one clause in one of § 479's several definitions demonstrates that the Secretary acted outside his statutory authority in this case. The consequences of the majority's reading are both curious and harsh: curious because it turns "now" into the most important word in the IRA, limiting not only some individuals' eligibility for federal benefits but also a tribe's; harsh because it would result in the unsupportable conclusion that, despite its 1983 administrative recognition, the Narragansett Tribe is not an Indian tribe under the IRA.

In the Court's telling, when Congress granted the Secretary power to acquire trust land "for the purpose of providing land for *Indians*," 25 U.S.C. § 465 (emphasis added), it meant to permit land acquisitions for those persons whose tribal membership qualify them as "Indian" as defined by § 479. In other words, the argument runs, the Secretary can acquire trust land for "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." § 479. This strained construction, advanced by petitioners, explains the majority's laser-like focus on the meaning of "now": If the Narragansett Tribe was not recognized or under federal jurisdiction in 1934, the Tribe's members do not belong to an Indian tribe "now under Federal jurisdiction" and would therefore not be "Indians" under § 465 by virtue of their tribal membership.

Petitioners' argument works only if one reads "Indians" (in the phrase in § 465 "providing land for Indians") to refer to individuals, not an Indian tribe. To petitioners, this reading is obvious; the alternative, they insist, would be "nonsensical." Reply Brief for Petitioner State of Rhode Island 3. This they argue despite the clear evidence of Congress' intent to provide the Secretary with the option of acquiring either tribal trusts or individual trusts in service of "providing land for Indians." And they ignore unambiguous evidence that Congress used "Indian tribe" and "Indians" interchangeably in other parts of the IRA. See § 475 (discussing "any claim or suit of any *Indian tribe* against the United States" in the first sentence and "any claim of such *Indians* against the United States" in the last sentence (emphasis added)).

In any event, this much must be admitted: Without the benefit of context, a reasonable person could conclude that "Indians" refers to multiple individuals who each qualify as "Indian" under the IRA. An equally reasonable person could also conclude that "Indians" is meant to refer to a collective, namely, an Indian tribe. Because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), the proper course of action is to widen the interpretive lens and look to the rest of the statute for clarity. Doing so would lead to § 465's last sentence, which specifies that the Secretary is to hold land in trust "for the Indian tribe or individual Indian for which the land is acquired." Put simply, in § 465 Congress used the term "Indians" to refer both to tribes and individuals.[8]

8. The majority continues to insist, quite incorrectly, that Congress meant the term "Indi-

The majority nevertheless dismisses this reading of the statute. The Court notes that even if the Secretary has authority to take land into trust for a tribe, it must be an "*Indian* tribe," with § 479's definition of "Indian" determining a tribe's eligibility. The statute's definition of "tribe," the majority goes on to state, itself makes reference to "Indian tribe." Thus, the Court concludes, "[t]here simply is no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under § 479." *Ante,* at 1076.

The majority bypasses a straightforward explanation on its way to a circular one. Requiring that a tribe be an "Indian tribe" does not demand immediate reference to the definition of "Indian"; instead, it simply reflects the requirement that the tribe in question be formally recognized as an Indian tribe. As explained above, the Secretary has limited benefits under federal Indian law—including the acquisition of trust land—to recognized tribes. Recognition, then, is the central requirement for being considered an "Indian tribe" for purposes of the Act. If a tribe satisfies the stringent criteria established by the Secretary to qualify for federal recognition, including the requirement that the tribe prove that it "has existed as a community from historical times until the present," 25 CFR § 83.7(b) (2008), it is *a fortiori* an "Indian tribe" as a matter of law.

The Narragansett Tribe is no different. In 1983, upon meeting the criteria for recognition, the Secretary gave notice that "the Narragansett Indian Tribe . . . exists as an *Indian tribe*." 48 Fed.Reg. 6177 (emphasis added). How the Narragansett could be an Indian tribe in 1983 and yet not be an Indian tribe today is a proposition the majority cannot explain.

The majority's retort, that because "tribe" refers to "Indian," the definition of "Indian" must control which groups can be considered a "tribe," is entirely circular. Yes, the word "tribe" is defined in part by reference to "Indian tribe." But the word "Indian" is also defined in part by reference to "Indian tribe." Relying on one definition to provide content to the other is thus "completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

The Governor of Rhode Island, for his part, adopts this circular logic and offers two examples of why reading the statute any other way would be implausible. He first argues that if § 479's definition of "Indian" does not determine a tribe's eligibility, the Secretary would have authority to take land into trust "for the benefit of any group that he deems, at his whim and fancy, to be an 'Indian tribe.' " Reply Brief for Petitioner Carcieri 7. The Governor caricatures the Secretary's discretion. This Court has long made clear that Congress—and therefore the Secretary—lacks constitutional authority to "bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe." *United States v. Sandoval,* 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913). The Governor's next objection, that condoning the acquisition of trust land for the Narragansett Tribe would allow the Secretary to acquire land for an Indian tribe that lacks Indians, is equally unpersuasive. As a general matter, to obtain federal recognition, a tribe must demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical

ans'' in § 465 to have the same meaning as the term ''Indian'' in § 479. That the text of the statute tells a different story appears to be an inconvenience the Court would rather ignore.

Indian tribes which combined and functioned as a single autonomous political entity." 25 CFR § 83.7(e) (2008). If the Governor suspects that the Narragansett is not an Indian tribe because it may lack members who are blood quantum Indians, he should have challenged the Secretary's decision to recognize the Tribe in 1983 when such an objection could have been properly received.[9]

In sum, petitioners' arguments—and the Court's conclusion—are based on a misreading of the statute. "[N]ow," the temporal limitation in the definition of "Indian," only affects an individual's ability to qualify for federal benefits under the IRA. If this case were about the Secretary's decision to take land into trust for an individual who was incapable of proving her eligibility by lineage or blood quantum, I would have no trouble concluding that such an action was contrary to the IRA. But that is not the case before us. By taking land into trust for a validly recognized Indian tribe, the Secretary acted well within his statutory authority.[10]

IV

The Court today adopts a cramped reading of a statute Congress intended to be "sweeping" in scope. *Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). In so doing, the Court ignores the "principle deeply rooted in [our] Indian jurisprudence" that " 'statutes are to be construed liberally in favor of the Indians.' " *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683,

9. The Department of the Interior found "a high degree of retention of [Narragansett] family lines" between 1880 and 1980, and remarked that "[t]he close intermarriage and stability of composition, plus the geographic stability of the group, reflect the maintenance of a socially distinct community." Recommendation for Acknowledgment 10. It also noted that the Narragansett "require applicants for full voting membership to trace their Narragansett Indian bloodlines back to the 'Detribalization Rolls of 1880–84.' " *Id.*, at 16. The record in this case does not tell us how many members of the Narragansett currently qualify as "Indian" by meeting the individual blood quantum requirement. Indeed, it is possible that a significant number of the Narragansett are blood quantum Indians. Accordingly, nothing the Court decides today prevents the Secretary from taking land into trust for those members of the Tribe who independently qualify as "Indian" under 25 U.S.C. § 479.

Although the record does not demonstrate how many members of the Narragansett qualify as blood quantum Indians, Justice BREYER nevertheless assumes that no member of the Tribe is a blood quantum Indian. *Ante*, at 1070 – 1071 (concurring opinion). This assumption is misguided for two reasons. To start, the record's silence on this matter is to be expected; the parties have consistently focused on the Secretary's authority to take land into trust for the Tribe, not for individual members of the Tribe. There is thus no legitimate basis for interpreting the lack of record evidence as affirmative proof that none of the Tribe's members are "Indian." Second, neither the statute nor the relevant regulations mandate that a tribe have a threshold amount of blood quantum Indians as members in order to receive trust land. Justice BREYER's unwarranted assumption about the Narragansett's membership, even if true, would therefore also be irrelevant to whether the Secretary's actions were proper.

10. Petitioners advance the additional argument that the Secretary lacks authority to take land into trust for the Narragansett because the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, 25 U.S.C. § 1701 *et seq.*, implicitly repealed the Secretary's § 465 trust authority as applied to lands in Rhode Island. This claim plainly fails. While the Tribe agreed to subject the 1,800 acres it obtained in the Settlement Act to the State's civil and criminal laws, § 1708(a), the 31–acre parcel of land at issue here was not part of the settlement lands. And, critically, nothing in the text of the Settlement Act suggests that Congress intended to prevent the Secretary from acquiring additional parcels of land in Rhode Island that would be exempt from the State's jurisdiction.

116 L.Ed.2d 687 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–768, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)); see also Cohen § 2.02[1], p. 119 ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians").

Given that the IRA plainly authorizes the Secretary to take land into trust for an Indian tribe, and in light of the Narragansett's status as such, the Court's decision can be best understood as protecting one sovereign (the State) from encroachment from another (the Tribe). Yet in matters of Indian law, the political branches have been entrusted to mark the proper boundaries between tribal and state jurisdiction. See U.S. Const., Art. I, § 8, cl. 3; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832). With the IRA, Congress drew the boundary in a manner that favors the Narragansett. I respectfully dissent.

UNITED STATES, Petitioner,

v.

Randy Edward HAYES.

No. 07–608.

Argued Nov. 10, 2008.

Decided Feb. 24, 2009.

Background: Defendant was convicted in the United States District Court for the Northern District of West Virginia, Irene M. Keeley, Chief District Judge, of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, and he appealed. The Court of Appeals for the Fourth Circuit, King, Circuit Judge, 482 F.3d 749, reversed and remanded.

Holding: On grant of certiorari, the Supreme Court, Justice Ginsburg, held that a domestic relationship need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of misdemeanor crime of domestic violence.

Reversed and remanded.

Chief Justice Roberts, filed dissenting opinion, with which Justice Scalia joined.

1. Weapons ⚿4, 17(4)

The existence of a domestic relationship, although it must be established beyond a reasonable doubt, need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of misdemeanor crime of domestic violence; statute defining misdemeanor crime of domestic violence stated that such crime was required to have as an element the use or attempted use of physical force or threatened use of deadly weapon, but it did not specify the domestic relationship between defendant and the victim as an element, and construing the statute to exclude domestic abuser convicted under generic use-of-force statute would frustrate Congress' manifest purpose to extend the federal firearm prohibition to persons convicted of misdemeanor domestic violence, as most states did not have criminal statutes specifically proscribing domestic violence, and most domestic abusers were routinely prosecuted under general assault and battery laws. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

It is true, as the Court notes, *ante,* at 2191, that each of the Tribes' contracts provides that the Act and the contract "shall be liberally construed for the benefit of the Contractor." App. 203; see also § 450*l* (c) (Model Agreement § 1(a)(2)). But a provision can be construed "liberally" as opposed to "strictly" only when there is some ambiguity to construe. And here there is none. Congress spoke clearly when it said that the provision of funds was "subject to the availability of appropriations," that spending on contract support costs was "not to exceed" a specific amount, and that the Secretary was "not required" to make funds allocated for one tribe's costs "available" to another. The unambiguous meaning of these provisions is that when the Secretary has allocated the maximum amount of funds appropriated each fiscal year for contract support costs, there are no other appropriations "available" to pay any remaining costs.

This is hardly a typical government contracts case. Many government contracts contain a "subject to the availability of appropriations" clause, and many appropriations statutes contain "not to exceed" language. But this case involves not only those provisions but a third, relieving the Secretary of any obligation to make funds "available" to one contractor by reducing payments to others. Such provisions will not always appear together, but when they do, we must give them effect. Doing so here, I would hold that the Tribes are not entitled to payment of their contract support costs in full, and I would reverse the contrary judgment of the Court of Appeals for the Tenth Circuit.

MATCH–E–BE–NASH–SHE–WISH BAND OF POTTAWATOMI INDIANS, Petitioners

v.

David PATCHAK et al.

Ken L. Salazar, Secretary of the Interior, et al., Petitioners

v.

David Patchak et al.

Nos. 11–246, 11–247.

Argued April 24, 2012.

Decided June 18, 2012.

Background: Owner of property near site of proposed Indian casino brought action challenging decision by Secretary of the Interior to take parcel of land into trust on behalf of Indian tribe. Tribe intervened. The United States District Court for the District of Columbia, Richard J. Leon, J., 646 F.Supp.2d 72, dismissed complaint on ground that resident lacked prudential standing. Resident appealed. The United States Court of Appeals for the District of Columbia Circuit, Randolph, Senior Circuit Judge, 632 F.3d 702, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kagan, held that:

(1) United States waived its sovereign immunity, abrogating *Neighbors for Rational Development, Inc. v. Norton,* 379 F.3d 956, *Metropolitan Water Dist. of Southern Cal. v. United States,* 830 F.2d 139, *Florida Dept. of Bus. Regulation v. Department of Interior,* 768 F.2d 1248, and

(2) resident had prudential standing.

Affirmed and remanded.

Justice Sotomayor filed dissenting opinion.

1. Indians ⚿342

United States ⚿125(22)

Administrative Procedure Act's (APA) general waiver of Federal Government's immunity applied to suit challenging decision by Secretary of the Interior to take parcel of land into trust on behalf of Indian tribe which sought to open casino; since plaintiff did not assert right to the property, suit was not under Quiet Title Act (QTA), and therefore, QTA's reservation of Government immunity from actions respecting Indian trust lands did not apply to bar suit pursuant to carve-out from APA waiver; abrogating *Neighbors for Rational Development, Inc. v. Norton,* 379 F.3d 956, *Metropolitan Water Dist. of Southern Cal. v. United States,* 830 F.2d 139, *Florida Dept. of Bus. Regulation v. Department of Interior,* 768 F.2d 1248. 5 U.S.C.A. § 702; Indian Reorganization Act, § 5, 25 U.S.C.A. § 465; 28 U.S.C.A. § 2409a(a, d).

2. Administrative Law and Procedure ⚿666

Person suing under Administrative Procedure Act (APA) must satisfy not only Article III's standing requirements; interest he asserts must also be arguably within zone of interests to be protected or regulated by statute that he says was violated. U.S.C.A. Const. Art. 3, § 2, cl. 1; 5 U.S.C.A. § 702.

3. Indians ⚿342

Owner of property near site of proposed Indian casino had prudential standing to bring action challenging decision by Secretary of the Interior to take the parcel of land into trust on behalf of tribe; economic, environmental, and aesthetic interests asserted by owner at least arguably fell within zone of interests regulated by governing statute, which authorized acquisition of land to foster Indian tribes' economic development. 5 U.S.C.A. § 702; Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

4. Administrative Law and Procedure ⚿666

Requirement that person suing under Administrative Procedure Act (APA) assert interest arguably within zone of interests to be protected or regulated by statute that he says was violated is applied in keeping with Congress's "evident intent" when enacting APA to make agency action presumptively reviewable; no indication of congressional purpose to benefit would-be plaintiff is required. 5 U.S.C.A. § 702.

5. Administrative Law and Procedure ⚿666

Requirement that person suing under Administrative Procedure Act (APA) assert interest "arguably" within zone of interests to be protected or regulated by statute that he says was violated forecloses suit only when plaintiff's interests are so marginally related to or inconsistent with purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. 5 U.S.C.A. § 702.

Syllabus *

The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire property "for the purpose of providing land to Indians." 25 U.S.C. § 465. Petitioner Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians (Band), an Indian tribe federally recognized in 1999, requested that the Secretary take into trust on its behalf a tract of land known as

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

the Bradley Property, which the Band intended to use "for gaming purposes." The Secretary took title to the Bradley Property in 2009. Respondent David Patchak, who lives near the Bradley Property, filed suit under the Administrative Procedure Act (APA), asserting that § 465 did not authorize the Secretary to acquire the property because the Band was not a federally recognized tribe when the IRA was enacted in 1934. Patchak alleged a variety of economic, environmental, and aesthetic harms as a result of the Band's proposed use of the property to operate a casino, and requested injunctive and declaratory relief reversing the Secretary's decision to take title to the land. The Band intervened to defend the Secretary's decision. The District Court did not reach the merits of Patchak's suit, but ruled that he lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The D.C. Circuit reversed and also rejected the Secretary's and the Band's alternative argument that sovereign immunity barred the suit.

Held:

1. The United States has waived its sovereign immunity from Patchak's action. The APA's general waiver of the Federal Government's immunity from suit does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. 5 U.S.C. § 702. The Government and Band contend that the Quiet Title Act (QTA) is such a statute. The QTA authorizes (and so waives the Government's sovereign immunity from) a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. 28 U.S.C. § 2409a(d). But it contains an exception for "trust or restricted Indian lands." § 2409a(a).

To determine whether the "Indian lands" exception bars Patchak's suit, the Court considers whether the QTA addresses the kind of grievance Patchak advances. It does not, because Patchak's action is not a quiet title action. The QTA, from its title to its jurisdictional grant to its venue provision, speaks specifically and repeatedly of "quiet title" actions, a term universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. Although Patchak's suit contests the Secretary's title, it does not claim any competing interest in the Bradley Property.

Contrary to the argument of the Band and Government, the QTA does not more broadly encompass any "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." § 2409(a). Rather, § 2409a includes a host of indications that the "civil action" at issue is an ordinary quiet title suit. The Band and Government also contend that the QTA's specific authorization of adverse claimants' suits creates the negative implication that non-claimants like Patchak cannot challenge Government ownership of land under any statute. That argument is faulty for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses. Finally, the Band and Government argue that Patchak's suit should be treated the same as an adverse claimant's because both equally implicate the "Indian lands" exception's policies. That argument must be addressed to Congress. The "Indian lands" exception reflects Congress's judgment about how far to allow quiet title suits—not all suits challenging the Government's ownership of property. Pp. 2204 – 2210.

2. Patchak has prudential standing to challenge the Secretary's acquisition. A person suing under the APA must assert

an interest that is "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184. The Government and Band claim that Patchak's economic, environmental, and aesthetic injuries are not within § 465's zone of interests because the statute focuses on land acquisition, while Patchak's injuries relate to the land's use as a casino. However, § 465 has far more to do with land use than the Government and Band acknowledge. Section 465 is the capstone of the IRA's land provisions, and functions as a primary mechanism to foster Indian tribes' economic development. The Secretary thus takes title to properties with an eye toward how tribes will use those lands to support such development. The Department's regulations make this statutory concern with land use clear, requiring the Secretary to acquire land with its eventual use in mind, after assessing potential conflicts that use might create. And because § 465 encompasses land's use, neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit. Pp. 2210 – 2212.

632 F.3d 702, affirmed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion.

Conly J. Schulte, Shilee T. Mullin, Fredericks Peebles & Morgan LLP, Louisville, CO, Patricia A. Millett, Counsel of Record, James T. Meggesto, James E. Tysse, Akin, Gump, Strauss, Hauer & Feld LLP, Washington, DC, Amit Kurlekar, Akin, Gump, Strauss, Hauer & Feld LLP, San Francisco, CA, Michael C. Small, Akin, Gump, Strauss, Hauer & Feld LLP, Los Angeles, CA, for Petitioner Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians.

Brian J. Murray, Jones Day, Chicago, IL, David M. Cooper, Jones Day, New York, NY, Daniel P. Ettinger, Counsel of Record, Matthew T. Nelson, Aaron D. Lindstrom, Nicole L. Mazzocco, Warner Norcross & Judd LLP, Grand Rapids, MI, for Respondent David Patchak.

Hilary C. Tompkins, Solicitor, Department of the Interior, Washington, DC, Donald B. Verrilli, Jr., Solicitor General, Counsel of Record, Ignacia S. Moreno, Assistant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Eric D. Miller, Assistant to the Solicitor General, Aaron P. Avila, Attorney, Department of Justice, Washington, DC, for the Federal Petitioners.

For U.S. Supreme Court briefs, see:

2012 WL 1332576 (Reply.Brief)

2012 WL 1332578 (Reply.Brief)

2012 WL 978181 (Resp.Brief)

2012 WL 416751 (Pet.Brief)

2012 WL 416752 (Pet.Brief)

Justice KAGAN delivered the opinion of the Court.

A provision of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire property "for the purpose of providing land for Indians." Ch. 576, § 5, 48 Stat. 985. The Secretary here acquired land in trust for an Indian tribe seeking to open a casino. Respondent David Patchak lives near that land and challenges the Secretary's decision in a suit brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Patchak

claims that the Secretary lacked authority under § 465 to take title to the land, and alleges economic, environmental, and aesthetic harms from the casino's operation.

We consider two questions arising from Patchak's action. The first is whether the United States has sovereign immunity from the suit by virtue of the Quiet Title Act (QTA), 86 Stat. 1176. We think it does not. The second is whether Patchak has prudential standing to challenge the Secretary's acquisition. We think he does. We therefore hold that Patchak's suit may proceed.

I

The Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians (Band) is an Indian tribe residing in rural Michigan. Although the Band has a long history, the Department of the Interior (DOI) formally recognized it only in 1999. See 63 Fed. Reg. 56936 (1998). Two years later, the Band petitioned the Secretary to exercise her authority under § 465 by taking into trust a tract of land in Wayland Township, Michigan, known as the Bradley Property. The Band's application explained that the Band would use the property "for gaming purposes," with the goal of generating the "revenue necessary to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs." App. 52, 41.[1]

In 2005, after a lengthy administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. See 70 Fed.Reg. 25596. In accordance with applicable regulations, the Secretary committed to wait 30 days before taking action, so that interested parties could seek judicial review. See *ibid.*; 25 CFR § 151.12(b) (2011). Within that window, an organization called Michigan Gambling Opposition (or MichGO) filed suit alleging that the Secretary's decision violated environmental and gaming statutes. The Secretary held off taking title to the property while that litigation proceeded. Within the next few years, a District Court and the D.C. Circuit rejected MichGO's claims. See *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 27–28 (C.A.D.C.2008); *Michigan Gambling Opposition v. Norton*, 477 F.Supp.2d 1 (D.D.C.2007).

Shortly after the D.C. Circuit ruled against MichGO (but still before the Secretary took title), Patchak filed this suit under the APA advancing a different legal theory. He asserted that § 465 did not authorize the Secretary to acquire property for the Band because it was not a federally recognized tribe when the IRA was enacted in 1934. See App. 37. To establish his standing to bring suit, Patchak contended that he lived "in close proximity to" the Bradley Property and that a casino there would "destroy the lifestyle he has enjoyed" by causing "increased traffic," "increased crime," "decreased property values," "an irreversible change in the rural character of the area," and "other aesthetic, socioeconomic, and environmental problems." *Id.*, at 30–31. Notably, Patchak did not assert any claim of his own to the Bradley Property. He requested only a declaration that the decision to acquire the land violated the IRA

1. Under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, an Indian tribe may conduct gaming operations on "Indian lands," § 2710, which include lands "held in trust by the United States for the benefit of any Indian tribe," § 2703(4)(B). The application thus requested the Secretary to take the action necessary for the Band to open a casino.

and an injunction to stop the Secretary from accepting title. See *id.,* at 38–39. The Band intervened in the suit to defend the Secretary's decision.

In January 2009, about five months after Patchak filed suit, this Court denied certiorari in MichGO's case, 555 U.S. 1137, 129 S.Ct. 1002, 173 L.Ed.2d 293, and the Secretary took the Bradley Property into trust. That action mooted Patchak's request for an injunction to prevent the acquisition, and all parties agree that the suit now effectively seeks to divest the Federal Government of title to the land. See Brief for Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians 17 (hereinafter Tribal Petitioner); Brief for Federal Petitioners 11; Brief for Respondent 24–25. The month after the Government took title, this Court held in *Carcieri v. Salazar,* 555 U.S. 379, 382, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), that § 465 authorizes the Secretary to take land into trust only for tribes that were "under federal jurisdiction" in 1934.[2]

The District Court dismissed the suit without considering the merits (including the relevance of *Carcieri*), ruling that Patchak lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The court reasoned that the injuries Patchak alleged fell outside § 465's "zone of interests." 646 F.Supp.2d 72, 76 (D.D.C.2009). The D.C. Circuit reversed that determination. See 632 F.3d 702, 704–707 (2011). The court also rejected the Secretary's and the Band's alternative argument that by virtue of the QTA, sovereign immunity barred the suit. See *id.,* at 707–712. The latter ruling conflicted with decisions of three Circuits holding that the United States has immunity from suits like Patchak's. See *Neighbors for Rational Development, Inc. v. Norton,* 379 F.3d 956, 961–962 (C.A.10 2004); *Metropolitan Water Dist. of Southern Cal. v. United States,* 830 F.2d 139, 143–144 (C.A.9 1987) *(per curiam)* ; *Florida Dept. of Bus. Regulation v. Department of Interior,* 768 F.2d 1248, 1253–1255 (C.A.11 1985). We granted certiorari to review both of the D.C. Circuit's holdings, 565 U.S. ——, 132 S.Ct. 845, 181 L.Ed.2d 548 (2011), and we now affirm.

II

We begin by considering whether the United States' sovereign immunity bars Patchak's suit under the APA. That requires us first to look to the APA itself and then, for reasons we will describe, to the QTA. We conclude that the United States has waived its sovereign immunity from Patchak's action.

[1] The APA generally waives the Federal Government's immunity from a suit "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." 5 U.S.C. § 702. That waiver would appear to cover Patchak's suit, which objects to official action of the Secretary and seeks only non-monetary relief. But the APA's waiver of immunity comes with an important carve-out: The waiver does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. *Ibid.* That provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on

2. The merits of Patchak's case are not before this Court. We therefore express no view on whether the Band was ''under federal jurisdiction'' in 1934, as *Carcieri* requires. Nor do we consider how that question relates to Patchak's allegation that the Band was not ''federally recognized'' at the time. Cf. *Carcieri,* 555 U.S., at 397–399, 129 S.Ct. 1058 (BREYER, J., concurring) (discussing this issue).

suit contained in other statutes. The question thus becomes whether another statute bars Patchak's demand for relief.

The Government and Band contend that the QTA does so. The QTA authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. 28 U.S.C. § 2409a(d). The statute, however, contains an exception: The QTA's authorization of suit "does not apply to trust or restricted Indian lands." § 2409a(a). According to the Government and Band, that limitation on quiet title suits satisfies the APA's carve-out and so forbids Patchak's suit. In the Band's words, the QTA exception retains "the United States' full immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands." Brief for Tribal Petitioner 18.

Two hypothetical examples might help to frame consideration of this argument. First, suppose Patchak had sued under the APA claiming that *he* owned the Bradley Property and that the Secretary therefore could not take it into trust. The QTA would bar that suit, for reasons just suggested. True, it fits within the APA's general waiver, but the QTA specifically authorizes quiet title actions (which this hypothetical suit is) *except when* they involve Indian lands (which this hypothetical suit does). In such a circumstance, a plaintiff cannot use the APA to end-run the QTA's limitations. "[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy"—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment. *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286, n. 22, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (quoting H.R.Rep. No. 94–1656, p. 13 (1976), 1976 U.S.C.C.A.N. 6121, 6133).

But now suppose that Patchak had sued under the APA claiming only that use of the Bradley Property was causing environmental harm, and raising no objection at all to the Secretary's title. The QTA could not bar that suit because even though involving Indian lands, it asserts a grievance altogether different from the kind the statute concerns. Justice SCALIA, in a former life as Assistant Attorney General, made this precise point in a letter to Congress about the APA's waiver of immunity (which we hasten to add, given the author, we use not as legislative history, but only for its persuasive force). When a statute "is not addressed to the type of grievance which the plaintiff seeks to assert," then the statute cannot prevent an APA suit. *Id.*, at 28 (May 10, 1976, letter of Assistant Atty. Gen. A. Scalia).[3]

3. According to the dissent, we should look only to the kind of relief a plaintiff seeks, rather than the type of grievance he asserts, in deciding whether another statute bars an APA action. See *post*, at 2214 (opinion of SOTOMAYOR, J.). But the dissent's test is inconsistent with the one we adopted in *Block*, which asked whether Congress had particularly dealt with a "claim." See *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286, n. 22, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). And the dissent's approach has no obvious limits. Suppose, for example, that Congress passed a statute authorizing a particular form of injunctive relief in a procurement contract suit except when the suit involved a "discretionary function" of a federal employee. Cf. 28 U.S.C. § 2680(a). Under the dissent's method, that exception would preclude *any* APA suit seeking that kind of injunctive relief if it involved a discretionary function, no matter what the nature of the claim. That implausible result demonstrates that limitations on relief cannot sensibly be understood apart from the claims to which they attach.

We think that principle controls Patchak's case: The QTA's "Indian lands" clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances. As we will explain, the QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak's suit is *not* a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA's "Indian lands" limitation simply inapposite to this litigation.

In reaching this conclusion, we need look no further than the QTA's text. From its title to its jurisdictional grant to its venue provision, the Act speaks specifically and repeatedly of "quiet title" actions. See 86 Stat. 1176 ("An Act [t]o permit suits to adjudicate certain real property quiet title actions"); 28 U.S.C. § 1346(f) (giving district courts jurisdiction over "civil actions ... to quiet title" to property in which the United States claims an interest); § 1402(d) (setting forth venue for "[a]ny civil action ... to quiet title" to property in which the United States claims an interest). That term is universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. See, *e.g.*, Black's Law Dictionary 34 (9th ed. 2009) (defining an "*action to quiet title*" as "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it"); *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 315, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005) ("[T]he facts showing the plaintiffs' title ... are essential parts of the plaintiffs' [quiet title] cause of action" (quoting *Hopkins v. Walker*, 244 U.S. 486, 490, 37 S.Ct. 711, 61 L.Ed. 1270 (1917))).

And the QTA's other provisions make clear that the recurrent statutory term "quiet title action" carries its ordinary meaning. The QTA directs that the complaint in such an action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). If the plaintiff does not assert any such right (as Patchak does not), the statute cannot come into play.[4] Further, the QTA provides an option for the United States, if it loses the suit, to pay "just compensation," rather than return the property, to the "person determined to be entitled" to it. § 2409a(b). That provision makes perfect sense in a quiet title action: If the plaintiff is found to own the property, the Government can satisfy his claim through an award of money (while still retaining the land for its operations). But the provision makes no sense in a suit like this one, where Patchak does not assert a right to the property. If the United States loses the suit, an award of just

4. The dissent contends that the QTA omits two other historical requirements for quiet title suits. See *post,* at 2215. But many States had abandoned those requirements by the time the QTA was passed. See S.Rep. No. 92–575, p. 6 (1971) (noting "wide differences in State statutory and decisional law" on quiet title suits); Steadman, "Forgive the U.S. Its Trespasses?": Land Title Disputes With the Sovereign—Present Remedies and Prospective Reforms, 1972 Duke L.J. 15, 48–49, and n. 152 (stating that cases had disputed whether a quiet title plaintiff needed to possess the land); *Welch v. Kai,* 4 Cal.App.3d 374, 380–381, 84 Cal.Rptr. 619, 622–623 (1970) (allowing a quiet title action when the plaintiff claimed only an easement); *Benson v. Fekete,* 424 S.W.2d 729 (Mo.1968) (en banc) (same). So Congress in enacting the QTA essentially chose one contemporaneous form of quiet title action.

compensation to the rightful owner (whoever and wherever he might be) could do nothing to satisfy Patchak's claim.[5]

In two prior cases, we likewise described the QTA as addressing suits in which the plaintiff asserts an ownership interest in Government-held property. In *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1982), we considered North Dakota's claim to land that the United States viewed as its own. We held that the State could not circumvent the QTA's statute of limitations by invoking other causes of action, among them the APA. See *id.*, at 277–278, 286, n. 22, 103 S.Ct. 1811. The crux of our reasoning was that Congress had enacted the QTA to address exactly the kind of suit North Dakota had brought. Prior to the QTA, we explained, "citizens asserting title to or the right to possession of lands claimed by the United States" had no recourse; by passing the statute, "Congress sought to rectify this state of affairs." *Id.*, at 282, 103 S.Ct. 1811. Our decision reflected that legislative purpose: Congress, we held, "intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id.*, at 286, 103 S.Ct. 1811. We repeat: "adverse claimants," meaning plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's.

Our decision in *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986), is of a piece. There, we considered whether the QTA, or instead the Tucker Act or General Allotment Act, governed the plaintiff's suit respecting certain allotments of land held by the United States. We thought the QTA the relevant statute because the plaintiff herself asserted title to the property. Our opinion quoted the plaintiff's own description of her suit: "At no time in this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case." *Id.*, at 842, 106 S.Ct. 2224 (quoting Brief for Respondent in *Mottaz*, O.T. 1985, No. 546, p. 3). That fact, we held, brought the suit "within the [QTA's] scope": "What [the plaintiff] seeks is a declaration that she alone possesses valid title." 476 U.S., at 842, 106 S.Ct. 2224. So once again, we construed the QTA as addressing suits by adverse claimants.

But Patchak is not an adverse claimant—and so the QTA (more specifically, its reservation of sovereign immunity from actions respecting Indian trust lands) cannot bar his suit. Patchak does not contend that he owns the Bradley Property, nor does he seek any relief corresponding to such a claim. He wants a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it. Patchak's lawsuit therefore lacks a defining feature of a QTA

5. The legislative history, for those who think it useful, further shows that the QTA addresses quiet title actions, as ordinarily conceived. The Senate Report states that the QTA aimed to alleviate the "[g]rave inequity" to private parties "excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs." S.Rep. No. 92–575, at 1. Similarly, the House Report notes that the history of quiet title actions "goes back to the Courts of England," and provided as examples "a plaintiff whose title to land was continually being subjected to litigation in the law courts," and "one who feared that an outstanding deed or other interest might cause a claim to be presented in the future." H.R.Rep. No. 92–1559, p. 6 (1972), 1972 U.S.C.C.A.N. 4547, 4551. From top to bottom, these reports show that Congress thought itself to be authorizing bread-and-butter quiet title actions, in which a plaintiff asserts a right, title, or interest of his own in disputed land.

action. He is not trying to disguise a QTA suit as an APA action to circumvent the QTA's "Indian lands" exception. Rather, he is not bringing a QTA suit at all. He asserts merely that the Secretary's decision to take land into trust violates a federal statute—a garden-variety APA claim. See 5 U.S.C. § 706(2)(A), (C) ("The reviewing court shall ... hold unlawful and set aside agency action ... not in accordance with law [or] in excess of statutory jurisdiction [or] authority"). Because that is true—because in then-Assistant Attorney General Scalia's words, the QTA is "not addressed to the type of grievance which [Patchak] seeks to assert," H.R. Rep. 94–1656, at 28, 1976 U.S.C.C.A.N. 6121 at 6147—the QTA's limitation of remedies has no bearing. The APA's general waiver of sovereign immunity instead applies.

The Band and Government, along with the dissent, object to this conclusion on three basic grounds. First, they contend that the QTA speaks more broadly than we have indicated, waiving immunity from suits "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). That language, the argument goes, encompasses all actions contesting the Government's legal interest in land, regardless whether the plaintiff claims ownership himself. See Brief for Federal Petitioners 19–20; Reply Brief for Tribal Petitioner 4–6; *post,* at 2215 – 2216 (SOTOMAYOR, J., dissenting). The QTA (not the APA) thus becomes the relevant statute after all—as to both its waiver and its "corresponding" reservation of immunity from suits involving Indian lands. Reply Brief for Tribal Petitioner 6.

But the Band and Government can reach that result only by neglecting key words in the relevant provision. That sentence, more fully quoted, reads: "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." § 2409a(a) (emphasis added). And as we have already noted, "this section"—§ 2409a—includes a host of indications that the "civil action" at issue is an ordinary quiet title suit: Just recall the section's title ("Real property quiet title actions"), and its pleading requirements (the plaintiff "shall set forth with particularity the nature of the right, title, or interest which [he] claims"), and its permission to the Government to remedy an infraction by paying "just compensation." Read with reference to all these provisions (as well as to the QTA's contemporaneously enacted jurisdictional and venue sections), the waiver clause rebuts, rather than supports, the Band's and the Government's argument: That clause speaks not to any suit in which a plaintiff challenges the Government's title, but only to an action in which the plaintiff also claims an interest in the property.

The Band and Government next invoke cases holding that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons," the statute may "impliedly preclude[ ]" judicial review "of those issues at the behest of other persons." *Block v. Community Nutrition Institute,* 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984); see *United States v. Fausto,* 484 U.S. 439, 455, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988). Here, the Band and Government contend, the QTA's specific authorization of adverse claimants' suits creates a negative implication: *non*-adverse claimants like Patchak cannot challenge Government ownership of land under any other statute. See Reply Brief for Tribal Petitioner 7–10; Reply Brief for Federal Petitioners 7–9; see also *post,* at 2213 – 2214. The QTA, says the Band,

thus "preempts [Patchak's] more general remedies." Brief for Tribal Petitioner 23 (internal quotation marks omitted).

But we think that argument faulty, and the cited cases inapposite, for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses. See *supra*, at 2213 – 2214. To see the point, consider a contrasting example. Suppose the QTA authorized suit only by adverse claimants who could assert a property interest of at least a decade's duration. Then suppose an adverse claimant failing to meet that requirement (because, say, his claim to title went back only five years) brought suit under a general statute like the APA. We would surely bar that suit, citing the cases the Government and Band rely on; in our imaginary statute, Congress delineated the class of persons who could bring a quiet title suit, and that judgment would preclude others from doing so. But here, once again, Patchak is not bringing a quiet title action at all. He is not claiming to own the property, and he is not demanding that the court transfer the property to him. So to succeed in their argument, the Government and Band must go much further than the cited cases: They must say that in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief. Presumably, that contention would extend only to suits involving similar subject matter—*i.e.*, the Government's ownership of property. But that commonality is not itself sufficient. We have never held, and see no cause to hold here, that some general similarity of subject matter can alone trigger a remedial statute's preclusive effect.

Last, the Band and Government argue that we should treat Patchak's suit as we would an adverse claimant's because they equally implicate the "Indian lands" exception's policies. According to the Government, allowing challenges to the Secretary's trust acquisitions would "pose significant barriers to tribes['] . . . ability to promote investment and economic development on the lands." Brief for Federal Petitioners 24. That harm is the same whether or not a plaintiff claims to own the land himself. Indeed, the Band argues that the sole difference in this suit cuts in its direction, because non-adverse claimants like Patchak have "the most remote injuries and indirect interests in the land." Brief for Tribal Petitioner 13; see Reply Brief for Federal Petitioners 11–12; see also *post*, at 2212, 2215, 2216.[6]

That argument is not without force, but it must be addressed to Congress. In the QTA, Congress made a judgment about how far to allow quiet title suits—to a point, but no further. (The "no further" includes not only the "Indian lands" exception, but one for security interests and water rights, as well as a statute of limitations, a bar on jury trials, jurisdictional and venue constraints, and the just compensation option discussed earlier.) Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call. The Band assumes that plaintiffs like Patchak have a lesser interest than those bringing quiet title actions,

6. In a related vein, the dissent argues that our holding will undermine the QTA's "Indian lands" exception by allowing adverse claimants to file APA complaints concealing their ownership interests or to recruit third parties to bring suit on their behalf. See *post*, at 2216 – 2217. But we think that concern more imaginary than real. We have trouble conceiving of a plausible APA suit that omits mention of an adverse claimant's interest in property yet somehow leads to relief recognizing that very interest.

and so should be precluded *a fortiori*. But all we can say is that Patchak has a different interest. Whether it is lesser, as the Band argues, because not based on property rights; whether it is greater because implicating public interests; or whether it is in the end exactly the same—that is for Congress to tell us, not for us to tell Congress. As the matter stands, Congress has not assimilated to quiet title actions all other suits challenging the Government's ownership of property. And so when a plaintiff like Patchak brings a suit like this one, it falls within the APA's general waiver of sovereign immunity.

III

[2, 3] We finally consider the Band's and the Government's alternative argument that Patchak cannot bring this action because he lacks prudential standing. This Court has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Here, Patchak asserts that in taking title to the Bradley Property, the Secretary exceeded her authority under § 465, which authorizes the acquisition of property "for the purpose of providing land for Indians." And he alleges that this statutory violation will cause him economic, environmental, and aesthetic harm as a nearby property owner. See *supra*, at 2203. The Government and Band argue that the relationship between § 465 and Patchak's asserted interests is insufficient. That is so, they contend, because the statute focuses on land *acquisition*, whereas Patchak's interests relate to the land's *use* as a casino. See Brief for Tribal Petitioner 46 ("The Secretary's decision to put land into trust does not turn on any particular use of the land, gaming or otherwise[,] . . . [and] thus has no impact on [Patchak] or his asserted interests"); Brief for Federal Petitioners 34 ("[L]and may be taken into trust for a host of purposes that have nothing at all to do with gaming"). We find this argument unpersuasive.

[4, 5] The prudential standing test Patchak must meet "is not meant to be especially demanding." *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). We apply the test in keeping with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." *Ibid.* We do not require any "indication of congressional purpose to benefit the would-be plaintiff." *Id.*, at 399–400, 107 S.Ct. 750.[7] And we have always conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*, at 399, 107 S.Ct. 750.

Patchak's suit satisfies that standard, because § 465 has far more to do with land

7. For this reason, the Band's statement that Patchak is "not an Indian or tribal official seeking land" and does not "claim an interest in advancing tribal development," Brief for Tribal Petitioner 42, is beside the point. The question is not whether § 465 seeks to benefit Patchak; everyone can agree it does not. The question is instead, as the Band's and the Government's main argument acknowledges, whether issues of land use (arguably) fall within § 465's scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits. See *infra* this page and 16–17.

use than the Government and Band acknowledge. Start with what we and others have said about § 465's context and purpose. As the leading treatise on federal Indian law notes, § 465 is "the capstone" of the IRA's land provisions. F. Cohen, Handbook of Federal Indian Law § 15.07[1][a], p. 1010 (2005 ed.) (hereinafter Cohen). And those provisions play a key role in the IRA's overall effort "to rehabilitate the Indian's economic life," *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (internal quotation marks omitted). "Land forms the basis" of that "economic life," providing the foundation for "tourism, manufacturing, mining, logging, ... and gaming." Cohen § 15.01, at 965. Section 465 thus functions as a primary mechanism to foster Indian tribes' economic development. As the D.C. Circuit explained in the *MichGO* litigation, the section "provid[es] lands sufficient to enable Indians to achieve self-support." *Michigan Gambling,* 525 F.3d, at 31 (internal quotation marks omitted); see *Morton v. Mancari,* 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (noting the IRA's economic aspect). So when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.

The Department's regulations make this statutory concern with land use crystal clear. Those regulations permit the Secretary to acquire land in trust under § 465 if the "land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 CFR § 151.3(a)(3). And they require the Secretary to consider, in evaluating any acquisition, both "[t]he purposes for which the land will be used" and the "potential conflicts of land use which may arise." §§ 151.10(c), 151.10(f); see § 151.11(a). For "off-reservation acquisitions" made "for business purposes"—like the Bradley Property—the regulations further provide that the tribe must "provide a plan which specifies the anticipated economic benefits associated with the proposed use." § 151.11(c). DOI's regulations thus show that the statute's implementation centrally depends on the projected use of a given property.

The Secretary's acquisition of the Bradley Property is a case in point. The Band's application to the Secretary highlighted its plan to use the land for gaming purposes. See App. 41 ("[T]rust status for this Property is requested in order for the Tribe to acquire property on which it plans to conduct gaming"); *id.,* at 61–62 ("The Tribe intends to ... renovate the existing ... building into a gaming facility.... to offer Class II and/or Class III gaming"). Similarly, DOI's notice of intent to take the land into trust announced that the land would "be used for the purpose of construction and operation of a gaming facility," which the Department had already determined would meet the Indian Gaming Regulatory Act's requirements. 70 Fed. Reg. 25596; 25 U.S.C. §§ 2701–2721. So from start to finish, the decision whether to acquire the Bradley Property under § 465 involved questions of land use.

And because § 465's implementation encompasses these issues, the interests Patchak raises—at least arguably—fall "within the zone ... protected or regulated by the statute." If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits. The difference here, as the Government and Band point out, is that § 465 specifically addresses only land acquisition. But for the reasons already given, decisions under the statute are

closely enough and often enough entwined with considerations of land use to make that difference immaterial. As in this very case, the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. See 25 CFR §§ 151.10(c), 151.10(f), 151.11(a). And so neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit.

* * *

The QTA's reservation of sovereign immunity does not bar Patchak's suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D.C. Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.

In enacting the Quiet Title Act (QTA), Congress waived the Government's sovereign immunity in cases seeking "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). In so doing, Congress was careful to retain the Government's sovereign immunity with respect to particular claimants, particular categories of land, and particular remedies. Congress and the Executive Branch considered these "carefully crafted provisions" essential to the immunity waiver and "necessary for the protection of the national public interest." *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 284–285, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983).

The Court's opinion sanctions an end-run around these vital limitations on the Government's waiver of sovereign immunity. After today, any person may sue under the Administrative Procedure Act (APA) to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land. That outcome cannot be squared with the APA's express admonition that it confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Court's holding not only creates perverse incentives for private litigants, but also exposes the Government's ownership of land to costly and prolonged challenges. Because I believe those results to be inconsistent with the QTA and the APA, I respectfully dissent.

I

A

Congress enacted the QTA to provide a comprehensive solution to the problem of real-property disputes between private parties and the United States. The QTA strikes a careful balance between private parties' desire to adjudicate such disputes, and the Government's desire to impose " 'appropriate safeguards' " on any waiver of sovereign immunity to ensure " 'the protection of the public interest.' " *Block*, 461 U.S., at 282–283, 103 S.Ct. 1811; see also S.Rep. No. 92–575, p. 6 (1971).

Section 2409a(a) provides expansively that "[t]he 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." That language mirrors the title proposed by the Executive Branch for the legislation that Congress largely adopted: "A Bill To permit suits to adjudicate disputed titles to lands in which

the United States claims an interest." *Id.*, at 7.

The remainder of the Act, however, imposes important conditions upon the Government's waiver of sovereign immunity. First, the right to sue "does not apply to trust or restricted Indian lands." § 2409a(a). The Indian lands exception reflects the view that "a waiver of immunity in this area would not be consistent with specific commitments [the Government] ha[s] made to the Indians through treaties and other agreements." *Block*, 461 U.S., at 283, 103 S.Ct. 1811 (internal quotation marks omitted). By exempting Indian lands, Congress ensured that the Government's "solemn obligations" to tribes would not be "abridg[ed] . . . without the consent of the Indians." S.Rep. No. 92–575, at 4.

Second, the Act preserves the United States' power to retain possession or control of any disputed property, even if a court determines that the Government's property claim is invalid. To that end, § 2409a(b) "allow[s] the United States the option of paying money damages instead of surrendering the property if it lost a case on the merits." *Block*, 461 U.S., at 283, 103 S.Ct. 1811. This provision was considered essential to addressing the Government's "main objection in the past to waiving sovereign immunity" where federal land was concerned: that an adverse judgment "would make possible decrees ousting the United States from possession and thus interfer[e] with operations of the Government." S.Rep. No. 92–575, at 5–6. Section 2409a(b) "eliminate[d] cause for such apprehension," by ensuring that—even under the QTA—the United States could not be stripped of its possession or control of property without its consent. *Id.*, at 6.

Finally, the Act limits the class of individuals permitted to sue the Government to those claiming a "right, title, or interest" in disputed property. § 2409a(d). As we have explained, Congress' decision to restrict the class entitled to relief indicates that Congress precluded relief for the remainder. See, *e.g.*, *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded"). That inference is especially strong here, because the QTA was "enacted against the backdrop of sovereign immunity." S.Rep. No. 94–996, p. 27 (1976). Section 2409a(d) thus indicates that Congress concluded that those without any "right, title, or interest" in a given property did not have an interest sufficient to warrant abrogation of the Government's sovereign immunity.

Congress considered these conditions indispensable to its immunity waiver.[1] "[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block*, 461 U.S., at 287, 103 S.Ct. 1811. Congress and the Executive Branch intended the

1. As we explained in *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 282–283, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), Congress' initial proposal lacked such provisions. The Executive Branch, however, strongly opposed the original bill, explaining that it was "too broad and sweeping in scope and lacking adequate safeguards to protect the public interest." Dispute of Titles on Public Lands: Hearings on S. 216 et al. before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 21 (1971). Congress ultimately agreed, largely adopting the Executive's substitute bill. See *Block*, 461 U.S., at 283–284, 103 S.Ct. 1811.

scheme to be the exclusive procedure for resolving property title disputes involving the United States. See *id.,* at 285, 103 S.Ct. 1811 (describing Act as a "careful and thorough remedial scheme"); S.Rep. No. 92–575, at 4 (§ 2409a "provides a *complete,* thoughtful approach to the problem of disputed titles to federally claimed land" (emphasis added)).

For that reason, we held that Congress did not intend to create a "new supplemental remedy" when it enacted the APA's general waiver of sovereign immunity. *Block,* 461 U.S., at 286, n. 22, 103 S.Ct. 1811. " 'It would require the suspension of disbelief,' " we reasoned, " 'to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.' " *Id.,* at 285, 103 S.Ct. 1811 (quoting *Brown v. GSA,* 425 U.S. 820, 833, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976)). If a plaintiff could oust the Government of title to land by means of an APA action, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted," and the "Indian lands exception to the QTA would be rendered nugatory." *Block,* 461 U.S., at 284–285, 103 S.Ct. 1811. We therefore had little difficulty concluding that Congress did not intend to render the QTA's limitations obsolete by affording any plaintiff the right to dispute the Government's title to any lands by way of an APA action—and to empower any such plaintiff to "dispossesses[s] [the United States] of the disputed property without being afforded the option of paying damages." *Id.,* at 285, 103 S.Ct. 1811.

It is undisputed that Patchak does not meet the conditions to sue under the QTA. He seeks to challenge the Government's title to Indian trust land (strike one); he seeks to force the Government to relinquish possession and title outright, leaving it no alternative to pay compensation (strike two); and he does not claim any personal right, title, or interest in the property (strike three). Thus, by its express terms, the QTA forbids the relief Patchak seeks. Compare *ante,* at 2203 ("[A]ll parties agree that the suit now effectively seeks to divest the Federal Government of title to the [Indian trust] land"), with *United States v. Mottaz,* 476 U.S. 834, 842, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986) (Section 2409a(a)'s Indian lands exclusion "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians"). Consequently, Patchak may not avoid the QTA's constraints by suing under the APA, a statute enacted only four years later. See 5 U.S.C. § 702 (rendering the APA's waiver of sovereign immunity inapplicable "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought").

B

The majority nonetheless permits Patchak to circumvent the QTA's limitations by filing an action under the APA. It primarily argues that the careful limitations Congress imposed upon the QTA's waiver of sovereign immunity are "simply inapposite" to actions in which the plaintiff advances a different "grievance" to that underlying a QTA suit, *i.e.,* cases in which a plaintiff seeks to "strip the United States of title to the land . . . not on the ground that it is his," but rather because "the Secretary's decision to take land into trust violates a federal statute." *Ante,* at 2206, 2207. This analysis is unmoored from the text of the APA.

Section 702 focuses not on a plaintiff's motivation for suit, nor the arguments on which he grounds his case, but only on whether another statute expressly or im-

pliedly forbids the relief he seeks. The relief Patchak admittedly seeks—to oust the Government of title to Indian trust land—is identical to that forbidden by the QTA. Conversely, the Court's hypothetical suit, alleging that the Bradley Property was causing environmental harm, would not be barred by the QTA. See *ante,* at 2206. That is not because such an action asserts a different "grievance," but because it seeks different relief—abatement of a nuisance rather than the extinguishment of title.[2]

In any event, the "grievance" Patchak asserts is no different from that asserted in *Block*—a case in which we unanimously rejected a plaintiff's attempt to avoid the QTA's restrictions by way of an APA action or the similar device of an officer's suit.[3] That action, like this one, was styled as a suit claiming that the Government's actions respecting land were "'"not within [its] statutory powers."'" 461 U.S., at 281, 103 S.Ct. 1811. Cf. *ante,* at 2207 ("[Patchak] asserts merely that the Secretary's decision to take land into trust violates a federal statute"). The relief requested was also identical to that sought here: injunctive relief directing the United States to "'cease and desist from . . . exercising privileges of ownership'" over the land in question. 461 U.S., at 278, 103 S.Ct. 1811; see also App. 38.

The only difference that the majority can point to between *Block* and this case is that Patchak asserts a weaker interest in the disputed property. But that is no reason to imagine that Congress intended a different outcome. As the majority itself acknowledges, the harm to the United States and tribes when a plaintiff sues to extinguish the Government's title to Indian trust land is identical "whether or not a plaintiff claims to own the land himself." *Ante,* at 2208. Yet, if the majority is correct, Congress intended the APA's waiver of immunity to apply to those hypothetical plaintiffs differently. Congress, it suggests, intended to permit anyone to circumvent the QTA's careful limitations and sue to force the Government to relinquish Indian trust lands—anyone, that is, except those with the strongest entitlement to bring such actions: those claiming a personal "right, title, or interest" in the land in question. The majority's conclusion hinges, therefore, on the doubtful premise that Congress intended to waive the Government's sovereign immunity wholesale for those like Patchak, who assert an "aesthetic" interest in land, *ante,* at 2201, while retaining the Government's sovereign immunity against those who assert a constitutional interest in land—the deprivation of property without due process of law. This is highly implausible. Unsurprisingly, the majority does not even

2. The majority claims, *ante,* at 2205, n. 3, that this test has "no obvious limits," but it merely applies the text of § 702 (which speaks of "relief," not "grievances"). In any event, the majority's hypothetical, *ibid.,* compares apples to oranges. I do not contend that the APA bars all injunctive relief involving Indian lands, simply other suits—like this one—that seek "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). That result is entirely consistent with *Block*—which stated that the APA "specifically confers no 'authority to grant relief if any other statute . . . expressly or impliedly forbids the relief which is sought.'" 461 U.S., at 286, n. 22, 103 S.Ct. 1811 (quoting 5 U.S.C. § 702).

3. An officer's suit is an action directly against a federal officer, but was otherwise identical to the kind of APA action at issue here. Compare *Block,* 461 U.S., at 281, 103 S.Ct. 1811 (seeking relief because agency official's actions were "'"not within [his] statutory powers"'"), with 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations").

attempt to explain why Congress would have intended this counterintuitive result.

It is no answer to say that the QTA reaches no further than an "ordinary quiet title suit." *Ante,* at 2208. The action permitted by § 2409a is not an ordinary quiet title suit. At common law, equity courts "permit[ted] a bill to quiet title to be filed only by a party in *possession* [of land] against a defendant, who ha[d] been ineffectually seeking to establish a legal title by repeated actions of ejectment." *Wehrman v. Conklin,* 155 U.S. 314, 321–322, 15 S.Ct. 129, 39 L.Ed. 167 (1894) (emphasis added). Section 2409a is broader, requiring neither prerequisite. Moreover, as the majority tells us, see *ante,* at 2206, an act to quiet title is "universally understood" as a proceeding "to establish a plaintiff's *title* to land." Black's Law Dictionary 34 (9th ed. 2009) (emphasis added). But § 2409a authorizes civil actions in cases in which neither the Government, nor the plaintiff, claims title to the land at issue. See § 2409a(d) ("The complaint shall set forth . . . the *right,* title, or *interest* which the plaintiff claims" (emphasis added)).[4] A plaintiff may file suit under § 2409a, for instance, when he claims only an easement in land, the right to explore an area for minerals, or some other lesser right or interest. See S.Rep. No. 92–575, at 5. Notwithstanding its colloquial title, therefore, the QTA plainly allows suit in circumstances well beyond "bread-and-butter quiet title actions," *ante,* at 2207, n. 3.[5]

The majority attempts to bolster its reading by emphasizing an unexpected source within § 2409a: the clause specifying that the United States may be sued "'in *a civil action under this section.*'" *Ante,* at 2208. The majority understands this clause to narrow the QTA's scope (and its limitations on the Government's immunity waiver) to quiet title claims only. But "this section" speaks broadly to civil actions "to adjudicate a disputed title to real property in which the United States claims an interest." § 2409a. Moreover, this clause is read most straightforwardly to serve a far more pedestrian purpose: simply to state that a claimant can file "a civil action under this section"—§ 2409a—to adjudicate a disputed title in which the United States claims an interest. Regardless of how one reads the clause, however, it does not alter the APA's clear command that suits seeking relief forbidden by other statutes are not authorized by the APA. And the QTA forbids the relief sought here: injunctive relief forcing the Government to relinquish title to Indian lands.

Even if the majority were correct that the QTA itself reached only as far as ordinary quiet title actions, that would establish only that the QTA does not expressly forbid the relief Patchak seeks. The APA, however, does not waive the Government's sovereign immunity where any other statute "expressly *or impliedly* forbids the

4. The majority notes that some States permit a broader class of claims under the rubric of "quiet title," and points to the "'wide differences in State statutory and decisional law' on quiet title suits" at the time of the Act. *Ante,* at 2206, n. 4. But that substantial variation only illustrates the artificiality of the majority's claim that the Act only "addresses quiet title actions, as *ordinarily* conceived." *Ante,* at 2207, n. 5.

5. I recognize, of course, that the QTA is titled "[a]n Act to permit suits to adjudicate certain real property quiet title actions." 86 Stat. 1176. But "the title of a statute . . . cannot limit the plain meaning of [its] text." *Trainmen v. Baltimore & Ohio R. Co.,* 331 U.S. 519, 528–529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). As explained above, the substance of Congress' enactment plainly extends more broadly than quiet title actions, mirroring the scope of the title proposed by the Government. See *supra,* at 2203.

relief which is sought." 5 U.S.C. § 702 (emphasis added). The text and history of the QTA, as well as this Court's precedent, make clear that the United States intended to retain its sovereign immunity from suits to dispossess the Government of Indian trust land. Patchak's suit to oust the Government of such land is therefore, at minimum, impliedly forbidden.[6]

II

Three consequences illustrate the difficulties today's holding will present for courts and the Government. First, it will render the QTA's limitations easily circumvented. Although those with property claims will remain formally prohibited from bringing APA suits because of *Block*, savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting only an "aesthetic" interest in the land but seeking an identical practical objective—to divest the Government of title and possession. § 2409a(a), (b). Nothing will prevent them from obtaining relief that the QTA was designed to foreclose.

Second, the majority's holding will frustrate the Government's ability to resolve challenges to its fee-to-trust decisions expeditiously. When a plaintiff like Patchak asserts an "aesthetic" or "environmental" concern with a planned use of Indian trust land, he may bring a distinct suit under statutes like the National Environmental Policy Act of 1969 and the Indian Gaming Regulatory Act. Those challenges generally may be brought within the APA's ordinary 6–year statute of limitations. Suits to contest the Government's decision to take title to land in trust for Indian tribes, however, have been governed by a different rule. Until today, parties seeking to challenge such decisions had only a 30–day window to seek judicial review. 25 CFR § 151.12 (2011); 61 Fed.Reg. 18,082–18,083 (1996). That deadline promoted finality and security—necessary preconditions for the investment and "economic development" that are central goals of the Indian Reorganization Act. *Ante*, at 2210.[7] Today's result will promote the opposite, retarding tribes' ability to develop land until the APA's 6–year statute of limitations has lapsed.[8]

Finally, the majority's rule creates substantial uncertainty regarding who exactly is barred from bringing APA claims. The majority leaves unclear, for instance, whether its rule bars from suit only those who "claim any competing interest" in the disputed land in their complaint, *ante*, at 2206, or those who could claim a competing interest, but plead only that the Government's title claim violates a federal statute. If the former, the majority's holding would allow Patchak's challenge to go forward even if he had some personal interest in the Bradley Property, so long as his complaint did not assert it. That result is difficult to square with *Block* and *Mottaz*. If the latter, matters are even more peculiar. Because a shrewd plaintiff will avoid referencing her own property claim in her

6. Because I conclude that sovereign immunity bars Patchak's suit, I would not reach the question of whether he has standing.

7. Trust status, for instance, is a prerequisite to making lands eligible for various federal incentives and tax credits closely tied to economic development. See, *e.g.*, App. 56. Delayed suits will also inhibit tribes from investing in uses other than gaming that might be less objectionable—like farming or office use.

8. Despite notice of the Government's intent through an organization with which he was affiliated, Patchak did not challenge the Government's fee-to-trust decision even though the organization did. See *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (C.A.D.C.2008). Instead, Patchak waited to sue until three years after the Secretary's intent to acquire the property was published. App. 35, 39.

complaint, the Government may assert sovereign immunity only if its detective efforts uncover the plaintiff's unstated property claim. Not only does that impose a substantial burden on the Government, but it creates perverse incentives for private litigants. What if a plaintiff has a weak claim, or a claim that she does not know about? Did Congress really intend for the availability of APA relief to turn on whether a plaintiff does a better job of overlooking or suppressing her own property interest than the Government does of sleuthing it out?

As these observations illustrate, the majority's rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the "national public interest" demanded should remain immune from challenge. Congress did not intend either result.

* * *

For the foregoing reasons, I would hold that the QTA bars the relief Patchak seeks. I respectfully dissent.

William Smoak FAIREY, Jr., aka Doak Fairey

v.

Kenneth S. TUCKER, Secretary, Florida Department of Corrections, et al.

No. 11–7185.

June 18, 2012.

The petition for a writ of certiorari is denied.

Justice SOTOMAYOR, dissenting from denial of certiorari.

Petitioner William Fairey was tried *in absentia* and without counsel on state felony charges. Although Fairey had not received actual notice of his trial date, the state court concluded that he had waived his right to be present when he failed to appear in court on the scheduled trial date. The State tried Fairey in his absence and, without having heard any defense, the jury found Fairey guilty. The court sentenced him to eight years' imprisonment and $25,000 in restitution. Fairey sought relief on the ground that his trial *in absentia* violated the Sixth and Fourteenth Amendments. After exhausting state remedies, he filed a federal petition for writ of habeas corpus. The District Court denied relief. Both the District Court and the United States Court of Appeals for the Fourth Circuit denied a certificate of appealability (COA).

I believe a COA should have issued; at the very least, "the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). An accused's right to be present at his own trial is among the most fundamental rights our Constitution secures. In view of the importance of the right involved and the obvious error here, I would grant the petition for a writ of certiorari and summarily reverse the judgment below.

I

In early 1998, South Carolina served Fairey with an arrest warrant for obtaining goods and moneys under false pretenses, a state felony. Fairey was released on his personal recognizance and the State dismissed the warrant. Some time later, Fairey moved from South Carolina to Sarasota, Florida. In 2001, South

BIG LAGOON RANCHERIA, a federally recognized Indian tribe, Plaintiff–Appellee–Cross–Appellant,

v.

State of CALIFORNIA, Defendant–Appellant–Cross–Appellee.

Nos. 10–17803, 10–17878.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 6, 2012.

Filed Jan. 21, 2014.

Background: Indian tribe brought action alleging that State violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on a particular 11-acre parcel of land. The United States District Court for the Northern District of California, Claudia Wilken, P.J., granted summary judgment for the tribe, 759 F.Supp.2d 1149, but, subsequently, granted State's motion for a stay pending appeal, 2012 WL 298464. Both parties appealed.

Holdings: The Court of Appeals, Block, District Judge, sitting by designation, held that:

(1) tribe's right to request negotiations under the IGRA depends on it having jurisdiction over Indian lands on which it proposed to conduct gaming;

(2) the State could waive the IGRA's "Indian lands" requirement;

(3) State's challenge to entrustment of 11-acre parcel of land to tribe was timely; and

(4) 11-acre parcel of land did not constitute "Indian lands" over which tribe could demand negotiations.

Reversed and remanded.

Rawlinson, Circuit Judge, filed a dissenting opinion.

1. Federal Courts ⚿3604(4), 3675

Court of appeals reviews a district court's summary judgment de novo, and must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

2. Indians ⚿337(3)

A state need not negotiate with a tribe under the Indian Gaming Regulatory Act (IGRA) unless the tribe has jurisdiction over Indian lands; as a corollary, jurisdiction over Indian lands is a prerequisite to a suit to compel negotiation under IGRA. Indian Gaming Regulatory Act, §§ 2–22, 25 U.S.C.A. §§ 2701–2721.

3. Indians ⚿337(3)

An Indian tribe's right to request negotiations, and to sue if the state does not negotiate in good faith, under the IGRA, depends on its having jurisdiction over Indians lands on which it proposes to conduct class III gaming. Indian Gaming Regulatory Act, § 11(d)(3)(A), 25 U.S.C.A. § 2710(d)(3)(A).

4. Federal Courts ⚿2077

An objection to subject-matter jurisdiction cannot be waived.

5. Federal Courts ⚿2213, 2349

A claim depending on a particular construction of federal law falls within federal-question jurisdiction, even if the court ultimately rejects the plaintiff's construction; a district court lacks jurisdiction over a federal-question claim only if the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or if such a claim

is wholly insubstantial and frivolous. 28 U.S.C.A. § 1331.

6. Indians ⚿337(3)

A state may waive the IGRA's requirement that an Indian tribe have Indian lands to compel negotiations. Indian Gaming Regulatory Act, § 11(d)(3)(A), 25 U.S.C.A. § 2710(d)(3)(A).

7. Federal Courts ⚿2077

One may stipulate to facts from which jurisdiction may be inferred.

8. Federal Courts ⚿3392

District court addressed State's argument challenging Indian tribe's right to negotiate under the Indian Gaming Regulatory Act (IGRA) for a casino on a particular 11-acre parcel of land, and therefore the issue was preserved for appeal. Indian Gaming Regulatory Act, §§ 2–22, 25 U.S.C.A. §§ 2701–2721.

9. Administrative Law and Procedure ⚿305

Administrative actions taken in violation of statutory authorization or requirement are of no effect.

10. Limitation of Actions ⚿58(1)

Indian tribe's suit to compel negotiations with the State for a casino on 11-acre parcel of land entrusted to the Indian tribe by the Bureau of Indian Affairs (BIA) triggered six-year limitations period for State to challenge the entrustment; Indian tribe's suit to compel negotiations was the most apt analogue to application/enforcement of the entrustment. 28 U.S.C.A. § 2401(a).

11. United States ⚿133

A challenge to unauthorized federal agency action is subject to a six-year time limit. 28 U.S.C.A. § 2401(a).

12. Indians ⚿152

The federal government's authority to acquire land for Indians is limited to acquisitions for tribes that were under the federal jurisdiction of the United States when the Indian Reorganization Act (IRA) was enacted. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

13. Indians ⚿152, 337(3)

Indian tribe purportedly entrusted with an 11-acre parcel of land by the Bureau of Indian Affairs (BIA) was not under federal jurisdiction when the IRA was enacted, and therefore the BIA did not have authority to acquire the land for the Indian tribe, and the parcel did not constitute "Indian lands" over which the Indian tribe could demand negotiations under the Indian Gaming Regulatory Act (IGRA) to conduct gaming; there was no family or other group on the 11-acre parcel of land when the IRA was enacted, and thus no group to organize pursuant to the central purpose of the IRA. Indian Reorganization Act, § 16, 25 U.S.C.A. § 476; Indian Gaming Regulatory Act, §§ 4(4), 25 U.S.C.A. § 2703(4).

See publication Words and Phrases for other judicial constructions and definitions.

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Peter J. Engstrom, Baker & McKenzie LLP, San Francisco, CA, for Plaintiff–Appellee–Cross–Appellant.

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, District Judge, Presiding. D.C. No. 4:09–CV–01471–CW.

Before: STEPHEN S. TROTT and JOHNNIE B. RAWLINSON, Circuit Judges, and FREDERIC BLOCK, District Judge.*

Opinion by Judge BLOCK; Dissent by Judge RAWLINSON.

OPINION

BLOCK, District Judge:

The State of California ("the State") has entered into an agreement allowing Big Lagoon Rancheria ("Big Lagoon") to operate a casino on an eleven-acre parcel of land in Humboldt County, California. It did so, however, only because the district court ordered it to negotiate with Big Lagoon under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. The State appeals that order and, for the following reasons, we reverse.

I

A. Historical Background and *Carcieri*

Big Lagoon is situated on two parcels of land along the shore of the eponymous lagoon in Northern California. The eleven-acre parcel on which Big Lagoon proposes to operate a casino was acquired by the United States, acting through the Bureau of Indian Affairs ("BIA"), in 1994.[1] However, to understand the background of the case, we must go further back in time to 1918, when the BIA purchased another parcel—a nine-acre tract adjacent to the eleven-acre parcel—as a homestead for James Charley and his family. According to contemporaneous BIA records, the purchase was paid out of an appropriation "to purchase land for village homes for the landless Indians of California."

By 1921, Charley had died and his widow had moved, with their children, to Trinidad, California. Charley's son Robert may have lived on the nine-acre parcel from 1942 to 1946, but the land was otherwise vacant for more than 30 years. In 1954 or thereabouts, Thomas Williams—Robert's nephew by marriage—and his wife, Lila, received the BIA's permission to camp on the land, but made no claim to ownership.

The 1950s ushered in a major change in Indian policy, from isolation to assimilation. As part of the change, the federal government moved to dissolve reservations and other tribal entities and distribute their lands to individual tribe members. The policy came to California with the enactment of the California Rancheria Termination Act, Pub.L. No. 85–671, 72 Stat. 619, in 1958. The Act mandatorily dissolved some 43 rancherias—the term for small Indian settlements in California—although some were later restored. *See Tillie Hardwick v. United States,* No. 79–1710 (N.D. Cal. stipulated judgment entered 1983). A 1964 amendment to the Act allowed any rancheria to request dissolution and distribution. *See* Pub.L. No. 88–419, 78 Stat. 390.

The Williamses apparently came to consider the nine-acre parcel a rancheria because they applied for dissolution and distribution in 1967. A 1968 BIA memorandum, by contrast, notes that the parcel "was not set aside for any specific tribe, band or group of Indians" when it was acquired in 1918. It further notes that the occupants "have not formally or-

* The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

1. The BIA is part of the Department of the Interior. In this case, there is no meaningful distinction between the two. We therefore use "BIA" to refer to the bureau, its agency, and the agency's secretary.

ganized" and did not have "allotments or formal assignments." The BIA nevertheless approved distribution to the Williamses and their daughter and son-in-law—who were also living on the land—in 1968.

The proposed distribution never took place because, for reasons unknown, the Williamses withdrew their request. But the 1968 distribution list forms the basis for membership in Big Lagoon as it exists today. The tribe first appeared on a 1979 list of "Indian Tribal Entities That Have a Government-to-government Relationship With the United States." 44 Fed.Reg. 7325 (Feb. 6, 1979). It has consistently appeared on similar lists since. *See, e.g.,* 78 Fed.Reg. 26384–02 (May 6, 2013) ("Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs"). Its roughly two dozen members trace their ancestry, not to Charley, but to his son's wife's nephew.

As noted, the BIA purchased the eleven-acre parcel in 1994. It took the land "in Trust for Big Lagoon Rancheria, a Federally Recognized Indian Rancheria" pursuant to 25 U.S.C. § 2202. That statute, in turn, is based on 25 U.S.C. § 465, which authorizes the BIA to acquire land "for the purpose of providing lands to Indians." Title is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.*

Section 465 was enacted as part of the Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 985. Another section of the IRA defines "Indian" as including

> 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 ... all other persons of one-half or more Indian blood.

Id. § 19, 48 Stat. 988 (codified at 25 U.S.C. § 479).

In *Carcieri v. Salazar,* 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), the Supreme Court held that the phrase "now under Federal jurisdiction" "unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395, 129 S.Ct. 1058. Thus, under *Carcieri,* the BIA lacks authority to acquire land in trust for tribes that were not under federal jurisdiction in 1934. *See id.* at 388, 129 S.Ct. 1058 ("[T]he Secretary's authority to take the parcel in question into trust depends on whether the Narragansetts are members of a 'recognized Indian Tribe now under Federal jurisdiction.' ").[2]

B. Indian Gaming and IGRA

Beginning in the 1970s, the State and several Indian tribes came into conflict over the operation of bingo halls on Indian lands. The conflict culminated in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), in which the Supreme Court held that state regulation of gaming on Indian lands "would impermissibly infringe on tribal government." *Id.* at 222, 107 S.Ct. 1083.

2. The Court rejected the argument that § 2202, cited above, is an independent grant of authority to acquire land: "Rather, § 2202 by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe." *Carcieri,* 555 U.S. at 394, 129 S.Ct. 1058.

Congress responded by enacting IGRA, which assigns authority to regulate gaming to tribal and state governments according to the class of gaming involved. "Class III" gaming—which includes the casino-type gambling at issue here—is allowed on Indian lands only if "conducted in conformance with a Tribal–State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). Such compacts are the result of negotiations requested by the "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted." *Id.* § 2710(d)(3)(A). "Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*

If negotiations are successful, the resulting compact goes to the BIA for approval. *See id.* § 2710(d)(3)(B). If not, the tribe may sue in the district court. *See id.* § 2710(d)(7)(A)(i). If the district court concludes that the State has failed to negotiate in good faith, it must order the parties to reach an agreement. *See id.* § 2710(d)(7)(B)(iii). If no agreement is reached after 60 days, the court orders each party to submit a proposed compact to a court-appointed mediator, who selects "the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Id.* § 2710(d)(7)(B)(iv). If the State is unwilling to accept the mediator's selection, the matter is referred to the BIA, which must then develop procedures "under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." *Id.* § 2710(d)(7)(B)(vii)(II).

A unifying thread running through the statutory provisions relating to class III gaming is the concept of "Indian lands." Such lands are where the gaming activities are to take place and it is the tribe "having jurisdiction" over those lands that requests negotiations and, if necessary, institutes legal action. IGRA defines "Indian lands" as

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power.

Id. § 2703(4).

C. Negotiation History

In 1998 and 1999, the State proposed a model compact to tribes seeking to offer class III gaming on their lands, including Big Lagoon. Most tribes accepted the State's model compact; Big Lagoon did not. Instead, it filed suit in the district court, alleging that the State had failed to negotiate in good faith under IGRA.

As the litigation proceeded, the State and Big Lagoon continued to negotiate in an effort to reach a mutually acceptable agreement. Those negotiations bore fruit in 2005, when the parties agreed that Big Lagoon, along with another group, would be allowed to operate a casino on non-Indian lands in Barstow. As part of the settlement, the lawsuit was dismissed without prejudice.

The settlement proved illusory, however, because the California Legislature did not ratify the agreement, as required by state law. The so-called Barstow Compact lapsed by its own terms in September 2007.

On September 18, 2007, Big Lagoon sent the State a written request for new negotiations "for the purpose of entering into a Tribal–State compact governing the conduct of Class III gaming activities on the trust lands that constitute the Big Lagoon Rancheria." A principal point of conten-

tion that arose during the resultant negotiations concerned the site of the casino. The State was reluctant to allow the casino to be built near the "environmentally significant State resources located adjacent to the rancheria."

The State ranked its siting preferences as follows:

1. locating a 500–device casino and a 100–room hotel on a site approximately five miles from the rancheria;
2. locating a 250–device casino on the nine-acre parcel, a 50–room hotel on the eleven-acre parcel, and parking on a separate parcel owned by Big Lagoon; and
3. locating a 175–device casino on the nine-acre parcel, a 50–room hotel on the eleven-acre parcel, and dividing parking between the two parcels.

The State conditioned the second and third options on compliance with a list of environmental mitigation measures. In addition, all three options included a proviso that Big Lagoon would share a percentage of its revenue with the State in exchange for an exclusive right to operate a casino within a 50–mile radius.

Big Lagoon responded that "possible sites other than the Tribe's existing trust lands would have to be rejected." It noted that it had always planned to site the casino and all related development on the eleven-acre parcel, and that it "continue[d] to believe that this is the best utilization of the Tribe's trust lands."

In its response, the State reiterated the parties' "difference of opinion on the eligibility of the 11–acre parcel for gaming." It apparently acquiesced in Big Lagoon's demand to site all development on that parcel, but proposed a 99–device casino and 50–room hotel. The State's proposal was again conditioned on compliance with environmental mitigation measures, as well as revenue sharing.

Big Lagoon rejected the proposal. In a letter dated October 6, 2008, it demanded permission to operate a 350–device casino and 100–room hotel on the eleven-acre parcel. It agreed in principle to environmental mitigation measures, but, with respect to revenue sharing, refused "to pay the State what simply amounts to a tax." It informed the State that it would file suit if an agreement was not reached by November 7.

In response, the State agreed to allow Big Lagoon to operate a casino and hotel "on the Rancheria," without distinguishing between the nine-acre and eleven-acre parcels. Although it acquiesced in the size of both the proposed casino and hotel, it objected to housing them in a tower of the height proposed by Big Lagoon. The State also continued to insist on revenue sharing, as well as specific environmental measures.

D. Litigation History

Apparently unsatisfied with the State's latest offer, Big Lagoon filed a second lawsuit on April 3, 2009. In its answer, the State admitted that "Big Lagoon is currently on a list of federally recognized tribes, [and] that the United States considers the Rancheria to be the trust beneficiary of certain lands the federal government owns in Humboldt County, California." As an "affirmative defense," however, it alleged that

> Big Lagoon is not entitled to injunctive relief compelling Governor Arnold Schwarzenegger to negotiate a Compact authorizing class III gaming on land taken in trust for the Rancheria subsequent to October 17, 1988, because Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to 25

> U.S.C. § 465 and, thus, was never entitled to a beneficial interest in that land.

After discovery, both Big Lagoon and the State moved for summary judgment. In its memorandum of law, the State argued, *inter alia,* that "[i]t is against the public interest to allow gaming on land that ... the United States unlawfully acquired in trust for [Big Lagoon]." Citing *Carcieri,* it argued that the eleven-acre parcel was "not 'Indian lands' eligible for gaming under IGRA" because Big Lagoon was not a tribe under federal jurisdiction in 1934. As an alternative to entering summary judgment in its favor, the State asked the district court to deny or continue Big Lagoon's motion pending further discovery pursuant to Federal Rule of Civil Procedure 56(f) (now Federal Rule of Civil Procedure 56(d)).

At oral argument on the motions, the district court opined that the status of the eleven-acre parcel was an issue separate from the State's obligation to negotiate in good faith: "Whether it's in the public interest or not, it might not be legal." In addition, the State conceded that it was not challenging the status of the nine-acre parcel.

In a decision dated November 22, 2010, the district court held that the State had not, as a matter of law, negotiated in good faith. It addressed the status of the eleven-acre parcel as both bearing on the good faith of the State's negotiation position and as a stand-alone issue. With respect to good faith, the district court reasoned that the State could not rely on *Carcieri* as evidence of its good faith because the case post-dated the negotiations: "The State cannot establish that it negotiated in good faith through a *post hoc* rationalization of its actions." As a stand-alone issue, it concluded that the status of the eleven-acre parcel was irrelevant:

> [T]he State does not dispute that [Big Lagoon] is currently recognized by the federal government or that it has lands on which gaming activity could be conducted. On these facts, [Big Lagoon] is entitled to good faith negotiation with the State toward a gaming compact. That the status of the eleven-acre parcel may be in question does not change this result.

The district court also addressed the State's proposal for revenue sharing. In so doing, it cited *Rincon Band of Luiseño Mission Indians v. Schwarzenegger,* 602 F.3d 1019 (9th Cir.2010), in which we held that "a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing provision is (a) for uses 'directly related to the operation of gaming activities' ..., (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.' " *Id.* at 1033 (quoting *In re Indian Gaming Related Cases,* 331 F.3d 1094 (9th Cir.2003)). The district court extended the reasoning of *Rincon* to the State's proposal for environmental mitigation. It concluded that both revenue sharing and environmental mitigation could be appropriate topics of negotiation under the circumstances described in *Rincon,* but that the State's nonnegotiable insistence on them amounted to bad faith.

Implementing its rulings, the district court granted Big Lagoon's motion for summary judgment and denied the State's. It denied the State's request for a Rule 56(f) continuance because "the status of [Big Lagoon] and its eleven-acre parcel has no bearing on whether the State negotiated in good faith." It ordered the parties to either conclude a compact within 60 days, or to submit their respective proposals to a court-appointed mediator. Both

the State and Big Lagoon timely appealed.[3]

The district court initially declined to stay its order pending appeal. Accordingly, the parties continued to negotiate. Unable to reach an agreement, they submitted their last, best proposals to a mediator. In its proposal, the State agreed to forgo all revenue sharing if Big Lagoon would agree to comply with specified environmental mitigation measures. Big Lagoon, on the other hand, offered to prepare a non-binding environmental impact report and to negotiate towards an environmental mitigation agreement with the appropriate agency. It also agreed to contribute revenue to gaming-related trust funds.

Apart from revenue sharing and environmental mitigation, both proposals were substantially similar. In particular, both identified the site of the casino as "within the boundaries of the Tribe's eligible Indian lands." Although that language does not specify the nine-acre or eleven-acre parcel, nothing in the record suggests that Big Lagoon has altered its plan to build the casino on the latter.

The mediator found that "[i]n light of the stringent, broad, and very substantial environmental and design requirements" in the State' proposal, "the compact that best comports with the terms of IGRA, applicable federal law, and [the district court's order] is clearly [Big Lagoon's]." The district court then stayed further proceedings.

II

[1] We review the district court's summary judgment *de novo,* "and must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir.2000) (en banc). The State challenges only the district court's legal conclusion that Big Lagoon was entitled to good-faith negotiation under IGRA, and we confine our review accordingly.

In essence, the State argues that the district court erred in compelling negotiations in the face of evidence that the eleven-acre parcel does not qualify as "Indian lands" under IGRA. It raises the issue principally as a question of whether the district court should have given it more time to develop the facts supporting that argument. Big Lagoon responds that the district court did not abuse its discretion in that regard because the State had ample time to conduct discovery.

In our view, there is more at stake in this case than a discovery dispute. We think it requires us to answer three questions: Must a tribe have jurisdiction over "Indian lands" to compel negotiations? Has the State waived the "Indian lands" requirement? Is the eleven-acre parcel "Indian lands"? We answer those questions in turn.

A. Must a tribe have jurisdiction over "Indian lands" to compel negotiations?

In *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.,* 531 F.3d 767 (9th Cir.2008), we described IGRA as requiring a tribe to "show that it has 'Indian lands' as defined by IGRA at the time of filing [suit]." *Id.* at 778. We further agreed with the Sixth Circuit's statement that "it is clear that the State does not have an obligation to negotiate with an Indian tribe

3. The district court's order was reduced to judgment on February 1, 2012, thus remedying any possible concern that the notices of appeal were premature. *See* Fed. R.App. P. 4(a)(2).

until the tribe has Indian lands." *Id.* (quoting *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir.2002)).

[2] Although *Guidiville* did not involve a claim for negotiation under IGRA,[4] we stand by its reasoning. We hold, therefore, that a state need not negotiate with a tribe under IGRA unless the tribe has jurisdiction over Indian lands. As a corollary, jurisdiction over Indian lands is a prerequisite to a suit to compel negotiation under IGRA.

The district court concluded that this prerequisite was satisfied because the State conceded that the nine-acre parcel acquired by the BIA was Indian land. This concession, the court continued, entitled Big Lagoon to good-faith negotiations regardless of the status of the eleven-acre parcel.

We disagree. The IGRA grants the right to request negotiations to the tribe having jurisdiction over "the Indian lands *upon which a class III gaming activity is being conducted, or is to be conducted.*" 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The plain meaning of the highlighted language is that a tribe may only request negotiations to conduct gaming on a particular piece of Indian land over which it has jurisdiction.

The Sixth Circuit described the practical significance of § 2710(d)(3)(A) as follows:

> The purposes of this requirement appear to be to ensure that the casino will be inside the borders of the State, to give the State notice of where it will be, and to require the tribe to have a place for the casino that has been federally approved.

Engler, 304 F.3d at 618. Although the tribe's ownership of Indian lands was not at issue in *Engler*, the same commonsense concerns support our reading of the statute. If the statute required only that a tribe have jurisdiction over Indian lands, whether or not those lands were to be the site of gaming activity, a tribe with jurisdiction over Indian lands could compel a state to negotiate for a compact to operate a casino on any other parcel. But IGRA authorizes compacts "governing gaming activities *on the Indian lands of the Indian tribe.*" 25 U.S.C. § 2710(d)(3)(B) (emphasis added).

[3] In sum, the only reasonable construction of § 2710(d)(3)(A) is that a tribe's right to request negotiations—and to sue if the state does not negotiate in good faith—depends on its having jurisdiction over Indians lands on which it proposes to conduct class III gaming. Big Lagoon's insistence that gaming be conducted on the eleven-acre parcel tells us that it is the status of that parcel that matters. The status of the nine-acre parcel is, as the State agreed at oral argument, "an irrelevancy."

B. Has the State waived the "Indian lands" requirement?

[4] Before addressing whether the State has waived the "Indian lands" requirement, we briefly respond to the State's contention that a lack of Indian lands deprives the district court of subject-matter jurisdiction to compel negotiations under IGRA. An objection to subject-matter jurisdiction cannot be waived. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

4. The issue in *Guidiville* was whether a contract violated a statute requiring BIA approval of contracts encumbering Indian lands for more than seven years. *See* 531 F.3d at 774–75 (citing 25 U.S.C. § 81(a)).

[5] A district court has jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A claim depending on a particular construction of federal law falls within this federal-question jurisdiction, even if the court ultimately rejects the plaintiff's construction. *See Bell v. Hood,* 327 U.S. 678, 685, 66 S.Ct. 773, 90 L.Ed. 939 (1946) ("[T]he right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction."). A district court lacks jurisdiction over a federal-question claim only if "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or [if] such a claim is wholly insubstantial and frivolous." *Id.* at 682–83, 66 S.Ct. 773.

[6, 7] A claim for negotiations under IGRA, by definition, arises under a law of the United States. Big Lagoon's claim is neither immaterial nor frivolous. That the parties dispute the proper construction of IGRA does not transform their dispute into a question of subject-matter jurisdiction. In addition, we infer from IGRA's structure that Congress did not intend the "Indian lands" requirement to be an implicit restriction on the district court's general federal-question jurisdiction. *See Arbaugh,* 546 U.S. at 515, 126 S.Ct. 1235 ("[W]hen Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character.") (footnote and citation omitted). Thus, we conclude that a state may waive the requirement.[5]

As Big Lagoon points out, the State engaged in negotiations for almost ten years without ever challenging the status of the tribe's lands. What a state may voluntarily do, however, is different than what it can be compelled to do under IGRA. In the Barstow Compact, for example, Big Lagoon agreed to request that the BIA take the proposed site into trust. Yet under our decision in *Guidiville,* it could not have compelled the State to negotiate over that site. *See* 531 F.3d at 778 ("[T]he Indian tribe must show that it has 'Indian lands' as defined by IGRA at the time of filing.").

Big Lagoon further argues that the State conceded the point now on appeal in its answer, which was filed two months after *Carcieri* was decided. In our view, however, the answer manifests the State's awareness of *Carcieri* and intent to rely on it. The State admitted that "the United States *considers* [Big Lagoon] to be the trust beneficiary of certain lands the federal government owns in Humboldt County, California." Any doubt that the State chose its words carefully is dispelled by its allegation that "Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to 25 U.S.C. § 465." While the State inartfully characterized the allegation as an affirmative defense, it is a clear invocation of *Carcieri.*

[8] The State continued to advance its argument at the summary judgment stage, devoting several pages to explaining exact-

5. In contrast to the eleven-acre parcel, the State has explicitly conceded that the nine-acre parcel is Indian land. We hold the State to that concession. Indeed, we would do so even if the statutory limitation were jurisdictional because "it is well-settled that one may stipulate to facts from which jurisdiction may be inferred." *Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 589 F.2d 974, 977 (9th Cir.1978) (quoting *De La Maza v. United States,* 215 F.2d 138, 140 (9th Cir.1954)). As we have held, however, the status of the nine-acre parcel is not dispositive.

ly why the BIA's 1994 trust acquisition was unlawful under *Carcieri.* To be sure, the argument was cast as bearing on the State's good faith during negotiations; like the district court, we fail to see the connection. Nevertheless, the district court obviously understood the State's argument as challenging Big Lagoon's right to negotiate for a casino on the eleven-acre parcel, and addressed it as such in its written decision. Thus, the issue was preserved for our review. *See Ahanchian v. Xenon Pictures, Inc.,* 624 F.3d 1253, 1260 n. 8 (9th Cir.2010) (rule against raising issues for first time on appeal "does not apply where the district court nevertheless addressed the merits of the issue" (citation and internal quotation marks omitted)).

C. Is the eleven-acre parcel "Indian lands"?

We thus come to the heart of our inquiry: Is the eleven-acre parcel "Indian lands"? Our dissenting colleague reasons that we are compelled to answer in the affirmative based on our statement in *Guidiville* that Congress's use of the present-tense verb *is* to define "Indian lands" requires us to assess the status of land in question at the time of the contract. *See* 531 F.3d at 775. We agree that the statement informs our conclusion that, to demand negotiation under IGRA, the site of the proposed gaming must be "Indian lands" at the time of the demand. *See supra* Part II.A. However, its usefulness to us ends there.

In *Guidiville,* we held that land to be entrusted *in the future* did not qualify as "Indian lands," *see* 531 F.3d at 775. Here, by contrast, we are called upon to decide whether a *past* entrustment qualifies if it turns out to have been invalid. *Guidiville* does not speak to that issue. Nor does *Carcieri,* which involved a contemporaneous challenge to an entrustment under the Administrative Procedure Act ("APA"). *See* 555 U.S. at 385, 129 S.Ct. 1058.[6] We must look elsewhere for guidance.

[9] We find it in the well-worn rule that "administrative actions taken in violation of statutory authorization or requirement are of no effect." *City of Santa Clara v. Andrus,* 572 F.2d 660, 677 (9th Cir.1978) (citing, *inter alia, Utah Power & Light Co. v. United States,* 243 U.S. 389, 392, 37 S.Ct. 387, 61 L.Ed. 791 (1917)). Other courts have used different language, *see, e.g., Employers Ins. of Wausau v. Browner,* 52 F.3d 656, 665 (7th Cir.1995) (unauthorized agency action may be "disregard[ed] ... as void, a nullity"), but the upshot is the same: The law treats an unauthorized agency action as if it never existed.

Big Lagoon and the dissent argue that a timely suit under the APA is the sole means by which to challenge agency action as unauthorized. The dissent cites *Wind River Mining Corp. v. United States,* 946 F.2d 710 (9th Cir.1991), in which we held that the catchall six-year statute of limitations applied to APA actions. *See id.* at 712–13 (citing 28 U.S.C. § 2401(a)). We then explained, however, that different types of challenges to agency actions raise different concerns:

> If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision.... The grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision.... The government's interest in finality outweighs a late-com-

6. Thus, we do not imply that *Carcieri* overruled *Guidiville.*

> er's desire to protest the agency's action as a matter of policy or procedure.
>
> If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. Such challenges, by their nature, will often require a more "interested" person than generally will be found in the public at large.... The government should not be permitted to avoid all challenges to its actions, even if *ultra vires,* simply because the agency took the action long before anyone discovered the true state of affairs.

Id. at 715. Although Wind River spoke in terms of a party's right to affirmatively challenge unauthorized agency action, the D.C. Circuit—whose approach we adopted—has made it clear that the distinction is "equally applicable to defensive attacks in enforcement proceedings." *N.L.R.B. Union v. Federal Labor Relations Auth.,* 834 F.2d 191, 196 n. 6 (D.C.Cir.1987). While we recognize that this case does not involve an enforcement proceeding in the usual sense, we see no reason to treat a third party's enforcement of a right stemming from agency action differently from enforcement by the agency itself.

The concerns we raised in *Wind River* are present here. The 1994 entrustment, standing alone, might not have caused the State any concern. *Cf. North County Community Alliance, Inc. v. Salazar,* 573 F.3d 738, 743 (9th Cir.2009). One might even question whether the State had standing at that time to challenge the BIA's action under the APA. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").[7]

[10, 11] It is true—at least in this circuit—that a challenge to unauthorized agency action is still subject to a six-year time limit. *Cf. Schiller v. Tower Semiconductor Ltd.,* 449 F.3d 286, 293 (2d Cir. 2006) ("The D.C. Circuit has explained that ... substantive challenges to agency action—for example, claims that agency action is unconstitutional, that it exceeds the scope of the agency's substantive authority, or that it is premised on an erroneous interpretation of a statutory term—have no time bars...."). In *Wind River,* we said that the time runs from "the agency's application of the disputed decision to the challenger." 946 F.2d at 716. Once again bearing in mind that there is no direct agency involvement in this case, we think the most apt analogue to application/enforcement of the 1994 entrustment is Big Lagoon's suit to compel negotiations. As noted above, *see supra* Part II.B., the State promptly challenged the entrustment in response to that suit. We must, therefore, address its challenge on the merits.

As noted, IGRA defines "Indian lands" as

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is ... held in trust by the United States for the benefit of any Indian tribe or individual ... and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

The term "reservation" is not further defined. Historically, it referred to the

7. Contrast *Carcieri,* in which the State of Rhode Island was aware that the entrustment was proposed by the Narragansett Indian Tribe with the express purpose of "free[ing] itself from compliance with local regulations." 555 U.S. at 385, 129 S.Ct. 1058.

land "reserved" from a cession of lands from a tribe to the United States. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 3.04[2][c][ii] (2005 ed.). Beginning in the 1850s, it came to include public lands "reserved" by the federal government for Indian use. *See id.* In other words, land is part of a reservation if it was (1) withheld from a cession of tribal lands or (2) acquired by the federal government for Indian use.

There are, we suppose, cases in which land held in trust for a tribe is, for some reason, not part of the tribe's "reservation." But whether we call the eleven-acre parcel part of Big Lagoon's reservation or not, its status unquestionably stems from the BIA's acquisition of the parcel in trust for the tribe.

[12] Once again, under *Carcieri* the federal government's authority to acquire land for Indians is limited to acquisitions for tribes that "were under the federal jurisdiction of the United States when the IRA was enacted in 1934." 555 U.S. at 395, 129 S.Ct. 1058. The Court did not, however, define what it means for a tribe to be "under federal jurisdiction." *See id.* ("None of the parties or *amici* ... has argued that the Tribe was under federal jurisdiction in 1934.").

[13] Neither party squarely addresses how we should go about deciding whether Big Lagoon was a tribe under federal jurisdiction in 1934. The State says that further discovery will shed light on the issue, but does not explain how. Big Lagoon argues that it has been a federally recognized tribe since at least the time of the compact negotiations, but we are concerned with its status in 1934, not 1999.

A BIA memorandum tells us that a "helpful ... starting point" is a list of 258 tribes compiled shortly after the IRA was enacted, but that the list is "not the only or finally determinative source." *See also Carcieri,* 555 U.S. at 398, 129 S.Ct. 1058 (Breyer, J., concurring) ("[W]e ... know that [the BIA] wrongly left certain tribes off the list."). Big Lagoon's undisputed absence from the list, combined with other facts in the record, leads us to the conclusion that the tribe was not under federal jurisdiction in 1934.

Here is what we know from the record: The BIA's acquisition of land in 1918 was for Charley and his family. All were members of the Lower Klamath Tribe, today known as the Yurok Tribe. The BIA confirmed in 1968 that the 1918 acquisition was "not set aside for any specific tribe, band or group of Indians."

Even if the 1918 acquisition amounted to recognition of Charley and his family as a distinct tribal group, Big Lagoon does not trace its roots to that group. Membership in Big Lagoon is, as noted, based on descent from Thomas Williams, the nephew, by marriage, of Charley's son Robert. According to the BIA, Williams and his family were "not formally organized" in 1968.

We agree with the State that there is much confusion in this narrative. Why, for example, did the BIA conditionally approve the dissolution and distribution of rancheria lands if the lands did not constitute a rancheria in the first place? And how did the group go from "not formally organized" in 1968 to an "Indian Tribal Entit[y] That Ha[s] a Government-to-government Relationship With the United States" in 1979?

These questions are thorny indeed, and perhaps beyond our competence to answer. *See Western Shoshone Bus. Council v. Babbitt,* 1 F.3d 1052, 1057 (10th Cir.1993) (holding that tribe's absence from BIA's list of recognized tribal entities "is dispositive"). But they do not detract from one undisputed fact: There was no family or other group on what is now the Big La-

goon Rancheria in 1934. The central purpose of the IRA was to give "[a]ny Indian tribe, or tribes, residing on the same reservation ... the right to organize for its common welfare." Ch. 576, § 16, 48 Stat. 987 (codified, as amended, at 25 U.S.C. § 476). Since no one resided on what is now the rancheria, there was no group to organize. The absence of Big Lagoon from the 258–tribe list was not an intentional or inadvertent omission; it was a reflection of reality.

As we have held, a predicate to the right to request negotiations under the IGRA is jurisdiction over the Indian lands upon which a tribe proposes to conduct class III gaming. IGRA defines "Indian lands" as including lands held in trust for a tribe. *Carcieri* holds that the BIA's authority to take lands in trust for a tribe extends only to tribes under federal jurisdiction in 1934. Thus, the effect of our conclusion that Big Lagoon is not such a tribe is that Big Lagoon cannot demand negotiations to conduct gaming on the eleven-acre parcel, and cannot sue to compel negotiations if the State fails to negotiate in good faith.

III

We appreciate that Big Lagoon has spent an enormous amount of time attempting to negotiate for a casino on the eleven-acre parcel. And we do not doubt that the State's negotiation position was defined, at least in part, by its belief that the casino should be sited elsewhere. But *Carcieri*, however fortuitously, gives the State the right to refuse to negotiate the siting issue.[8] Accordingly, the district court's order compelling negotiations is

REVERSED and REMANDED with instructions to enter judgment for the State.[9]

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent from the conclusion that the eleven-acre parcel held in trust by the United States for the benefit of Big Lagoon Rancheria does not constitute "Indian lands" under the Indian Gaming Regulatory Act (IGRA).

For purposes of gaming matters, IGRA defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which *is* ... held in trust by the United States for the benefit of any Indian tribe or individual ...

25 U.S.C. § 2703(4) (emphasis added).

Use of the verb "is" in the definition of "Indian lands" embodies context that is important to the resolution of this case. In *Guidiville Band of Pomo Indians v. NGV Gaming*, 531 F.3d 767, 769 (9th Cir. 2008), we were similarly tasked with determining the meaning of "Indian lands" as used in 25 U.S.C. § 81. That statute addresses contracts with Indian tribes and defines "Indian lands" as "lands the title to which *is* held by the United States in trust for an Indian tribe ..." 25 U.S.C. § 81(a)(1) (emphasis added).

Applying statutory analysis to § 81, we concluded that the "statute's unequivocal

8. We express no opinion as to whether Big Lagoon's conceded jurisdiction over the nine-acre parcel would entitle it to request good-faith negotiations—and to bring suit to compel such negotiations, if necessary—for a casino on that site. Nor need we address the validity of the 1994 entrustment in any other respect than its effect on the parties' respective rights under IGRA. Accordingly, we deny the State's request for remand to implead the BIA as part of a wholesale challenge to the entrustment.

9. Our disposition makes it unnecessary to address Big Lagoon's cross-appeal.

present tense use of the word 'is' does a tremendous amount of the legwork" in discerning the meaning of "Indian lands." *Id.* at 774. We determined that use of the present tense in § 81(a) "unambiguously prescribe[d]" that the real estate must be held by the United States in trust at the time of the contract. *Id.* at 775. We noted that Congress' use of verb tense is significant to the process of statutory construction. *See id.* at 776. We also observed that Congress' use of the present tense to define Indian lands unambiguously provided that we look to the present, not the past, to determine if the land is held in trust. *See id.* at 770 ("[W]e conclude that the word 'is' means just that (in the most basic, present-tense sense of the word) . . .").

We cross-referenced the statute at issue in this case as defining "Indian lands" in like fashion. *Id.* at 778 ("[S]ee Section 2703(4)(B), defining 'Indian lands' in part as 'any lands title to which *is* held in trust by the United States . . .)' " (emphasis in *Guidiville*).

I am not persuaded that *Carcieri v. Salazar,* 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), overruled our decision in *Guidiville* defining "Indian lands." In *Carcieri,* the United States Supreme Court interpreted 25 U.S.C. § 479, which defines "Indian" generally under the Indian Reorganization Act. *See Carcieri,* 555 U.S. at 381–82, 129 S.Ct. 1058. That statute defines "Indian" as including "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . ." 25 U.S.C. § 479. The Supreme Court interpreted the phrase "now under Federal jurisdiction" in the course of resolving a challenge to the Secretary of the Interior's plan to accept a parcel of land in trust for a particular Indian tribe. *Id.* at 381–82, 129 S.Ct. 1058. In that context, and following a timely challenge to the Secretary's decision under the Administrative Procedure Act, the Supreme Court ruled that the Secretary had no authority to take land into trust for a tribe unless that tribe was under federal jurisdiction when the Indian Reorganization Act was enacted in 1934. *See id.* at 382, 391, 129 S.Ct. 1058.

Importantly, *Carcieri* says nothing about a collateral challenge to the legitimacy of a designation of trust property outside the parameters of the Administrative Procedure Act. As we noted in *Guidiville,* 531 F.3d at 777, 25 U.S.C. § 465, together with its implementing regulations, details an extensive process that precedes the designation of lands as trust property. This process includes "giv[ing] state and local governments the opportunity to object to the tribe's application . . ." In addition, once the final decision is made to designate lands as trust property, any objector may challenge the decision administratively and in the federal courts. *Id.; see also Carcieri,* 555 U.S. at 385, 129 S.Ct. 1058 (noting that objectors sought review under the Administrative Procedure Act of the decision designating lands as trust property).

It is undisputed that until this case, almost eighteen years after the eleven-acre parcel was acquired in trust for Big Lagoon Rancheria, the State of California has not challenged the legality of the trust designation, despite the administrative and judicial avenues available for just that purpose. Surely it cannot be the case that the State of California can launch a collateral attack upon the designation of trust lands years after its administrative and legal remedies have expired. *See, e.g., Wind River Mining Corp. v. United States,* 946 F.2d 710, 716 (9th Cir.1991) (holding that a challenge under the Administrative Procedure Act must be brought within six years of the contested agency action). *Carcieri*

certainly does not come anywhere close to such a holding. Indeed, we cannot say how the Supreme Court would have ruled if the challenger in *Carcieri* had not filed a timely challenge under the Administrative Procedure Act or had sued under a different statute entirely. For that reason, we must adhere to our ruling in *Guidiville.* Because *Carcieri* does not directly overrule *Guidiville,* we cannot rely on *Carcieri* to negate our controlling precedent that directly answers the issue before us. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (en banc). As we have held, "as long as we can apply our prior circuit precedent without running afoul of the intervening authority, we must do so." *Lair v. Bullock,* 697 F.3d 1200, 1207 (9th Cir. 2012) (citation and internal quotation marks omitted). Even if intervening authority creates "some tension" with our precedent or "cast[s] doubt" on our precedent, we must still adhere to our precedent. *Id.* Indeed, unless the intervening authority meets the "high standard" of being "clearly inconsistent" with our precedent, we cannot depart from our authority. *Id.* (citations omitted).

Because *Carcieri* in no wise overruled our prior interpretation of 25 U.S.C. § 2703, purported to address IGRA in any way, or considered an untimely challenge to the designation of trust lands, it is not inconsistent with our precedent, and we are bound by our ruling in *Guidiville* that Indian lands for the purpose of IGRA includes lands held in trust for a tribe at the time of the gaming contract. *See Guidiville,* 531 F.3d at 774–75.

In my view, our decision in *Guidiville* forecloses the State's challenge to the legality of the trust. I would affirm the district court's entry of summary judgment in favor of Big Lagoon Rancheria and its denial of the State's motion for a continuance pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.

Juana NEGRETE–RAMIREZ, Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General, Respondent.

No. 10–71322.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 2011.

Filed Jan. 21, 2014.

Background: Alien, citizen of, applied for asylum, withholding of removal, and relief under Convention Against Torture (CAT). Immigration Judge (IJ) denied those applications. Alien appealed. Board of Immigration Appeals (BIA) dismissed the appeal. Alien petitioned for judicial review.

Holding: The Court of Appeals, Cowen, Circuit Judge for the Third Circuit, sitting by designation, held that alien was not barred from applying for waiver of grounds of inadmissibility.

Petition granted.

Berzon, Circuit Judge, filed concurring opinion.

1. Aliens, Immigration, and Citizenship ⚿301

Alien's post-entry adjustment of status to lawful permanent resident (LPR) after her admission to United States as visitor did not constitute "admission" in context of provision governing waiver of

No further petitions for rehearing or rehearing en banc will be entertained.

BIG LAGOON RANCHERIA, a federally recognized Indian tribe, Plaintiff–Appellee/Cross–Appellant,

v.

State of CALIFORNIA, Defendant–Appellant/Cross–Appellee.

Nos. 10–17803, 10–17878.

United States Court of Appeals, Ninth Circuit.

June 4, 2015.

As Amended on Denial of Rehearing En Banc July 8, 2015.

Background: Indian tribe brought action alleging that state violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on tribal trust land. The United States District Court for the Northern District of California, Claudia Wilken, P.J., granted summary judgment for tribe, 759 F.Supp.2d 1149, but, subsequently, granted state's motion for stay pending appeal, 2012 WL 298464. Both parties appealed. The Court of Appeals, Block, District Judge, sitting by designation, 741 F.3d 1032, reversed and remanded. On remand, the District Court, Wilken, Chief Judge, denied state's motion for continuance to conduct additional discovery. Parties cross-appealed.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:

(1) state's claim that tribe lacked standing to bring the action was a prohibited collateral attack on administrative proceedings;

(2) any claim under Administrative Procedure Act (APA) challenging administrative decision was governed by six-year statute of limitations;

(3) District Court was within its discretion in denying state's motion for continuance to conduct additional discovery; and

(4) tribe's cross-appeal was moot.

Affirmed.

1. Indians ⇨342

State's claim that Indian tribe lacked standing to bring action alleging that it violated the IGRA by failing to negotiate in good faith for a casino on tribal trust land, because tribe was not under federal jurisdiction at time of IRA's enactment, necessarily challenged authority of the Bureau of Indian Affairs (BIA) to take the land into trust for benefit of reorganized tribe, and, thus, the claim was a prohibited collateral attack on administrative proceedings; proper vehicle to make such a challenge was a petition for review pursuant to the Administrative Procedure Act (APA). 5 U.S.C.A. § 551 et seq.; Indian Gaming Regulatory Act, § 11(d)(7)(A)(i), 25 U.S.C.A. § 2710(d)(7)(A)(i); Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

2. Indians ⇨342

Any claim brought by state, pursuant to the Administrative Procedure Act (APA), that Indian tribe lacked standing to bring action alleging that it violated the IGRA by failing to negotiate in good faith for a casino on tribal trust land, because tribe was not under federal jurisdiction at time of IRA's enactment, which necessarily challenged authority of the Bureau of Indian Affairs (BIA) to take the land into trust for benefit of reorganized tribe, was governed by six-year statute of limitations for actions brought against the United States. 5 U.S.C.A. § 551 et seq.; Indian Reorganization Act, § 5, 25 U.S.C.A. § 465; Indian Gaming Regulatory Act, § 11(d)(7)(A)(i),

25 U.S.C.A. § 2710(d)(7)(A)(i); 28 U.S.C.A. § 2401(a).

3. Indians ⚿245

Any claim brought by state, pursuant to the Administrative Procedure Act (APA), challenging determination of the Bureau of Indian Affairs (BIA) recognizing Indian tribe on ground that it was unclear how tribe came to appear on list of "Indian Tribal Entities" was governed by six-year statute of limitations for actions brought against the United States. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a).

4. Federal Civil Procedure ⚿2553

District Court was within its discretion in denying state's motion for continuance to conduct additional discovery, on Indian tribe's motion for summary judgment in its action alleging that state violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on tribal trust land, although issues of whether tribe was properly recognized and whether the land was properly held in trust for its benefit could be relevant to whether state negotiated in good faith, where state was not reasonably diligent in seeking discovery on earlier motion to stay all proceedings except discovery; deadlines for discovery and filing dispositive motions were both extended twice, and state waited until near end of discovery period to serve document subpoena. Indian Gaming Regulatory Act, § 11(d)(7)(A)(i), 25 U.S.C.A. § 2710(d)(7)(A)(i); Fed.Rules Civ.Proc. Rule 56(d), 28 U.S.C.A.

5. Federal Courts ⚿3515

Indian tribe's cross-appeal, in its action alleging that state violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on tribal trust land, challenging District Court's ruling that state's negotiation over environmental measures did not necessarily constitute bad faith was dismissed as moot, where the Court ordered state to reach a gaming compact with tribe, and tribe could receive no further relief on its cross-appeal. Indian Gaming Regulatory Act, § 11(d)(7)(A)(i), 25 U.S.C.A. § 2710(d)(7)(A)(i).

6. Federal Courts ⚿3514

A case is moot on appeal if no live controversy remains at the time the court of appeals hears the case.

Michael A. Pollard, Baker & McKenzie, Chicago, IL, argued the cause for the plaintiff-appellee/cross-appellant. Bruce H. Jackson, Baker & McKenzie, San Francisco, CA filed the briefs for the plaintiff-appellee/cross-appellant Big Lagoon Rancheria. With him on the briefs were Peter J. Engstrom and Irene V. Gutierrez, San Francisco, CA.

Peter H. Kaufman, Deputy Attorney General for the State of California, San Diego, CA, argued the cause for defendant-appellant/cross-appellee the State of California. Kamala D. Harris, Attorney General of California, filed the briefs for the defendant-appellant/cross-appellee. With her on the briefs were Sara J. Drake, Senior Assistant Attorney General, and Randall A. Pinal, Deputy Attorney General, San Diego, CA.

Samuel Hirsch, Acting Assistant Attorney General, Washington, D.C., argued the cause for amicus curiae the United States of America. Robert G. Dreher, Acting Assistant Attorney General filed the brief on behalf of amicus curiae the United States of America in support of the plaintiff-appellee/cross-appellant. With him on the brief were Jennifer Turner and Rebecca Ross, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., and Amber B. Blaha, Elizabeth A.

Peterson, and Kate R. Bowers, United States Department of Justice, Environmental & Natural Resources Division, Washington, D.C.

Kenneth J. Pfaehler, Dentons U.S. LLP, Washington, D.C., filed the brief on behalf of amici curiae National Congress of American Indians, United South and Eastern Tribes, Inc., and The Navajo Nation in support of plaintiff-appellee/cross-appellant. With him on the brief were V. Heather Sibbison and Samuel F. Daugherty, Dentons U.S. LLP, Washington, D.C., and Riyaz A. Kanji, Kanji & Katzen PLLC, Ann Arbor, MI.

Dorothy Ann Alther, California Indian Legal Services, Escondido, CA, filed the brief on behalf of amici curiae California Indian Legal Services and California Association of Tribal Governments in support of plaintiff-appellee/cross-appellant.

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, Chief District Judge, Presiding. D.C. No. 4:09–cv–01471–CW.

Argued and Submitted En Banc September 17, 2014–San Francisco, California.

Before: HARRY PREGERSON, STEPHEN REINHARDT, ALEX KOZINSKI, DIARMUID F. O'SCANNLAIN, SUSAN P. GRABER, WILLIAM A. FLETCHER, RICHARD A. PAEZ, JAY S. BYBEE, MILAN D. SMITH, JR., MORGAN CHRISTEN and JACQUELINE H. NGUYEN, Circuit Judges.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether, in the course of negotiations under the Indian Gaming Regulatory Act, a state can challenge a Bureau of Indian Affairs decision to hold a parcel of land in trust for an Indian tribe and whether it can challenge the tribe's federally recognized status.

I

A

This litigation is between a small federally recognized Indian tribe which wishes to build and to operate a class III gaming casino and hotel on tribal trust land and the State of California, which seeks to regulate or to oppose such activity.

To regulate gaming on Indian lands, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. ¶¶ 2701 et seq. (the "IGRA"), which created a "cooperative federalis[t]" framework that "balance[d] the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir.2003) (quoting *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1092 (E.D.Cal.2002)). The IGRA assigns authority to regulate gaming to tribal and state governments depending on the class of gaming involved.

Class I gaming includes " 'social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations,' 25 U.S.C. § 2703(6), and its regulation is left exclusively within the jurisdiction of the Indian tribes, *id.* § 2710(a)(1)." *Id.* at 1096–97. "Class II gaming includes bingo ... and certain card games ... but excludes any banked card games, electronic games of chance, and slot machines." *Id.* at 1097. Class III gaming includes "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class III gaming, which is contemplated by the tribe here, often involves "the types of high-stakes games usually associated with Nevada-style gambling." *In re Indian Gaming Related Cases*, 331 F.3d at 1097.

B

The IGRA sets out detailed procedures for Indian tribes seeking to conduct class III gaming, which is allowed on Indian lands only if "conducted in conformance with a Tribal–State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). Negotiations for a gaming compact begin at the request of an "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted." *Id.* § 2710(d)(3)(A). The Indian tribe's request triggers the state's obligation to negotiate in good faith. *Id.*

If negotiations are successful, the tribe and the state will enter into a compact to allow class III gaming subject to the approval of the Secretary of the Interior. *Id.* § 2710(d)(3)(B). If negotiations are unsuccessful, the tribe can sue the state in district court.[1] *Id.* § 2710(d)(7)(A)(I). If, in turn, the district court finds that the state has failed to negotiate in good faith, it must order the parties to reach an agreement. *Id.* § 2710(d)(7)(B)(iii). If no agreement is reached after 60 days, the court must order each party to submit a proposal to a court-appointed mediator, who selects the proposal that best comports with the IGRA and other federal laws. *Id.* § 2710(d)(7)(B)(iv).

Of course, gaming is confined to "Indian lands" and negotiations are begun by a tribe with jurisdiction over such lands. The IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is ... held in trust by the United States for the benefit of any Indian tribe or individual ... and over which an Indian tribe exercises governmental power." *Id.* § 2703(4).

The Bureau of Indian Affairs (the "BIA") obtains authority to hold land in trust for Indian tribes from the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq. (the "IRA"), under which the Secretary of the Interior is authorized "to acquire ... any interest in lands ... for the purpose of providing land for Indians" and to hold those lands "in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* § 465. Indians include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479.

C

Big Lagoon Rancheria is a federally recognized Indian tribe located on the shoreline of Big Lagoon near Trinidad in Humboldt County, California. It claims jurisdiction over two parcels of land adjacent to one another. One consists of nine acres purchased by the United States in 1918. The other consists of eleven acres taken into trust for Big Lagoon Rancheria by the BIA in 1994. Big Lagoon Rancheria seeks to operate a class III gaming casino and hotel on the eleven-acre parcel held in trust for the tribe.

1

In 1918, the BIA purchased the nine-acre parcel for James Charley and his family. Charley, an Indian whose family lived on the parcel, died soon thereafter, and his wife moved the rest of the family away. One of Charley's sons, Robert

1. In *Seminole Tribe v. Florida*, 517 U.S. 44, 75, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court held that Section 2710(d)(7) does not abrogate the states' Eleventh Amendment sovereign immunity. California's sovereign immunity is not implicated here, however, because the State has waived its immunity to suit in this context. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026 (9th Cir.2010).

Charley, may have lived at Big Lagoon between 1942 and 1946, but the nine-acre parcel otherwise appears to have remained vacant. Later, in the late 1940s or early 1950s, Robert's nephew by marriage, Thomas Williams, and his family obtained the BIA's permission to camp on the land. Though they did not have a claim of ownership, they apparently constructed a home there.

The Williamses came to view the land as a "rancheria" eligible for termination under the California Rancheria Termination Act, Pub.L. No. 85–671, 72 Stat. 619 (1958).[2] They applied for dissolution of the rancheria—a step that would have distributed the land to individual tribe members—in 1967. Although approved, the dissolution never took place.

Big Lagoon Rancheria first appeared on a list of "Indian Tribal Entities that Have a Government–to–Government Relationship with the United States" in 1979, 44 Fed.Reg. 7235 (Feb. 6, 1979), and has appeared on many subsequent lists. The BIA has held the nine-acre parcel in trust for the tribe under 25 U.S.C. § 465 since at least 1979.

2

In 1994, the BIA took the eleven-acre parcel that is the focus of this appeal in trust for Big Lagoon Rancheria. It is unclear exactly when the State of California became aware of the entrustment decision. But the State's interests were plainly affected, and the State was plainly aware in 1997, when it petitioned to intervene and subsequently filed two amicus briefs before the Department of the Interior Board of Indian Appeals in a challenge to the BIA's decision. *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Dir., Bureau of Indian Affairs,* 32 IBIA 309, 312 (1998). Moreover, California has by its own admission been aware of the entrustment and the potential for casino gambling on the eleven-acre parcel since 1998, when the State began negotiating with Big Lagoon Rancheria directly with respect to the eleven-acre parcel.

II

When negotiations to build the hotel and casino broke down in 1999, Big Lagoon Rancheria sued the state of California under the IGRA, alleging that California had failed to negotiate in good faith. In 2000, as part of the litigation, the state questioned whether "the lands on which Big Lagoon proposed to build its casino were Indian lands over which Big Lagoon properly had jurisdiction to conduct gaming activities."

The 1999 lawsuit was dismissed without prejudice as part of a settlement in 2005 when Big Lagoon Rancheria and the state reached an agreement allowing the tribe to build a hotel and casino. That agreement, known as the Barstow Compact, lapsed in 2007 because the California legislature failed to ratify it. Negotiations then began anew, but again failed, foundering principally because the state insisted on environmental mitigation measures related to the casino's construction as well as a share of Big Lagoon Rancheria's revenue from gaming. Throughout the course of the negotiations, the state proceeded on

2. "Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of [the twentieth] century—a program triggered by an inquiry (in 1905–06) into the landless, homeless or penurious state of many California Indians." *Williams v. Gover,* 490 F.3d 785, 787 (9th Cir.2007) (alteration in original) (quoting *Duncan v. United States,* 229 Ct.Cl. 120, 667 F.2d 36, 38 (1981)) (internal quotation marks omitted).

the assumption that it was obligated to negotiate in good faith under the IGRA.

Big Lagoon Rancheria filed the instant suit in district court in 2009, once again alleging under 25 U.S.C. § 2710(d)(7)(A)(i) that California had failed to negotiate in good faith. The tribe substantially prevailed when the district court declared that California had failed to negotiate in good faith and that the tribe was entitled to conduct gaming subject only to the Secretary of the Interior's approval of a gaming compact. *Big Lagoon Rancheria v. California*, 759 F.Supp.2d 1149, 1160 (N.D.Cal. 2010). The State of California appeals from the district court's adverse grant of summary judgment, and also appeals the district court's order refusing to grant a continuance to conduct additional discovery under Fed.R.Civ.P. 56(f),[3] now Fed. R.Civ.P. 56(d).[4] Big Lagoon Rancheria cross-appeals, challenging the district court's ruling that negotiation over environmental measures did not necessarily constitute bad faith by California.[5]

III

A

California first argues that Big Lagoon Rancheria lacks standing to compel it to negotiate in good faith under the IGRA because the BIA's 1994 entrustment decision was improper and because it is not properly recognized as an Indian tribe. Although the State frames these issues in terms of challenges to standing and asserts them as affirmative defenses, the State's arguments amount to collateral attacks on the BIA's 1994 decision to take the eleven-acre parcel into trust and its pre–1979 designation of Big Lagoon Rancheria as an Indian tribe.

1

The State's principal argument is that Big Lagoon Rancheria is not entitled to enter into good faith negotiations under the IGRA because the BIA lacked the authority to take the eleven-acre parcel into trust, relying on *Carcieri v. Salazar*, 555 U.S. 379, 395, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009).

Carcieri involved a challenge by the State of Rhode Island, the State's governor, and the town of Charleston, Rhode Island to the Secretary of the Interior's decision to take thirty-one acres of land into trust on behalf of the Narragansett Tribe. As in Big Lagoon Rancheria's case, the Secretary had taken the land into trust

3. The 2010 amendments to the Federal Rules of Civil Procedure moved the language contained at Fed.R.Civ.P. 56(f) to Fed.R.Civ.P. 56(d). As the notes of the Advisory Committee explain, new "subdivision (d) carries forward without substantial change the provisions of former subdivision (f)."

4. We review the district court's grant of summary judgment de novo. *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir.2010) (citing *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 946 (9th Cir. 2008)). "[W]e determine whether there are any genuine issues of material fact for trial, viewing the evidence in the light most favorable to the nonmovant." *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 772 (9th Cir.2008) (citation omitted). We review the district court's decision to deny a continuance under Fed.R.Civ.P. 56(f) for abuse of discretion. *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003).

5. A divided three-judge panel of this court reversed the judgment of the district court, *Big Lagoon Rancheria v. California*, 741 F.3d 1032, 1045 (9th Cir.2014), holding that California was not obligated to negotiate in good faith under the IGRA because the eleven-acre parcel was not properly taken into trust by the BIA. We subsequently granted rehearing en banc, vacating the three-judge panel decision. *Big Lagoon Rancheria v. California*, 758 F.3d 1073 (9th Cir.2014).

"for the purpose of providing land for Indians" based on his authority under Section 465 of the IRA. *See id.* at 381–82, 129 S.Ct. 1058; 25 U.S.C. § 465. The tribe had wished "to free itself from compliance with local regulations" governing construction of housing. *Carcieri,* 555 U.S. at 385, 129 S.Ct. 1058. In response, the state, the governor, and the town of Charleston timely "sought review of the . . . decision [to take the land into trust] pursuant to the Administrative Procedure Act ["APA"]." *Id.* The district court granted summary judgment in favor of the Narragansett tribe, and the First Circuit affirmed, first in a panel decision and then sitting en banc. *Id.* at 385–86, 129 S.Ct. 1058.

The Supreme Court reversed. It held that the term " 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395, 129 S.Ct. 1058. The Narragansett tribe was not under Federal jurisdiction in 1934 and was not recognized by the United States until 1983, meaning that the Secretary of the Interior's decision to take land into trust for the Narragansett was invalid. *Id.* at 385, 395, 129 S.Ct. 1058. Therefore, under *Carcieri,* if a tribe was not under federal jurisdiction in 1934, the BIA lacks the authority to take land into trust on its behalf.

The present case is distinguishable from *Carcieri,* which involved a timely administrative challenge brought against the Secretary of the Interior. The instant case is a belated collateral attack. *Carcieri* does not address whether the BIA's entrustment decisions can be challenged outside an action brought under the APA or outside the statute of limitations for APA actions.

2

The Supreme Court has explained that a challenge to the BIA's "decision to take land into trust" is "a garden-variety APA claim." *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak,* —— U.S. ——, 132 S.Ct. 2199, 2208, 183 L.Ed.2d 211 (2012) (citing 5 U.S.C. § 706(2)(A), (C)). Such claims "assert[ ] merely that the Secretary [ ] [of the Interior's] decision to take land into trust violates a federal statute." *Id.*

We have recently observed that parties cannot "use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions." *United States v. Backlund,* 689 F.3d 986, 1000 (9th Cir.2012). For example, in *United States v. Lowry,* 512 F.3d 1194 (9th Cir.2008), we held that a criminal defendant who "declined to exercise her right to seek direct judicial review of the agency decision [in question] within the time allowed" could not "collaterally attack it in a subsequent criminal proceeding." *Backlund,* 689 F.3d at 1000 (citing *Lowry,* 512 F.3d at 1203). "[A]llowing [the defendant] to collaterally attack the administrative proceedings would effectively circumvent the six-year statute of limitations we have held governs review of such actions." *Lowry,* 512 F.3d at 1203.

[1] While California asserts that Big Lagoon Rancheria lacks standing to invoke the IGRA, it necessarily argues that the BIA exceeded its authority when it took the eleven-acre parcel into trust. The proper vehicle to make such a challenge is a petition for review pursuant to the APA, and that is the typical method employed in prior litigation challenging entrustment decisions. *See, e.g., Patchak,* 132 S.Ct. at 2210–11 (allowing an APA challenge to the government's decision to take land into trust for the benefit of an Indian tribe under 25 U.S.C. § 465); *Carcieri,* 555 U.S.

at 385, 129 S.Ct. 1058 ("Petitioners sought review of the IBIA decision [upholding the government's decision to take land into trust] pursuant to the Administrative Procedure Act. . . .").

Allowing California to attack collaterally the BIA's decision to take the eleven-acre parcel into trust outside the APA would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government.

3

And, of course, California has not brought an APA action in this case, nor has it joined the United States, the Secretary of the Interior, or any other federal government official. *See, e.g., Carcieri,* 555 U.S. at 385–86, 129 S.Ct. 1058 ("Petitioners sought review of the IBIA decision pursuant to the" APA and named "the Secretary [of the Interior] and other Department of Interior officials" as defendants.); 5 U.S.C. §§ 702, 703 (waiving the United States's sovereign immunity where persons have "suffer[ed] legal wrong because of agency action" or have been "adversely affected or aggrieved by agency action" and allowing an "action for judicial review" against "the United States, the agency by its official title, or the appropriate officer" where "no special statutory review proceeding is applicable").

[2] Moreover, even if California had brought an APA claim, such an action would be time barred. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). We have held that this rule "applies to actions brought under the APA." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 713 (9th Cir.1991).[6] Therefore, California's arguments that the BIA does not properly hold the eleven-acre parcel in trust for Big Lagoon Rancheria fail, both because the state has failed to file the appropriate APA action and because such an APA challenge would be time-barred.

B

[3] The State also challenges the BIA's recognition of Big Lagoon Rancheria as an Indian tribe. The thrust of the State's argument is that it is unclear how the tribe came to appear on the list of "Indian Tribal Entities" in 1979 and that such uncertainty gives rise to an issue of material fact precluding summary judgment.

California has not brought an APA challenge to the BIA's determination, and, like the challenge to the BIA's entrustment decision with respect to the eleven-acre parcel, such a challenge would be time-barred for the reasons stated in Part III(A)(3), *supra.*

6. In *Wind River,* we recognized an exception to the six-year statute of limitations when "a challenger contests the substance of an agency decision . . . by filing a complaint for review of the adverse application of the decision to a particular challenger." *Wind River,* 946 F.2d at 715. We reasoned that a cause of action should be understood to "accrue" six years following the application of the decision to a particular challenger under those circumstances because "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires,* simply because the agency took the action long before anyone discovered the true state of affairs." *Id.* That exception is inapplicable here because California understood the "true state of affairs" concerning the BIA's decision to take the eleven-acre parcel into trust by, at the very latest, 1997, when it filed amicus briefs in a proceeding challenging the BIA's authority to take the eleven-acre parcel into trust.

IV

California also appeals the district court's decision not to grant a continuance under Fed.R.Civ.P. 56(f). When a district court refuses to grant a motion for a continuance, we have found abuse of discretion only " 'if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment.' " *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir.2002) (quoting *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir.1994)).

[4] The district court ruled that the State was not entitled to a continuance because "the status of the Tribe and its eleven-acre parcel has no bearing on whether the State negotiated in good faith." *Big Lagoon*, 759 F.Supp.2d at 1160. Effectively, the district court concluded that whether Big Lagoon Rancheria is properly recognized as a tribe and whether the eleven-acre parcel is properly held in trust are irrelevant to whether the State was obligated to negotiate in good faith. While the State's claims fail in this case, such considerations might not be irrelevant in a case involving a timely APA claim.

Nonetheless, the district court also observed that the State "was [not] reasonably diligent in seeking discovery" on an earlier motion to stay all proceedings except discovery in the district court. The record provides ample support for that conclusion. The parties agreed to one extension of the discovery deadline, and the court granted another. The deadline for filing dispositive motions was likewise extended twice in the district court, once by agreement of the parties and once by the court. In addition, the State waited until mid-December 2009—very near the end of the discovery period—to serve the BIA with a document subpoena. Because the State failed to demonstrate that it "diligently pursued its previous discovery opportunities," the district court did not abuse its discretion when it denied the State's motion for a continuance. *U.S. Cellular*, 281 F.3d at 934.

V

[5] On cross-appeal, Big Lagoon Rancheria challenges the district court's ruling that the State's negotiation over environmental measures did not necessarily constitute bad faith. The district court concluded that "environmental mitigation measures are a permissible subject for negotiation under [the] IGRA" under certain circumstances so long as the State offered "as a meaningful concession gaming rights that are more expansive than allowed to otherwise similarly situated tribes." *Big Lagoon*, 759 F.Supp.2d at 1162. It found that the State had not offered meaningful concessions, but stopped short of holding that a request for environmental mitigation necessarily constitutes bad faith. *Id.*

[6] "A case is moot on appeal if no live controversy remains at the time the court of appeals hears the case." *NASD Dispute Resolution, Inc. v. Judicial Council of Cal.*, 488 F.3d 1065, 1068 (9th Cir.2007). We have held that "[t]he test for whether such a controversy exists is 'whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor.' " *Id.* (quoting *In re Burrell*, 415 F.3d 994, 998 (9th Cir.2005)).

The district court ordered the State to reach a gaming compact with Big Lagoon Rancheria to govern class III gaming. *Big Lagoon*, 759 F.Supp.2d at 1163. Subsequently, a mediator selected by the district court chose Big Lagoon Rancheria's proposal as the one that would govern gaming at Big Lagoon. All that remains is for the mediator to notify the Secretary of

the Interior of his selection, and, once the Secretary of the Interior prescribes procedures to govern gaming that are consistent with that selection, Big Lagoon Rancheria will be authorized to build the casino and engage in the gaming that it seeks. *See* 25 U.S.C. § 2710(d)(7)(B)(vii) Big Lagoon Rancheria can receive no further relief on its cross-appeal which is therefore moot.

VI

For the reasons explained above, the judgment of the district court is **AFFIRMED.** Big Lagoon Rancheria's cross-appeal is **DISMISSED** as moot.[7]

NORTHBAY WELLNESS GROUP, INC., a corporation, Appellant,

v.

Michael Kenneth BEYRIES, Appellee.

No. 13–17381.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 14, 2015.

Filed June 5, 2015.

Background: Chapter 7 debtor, an attorney, stole $25,000 from judgment creditor, his client, which was a California medical marijuana dispensary, and after debtor filed for bankruptcy, judgment creditor brought adversary proceeding, seeking a determination that the debt was nondischargeable. Following trial, the United States Bankruptcy Court for the Northern District of California, Alan Jaroslovsky, J., 2011 WL 5975445, applied the doctrine of "unclean hands" to hold that judgment creditor's illegal marijuana sales prevented it from obtaining relief, and dismissed the complaint. Judgment creditor appealed. The District Court, Jeffrey S. White, J., 2012 WL 4120409, affirmed, and judgment creditor appealed.

Holdings: The Court of Appeals, Friedland, Circuit Judge, held that:

(1) by failing to conduct the required balancing, the bankruptcy court abused its discretion in concluding that the doctrine of unclean hands applied, and

(2) under the required balancing, debtor's wrongdoing outweighed that of judgment creditor, both as to harm caused to each other and as to harm caused to the public, such that the doctrine of unclean hands did not bar determination that judgment debt was nondischargeable.

Reversed and remanded.

1. Bankruptcy ⚿3779, 3836

Court of Appeals reviews a district court's decision on an appeal from the bankruptcy court de novo, applying the same standard of review to the bankruptcy court's decision as did the district court.

2. Bankruptcy ⚿3782, 3786

Court of Appeals reviews the bankruptcy court's findings of fact for clear error and its conclusions of law de novo.

3. Bankruptcy ⚿3784

Court of Appeals reviews application of the unclean hands doctrine for abuse of discretion.

4. Bankruptcy ⚿3784

Trial court, including the bankruptcy court, commits "abuse of discretion" if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact.

See publication Words and Phrases for other judicial constructions and definitions.

7. Big Lagoon Rancheria's Request to Take Judicial Notice in Support of Petition for Panel Rehearing and Rehearing En Banc filed March 6, 2014 is **DENIED** as moot.

ally. (*See, e.g.,* Benenati Decl., Ex. D, at HUNG010996.) But other evidence indicates that at least some of defendants treated the Collection as a unitary whole. (*See, e.g.,* Benenati Decl., Ex. U [ECF No. 89–23] at HUNG002382 ("The Museum of Fine Arts never knew the exact distribution of the Herzog collection among the different heirs. They have always treated the collection as one.").) The scheduled fact depositions could clarify this issue in a way that would support plaintiffs' jurisdictional arguments. In short, the Court believes that fact depositions "could produce [facts] that would affect [its] jurisdictional analysis." *Goodman Holdings,* 26 F.3d at 1147. It will therefore deny the instant motion without prejudice and allow defendants to file a new motion to dismiss when fact depositions conclude.[1]

As a final matter, the Court notes that it has held that there is an alternative ground for jurisdiction, which has been largely ignored by the parties. This Court originally held that it had subject matter jurisdiction under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3), but the Court of Appeals did not address that exception. *de Csepel,* 714 F.3d at 598. Notwithstanding a request for supplemental briefing, defendants have provided little reason for this Court to change its original conclusion that the seizure of the Herzog Collection during World War II brings plaintiffs' claims under the expropriation exception. *See de Csepel,* 808 F.Supp.2d at 128–33. Instead, in its briefing, defendants argue that the 2008 decision by the Hungarian courts was not a taking in violation of international law. (*See* Supplemental Br. in Supp. of Mot. to Dismiss by the Republic of Hungary, the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics [ECF No. 92] at 7 ("The 2008 judgment was not a violation of international law. . . .").) Defendants make this argument notwithstanding the direction from the Court that it did "not intend to revisit whether the property was taken in violation of international law or, as pled in plaintiffs' Complaint, that the expropriation occurred during World War II." *de Csepel v. Republic of Hungary,* No. 10–cv–1261, at *2 (D.D.C. Oct. 20, 2014). In future briefing, the Court requests that the parties address fully the validity of the Court's prior holding that the expropriation exception provides subject matter jurisdiction.

CONCLUSION

For the reasons stated herein, defendants' motion to dismiss is denied without prejudice pending the close of fact discovery. A separate Order accompanies this Memorandum Opinion.

The CONFEDERATED TRIBES OF the GRAND RONDE COMMUNITY OF OREGON, et al., Plaintiffs,

v.

Sally JEWELL, et al., Defendants.

Civil Action No. 13–849 (BJR)

United States District Court,
District of Columbia.

Signed December 12, 2014

Background: Operator of a tribal casino, along with county, city, and local busi-

1. Plaintiffs have failed to provide details about their expected expert depositions or to explain how those depositions will bear on this Court's jurisdictional analysis. As such, the Court will only postpone its jurisdictional ruling for the duration of fact depositions.

nesses, brought consolidated actions against Secretary of the Interior, challenging her decision to take into trust 152 acres of land for Cowlitz Indian Tribe and allow gaming there. Tribe intervened as a defendant, and parties cross-moved for summary judgment.

Holdings: The District Court, Barbara J. Rothstein, J., held that:

(1) Secretary's interpretation of Indian Reorganization Act (IRA) was entitled to deference;

(2) Secretary's determination that Tribe was under federal jurisdiction was neither arbitrary nor capricious;

(3) Secretary's determination that land qualified for gaming under Indian Gaming Regulatory Act (IGRA) was neither arbitrary nor capricious; and

(4) Secretary satisfied National Environmental Policy Act's (NEPA) reasonable-alternatives requirement.

Ordered accordingly.

1. Administrative Law and Procedure ⚿751, 760

The Administrative Procedure Act's (ADA) standard of review for agency action is narrow, and a court is not empowered to substitute its judgment for that of the agency. 5 U.S.C.A. § 706(2)(A).

2. Administrative Law and Procedure ⚿432

Under the first *Chevron* step, a court reviewing an agency's interpretation of a statute it is tasked with administering must examine the statute to determine whether Congress has spoken directly to the precise question at issue, and if the court determines that Congress has directly spoken to the precise issue, that is the end of the analysis, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

3. Administrative Law and Procedure ⚿433

Under the second *Chevron* step, if a statute an agency is tasked with administering is silent or ambiguous with respect to the precise question at issue, then the court must determine whether the agency's response to that question is reasonable and based on a permissible construction of the statute, and if the agency provides a reasonable interpretation of the statute, the court must defer to the agency's interpretation.

4. Administrative Law and Procedure ⚿433

An agency's interpretation of a statute it is tasked with administering need not be the only possible interpretation, nor even the interpretation deemed most reasonable by the courts, in order to receive *Chevron* deference.

5. Administrative Law and Procedure ⚿760, 763, 785

Under the Administrative Procedure Act (APA), a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency, for the court is principally concerned with ensuring that the agency has examined the relevant data and articulated a satisfactory explanation for its action, the agency's decision was based on a consideration of the relevant factors, and the agency has made no clear error of judgment. 5 U.S.C.A. § 706(2)(A).

6. Indians ⚿109

When interpreting an ambiguous statutory provision involving Indian affairs, the governing canon of construction requires the statute to be construed liberally in favor of the Indian tribe, with ambigu-

ous provisions interpreted to the tribe's benefit; however, this canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe.

7. Administrative Law and Procedure ⚿438(1)

Indians ⚿152, 252

Secretary of the Interior's interpretation of Indian Reorganization Act (IRA) to impose no temporal limitation on recognition of an Indian tribe before taking land into trust for tribe was reasonable and entitled to *Chevron* deference, even though term "recognized tribe" was qualified by phrase "now under Federal jurisdiction," which required that a tribe be under federal jurisdiction at time of IRA's enactment, where nothing in IRA prevented recognition and jurisdiction from being treated as two separate concepts, and IRA did not explicitly impose a time limit for recognition. 25 U.S.C.A. §§ 465, 479.

8. Administrative Law and Procedure ⚿438(1)

Indians ⚿152, 252

Secretary of the Interior's interpretation of Indian Reorganization Act (IRA) to allow Secretary to determine whether an Indian tribe was "under Federal jurisdiction" at time of IRA's enactment, as required for Secretary to take land into trust for tribe, by looking at actions taken by Federal government toward individual tribal members was reasonable and entitled to *Chevron* deference, where nothing in IRA prohibited Secretary from considering relationship between Federal Government and individual tribal members. 25 U.S.C.A. §§ 465, 479.

9. Indians ⚿152

Secretary of the Interior's determination that Cowlitz Indian Tribe was under federal jurisdiction at time of Indian Reorganization Act's (IRA) enactment, as required for Secretary to take land into trust for Tribe, was neither arbitrary nor capricious, where as a result of failed treaty negotiations with Tribe, Federal Government assumed control of Tribal lands, granted allotments to Tribal members, approved Tribe's attorney contracts, and provided other services to Tribe and its members up to and including year in which IRA was enacted. 25 U.S.C.A. §§ 465, 479; 5 U.S.C.A. § 706(2)(A).

10. Administrative Law and Procedure ⚿669.1

While there are surely limits on the level of congruity required between a party's arguments before an administrative agency and a court, respect for agencies' proper role in the *Chevron* framework requires that a court be particularly careful to ensure that challenges to an agency's interpretation of its governing laws are first raised in the administrative forum.

11. Administrative Law and Procedure ⚿669.1

Courts require that a party to an Administrative Procedure Act (APA) proceeding raise only the specific argument that was raised to the agency, not merely the same general legal issue, and this principle applies to legal, as well as factual, arguments.

12. Indians ⚿252

County waived its summary judgment argument that Secretary of the Interior's purported failure to confirm that new members of Cowlitz Indian Tribe maintained social and political ties with Tribe voided Secretary's decision to take into trust 152 acres of land for Tribe under Indian Reorganization Act, where county failed to raise issue at administrative level. 25 U.S.C.A. §§ 465, 479; 25 C.F.R. § 83.12; Fed. R. Civ. P. 56.

13. Indians ⚿335

Secretary of the Interior's determination that Cowlitz Indian Tribe had a significant historical connection to 152 acres of land that was taken into trust for Tribe and that land qualified for gaming under IGRA's initial-reservation exception was neither arbitrary nor capricious, even though land was 14 miles outside of Tribe's aboriginal territory, where regulation defining "significant historical connection" did not require Tribe to have occupied or used land it in order to have such a connection, Tribe had maintained hunting and camping sites in vicinity of land, and it had conducted extensive trading activities there. Indian Gaming Regulatory Act § 20, 25 U.S.C.A. § 2719(b)(1)(B)(ii); 25 C.F.R. § 292.2.

14. Federal Civil Procedure ⚿103.2

The plaintiff bears the burden of establishing the elements of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

15. Environmental Law ⚿651

A plaintiff raising NEPA challenges must demonstrate that it is under threat of suffering an injury in fact that is concrete and particularized in order to establish Article III standing, and while generalized harm to the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969 § 2 et seq., 42 U.S.C.A. § 4321 et seq.

16. Environmental Law ⚿656

Operator of a tribal casino failed to demonstrate that its purported recreational and aesthetic interests in north side of Columbia River would be harmed if Secretary of the Interior took into trust 152 acres of land near river for Cowlitz Indian Tribe and allowed tribe to conduct gaming there, as required to establish Article III standing to challenge Secretary's decision under NEPA, where operator failed to provide evidence that it planned to make use of specific land at issue. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

17. Indians ⚿235

An Indian tribe may voluntarily subject itself to suit by issuing a clear waiver of its sovereign immunity.

18. Environmental Law ⚿689

Courts review an agency's selection of alternatives as part of NEPA's environmental impact statement (EIS) requirement under the rule of reason, which requires considerable deference to the agency's expertise and policy-making role. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

19. Environmental Law ⚿689

Under the rule-of-reason approach to evaluating an agency's selection of alternatives as part of NEPA's environmental impact statement (EIS) requirement, courts first consider whether the agency has reasonably identified and defined its objectives, and an alternative is properly excluded from consideration in an EIS only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

20. Environmental Law ⚿689

Courts must reject an unreasonably narrow objective that compels the selection of a particular alternative in reviewing an agency's environmental impact statement (EIS) under NEPA. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

21. Environmental Law ⇨604(2)

Secretary of the Interior satisfied NEPA's reasonable-alternatives requirement in a final environmental impact statement (FEIS) prepared as part of her decision to take into trust 152 acres of land for Cowlitz Indian Tribe and allow gaming there; Secretary identified objective of establishing a headquarters from which Tribe could conduct economic development necessary to fund Tribal Government services, she considered alternative sites but rejected them as too inconvenient to nearby cities to adequately meet Tribe's economic objectives, and she reasonably relied on Tribe's self-assessment of its economic needs, since second-guessing Tribe's self-assessment would have undermined Tribe's sovereignty. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

22. Environmental Law ⇨604(2)

Secretary of the Interior was not required to provide a full evaluation as to whether Cowlitz Indian Tribe would receive a National Pollution Discharge Elimination System (NPDES) permit for its proposed casino in preparing an environmental impact statement (EIS) under NEPA for her decision to take into trust 152 acres of land for Tribe and allow gaming there, since NEPA did not impose a substantive requirement that mitigation measures actually be taken. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

23. Environmental Law ⇨597

County's adoption of stronger stormwater management and erosion-control standards did not obligate Secretary of the Interior to prepare a supplemental environmental impact statement (SEIS) under NEPA in connection with her decision to take into trust 152 acres of land for Cowlitz Indian Tribe and allow gaming there, since land would only be subject to federal and tribal environmental laws once it was accepted into trust. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1502.9(c)(1)(ii).

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MEMORANDUM OPINION

DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT; GRANTING DEFENDANTS' CROSS–MOTIONS FOR SUMMARY JUDGMENT

BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This consolidated action [1] arises under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* Plaintiffs challenge the Secretary of the Department of Interior's decision to acquire and hold in trust approximately 152 acres in Clark County, Washington for the Cowlitz Indian Tribe, the Intervenor–Defendant. Plaintiffs further challenge the Secretary's decision to allow gaming on that land, and dispute whether the Secretary has complied with NEPA's requirements. Before the Court are the parties' cross-motions for summary judgment. Having considered the record herein together with the parties' briefs the Court denies the Plaintiffs' motions for summary judgment and grants the Defendants' motions for summary judgment. The Court's reasoning follows:

II. BACKGROUND

A. Legal Framework

The Secretary's decision was arrived upon consideration of a complex combination of statutes, procedures, and regulations, a brief description of which follows:

1. Indian Reorganization Act of 1934

"The IRA was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains. Native people were encouraged to organize or reorganize with tribal structures similar to modern business corporations." 1–1 Cohen's Handbook of Federal Indian Law § 1.05. "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." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

Among other things, the IRA provides the Secretary with the authority "to acquire ... any interest in lands ... for the purpose of providing land for Indians." 25 U.S.C. § 465. "Title to any lands ... acquired pursuant to [the IRA] ... 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 ... shall be exempt from State and local taxation." *Id.* Lands taken in trust by the United States can be designated as part of an Indian Tribe's reservation. *Id.* § 467.

Section 19 of the IRA defines "Indian" to include, *inter alia*, "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479. While the IRA does not elaborate on what it means to be a "recognized Indian tribe now under Federal jurisdiction," the Supreme Court recently interpreted the phrase "now under Federal jurisdiction." In doing so it reasoned that when Congress refers to a tribe that was "now under federal jurisdiction," it used the word "now" to mean the date that the IRA was enacted, which was 1934. *Carcieri v. Salazar*, 555 U.S. 379, 382, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009).

2. Federal Acknowledgment Process

In 1978, the Department of Interior established a "departmental procedure and policy for acknowledging that certain

1. Civil Action No. 13–849 and Civil Action No. 13–850 were consolidated on July 18, 2013.

American Indian groups exist as tribes." 25 C.F.R. § 83.2. This process was "intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." *Id.* § 83.3. Such acknowledgment was necessary to receive "the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes," as well as "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." *Id.* § 83.2. An Indian tribe acknowledged under this procedure would "subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected." *Id.*

The Regulations specified the criteria that a tribe must demonstrate to achieve Federal acknowledgment. *Id.* § 83.7–83.8. Among other requirements, the tribe must have been "identified as an American Indian entity on a substantially continuous basis since 1900," and a "predominant portion" of the tribe must "comprise[ ] a distinct community" and must have "existed as a community from historical times until the present." *Id.* § 83.7(a)–(b).

3. Indian Gaming Regulatory Act of 1988

Like the IRA, the IGRA was enacted in large part to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). To this end, the IGRA provided "a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2702(1); *see also Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460, 462 (D.C.Cir.2007). The IGRA generally prohibits Indian gaming on lands acquired after October 17, 1988. 25 U.S.C. § 2719. However, there are exceptions.

Of particular relevance here, the IGRA allows gaming if "lands are taken into trust as part of . . . (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B). For brevity, these exceptions are referred to herein as the "initial reservation" exception and the "restored lands" exception, respectively.

4. National Environmental Policy Act

NEPA requires federal agencies to issue an Environmental Impact Statement (EIS) for any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must discuss in detail, *inter alia,* "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action." *Id.*

Because the NEPA process "involves an almost endless series of judgment calls . . . [t]he line-drawing decisions . . . are vested in the agencies, not the courts." *Coalition on Sensible Transp., Inc. v. Dole,* 826 F.2d 60, 66 (D.C.Cir.1987). Therefore, the "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *City of Olmsted Falls, Ohio v. Fed. Aviation Admin.,* 292 F.3d 261, 269 (D.C.Cir.2002) (citing *Baltimore Gas & Elec. v. Natural Res. Def. Council,* 462 U.S. 87, 97–98, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)).

B. Factual & Procedural Background

The Cowlitz Indian Tribe (hereinafter, Cowlitz or Tribe) is the successor in interest of the Lower Cowlitz and the Upper Cowlitz Bands of Southwestern Washington. The Tribe has been without land since President Lincoln signed a proclamation in 1863 that opened the Cowlitz lands in southwest Washington to non-Indian settlement. A.R. 8200; A.R. 14048762; Fed.Reg. 8,983–01 (Feb. 27, 1997).

In 2002,[2] the Department of Interior federally acknowledged the Cowlitz after finding that the Tribe had existed as an Indian entity on a substantially continuous basis since at least 1878–80 and that it had satisfied the criteria set forth in 25 C.F.R. part 83. 67 Fed.Reg. 607 (Jan. 4, 2002); 65 Fed.Reg. 8,436 (Feb. 18, 2000). Immediately upon receiving federal acknowledgment, the Cowlitz submitted an application requesting that the Secretary take into trust 151.87 acres of land in Clark County, Washington (hereinafter, "the Parcel") and declare it the Tribe's "initial reservation" under the IRA. A.R. 140382. The Tribe claimed its purpose was to "create a federally-protected land base on which the Cowlitz Indian Tribe can establish and operate a tribal government headquarters to provide housing, health care, education and other governmental services to its members, and conduct the economic development necessary to fund these tribal government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient." A.R. 140383. To further that goal, the Cowlitz Tribe, currently landless, intends to develop the Parcel to establish 20,000 square feet of tribal government offices, sixteen elder housing units, a 12,000 square foot tribal cultural center and a casino-resort complex consisting of 134,150 square feet of game floor; 355,225 square feet of restaurant and retail facilities and public space; 147,500 square feet of convention and multipurpose space; and an eight story 250–room hotel. BIA ROD at 2, 115.

A tribe must seek approval for casino-style gambling from the National Indian Gaming Commission (NIGC), an independent federal regulatory agency within the Department of Interior. 25 U.S.C. § 2706. In August 2005, the Cowlitz submitted its proposed tribal gaming ordinance for review, which the NIGC eventually approved. A.R. 8193.

As part of the tribal gaming ordinance review process, the NIGC issued an opinion in November 2005 which found that the Parcel qualified for IGRA's 'restored lands' exception to the general prohibition on gaming. *Id.* More specifically, NIGC concluded that "the Cowlitz Tribe is a restored tribe and that if the United States Department of Interior accepts the [Parcel] into trust for the Tribe, such trust acquisition will qualify as the "restoration of lands" within the meaning of the [IGRA]." A.R. 008195. For the Cowlitz to be considered an "Indian Tribe that is restored to Federal recognition," as that term is used in IGRA, the Cowlitz had to demonstrate "a history of 1) government recognition; 2) a period of non-recognition; and 3) reinstatement of recognition." A.R. 008198. The NIGC concluded that the Federal government had recognized the Cowlitz during the latter half of the 1800s and then "did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002," at which point the Tribe received formal Federal acknowledgment under 25 C.F.R. part 83. A.R. 008199.

2. The Federal acknowledgment was first issued in February 2000, but that decision was reconsidered and reaffirmed on January 4, 2002. 67 Fed.Reg. 607 (Jan. 4, 2002).

The NIGC explicitly noted in its November 2005 opinion that if the Secretary accepted the Parcel into her trust, the Department of Interior could proclaim the Parcel to be the Tribe's initial reservation. According to the NIGC, "[a]n 'initial reservation proclamation would provide a second basis by which the [P]arcel would qualify as Indian lands on which the Tribe could conduct gaming." [3] A.R. 8195.

The Tribe's application to take the Parcel into federal trust prompted the NEPA process. The Bureau of Indian Affairs issued a draft Environmental Impact Statement (EIS) concerning the proposed actions surrounding the Parcel. After a period of public comment, the final EIS was issued on May 30, 2008. AR140377; 75768–76440.

In April 2013,[4] the Secretary of the Department of the Interior (hereinafter, Secretary) through her designee, the Assistant Secretary of Indian Affairs issued a Record of Decision ("ROD" or "the decision") accepting the Parcel into trust and declaring that gaming would be allowed on the land. Specifically, the Secretary determined that the Parcel qualified for gaming under IGRA's "initial reservation" exception to the general ban on gaming. A.R.140494–518. The ROD did not discuss whether the Parcel would qualify under IGRA's "restored lands" exception.

Plaintiffs are entities and individuals who, for varying reasons, oppose the construction of the Cowlitz casino-resort complex. The first action was brought by Plaintiff Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde") which owns and operates a casino that would compete with any future casino built on the Parcel. The second action was brought by Clark County, Washington, the City of Vancouver, homeowners and community members in the area surrounding the Parcel, and specific businesses (clubs and card rooms) that would also be forced to compete with the future casino (collectively, Clark County Plaintiffs).

Plaintiffs argue that the Secretary violated the APA and NEPA. Specifically, Plaintiffs challenge: (1) the decision to accept into federal trust the Parcel pursuant to Section 5 of the Indian Reorganization Act of 1934(IRA), 25 U.S.C. § 461 *et seq.*; (2) the decision to allow the Cowlitz to conduct gaming activities on the Parcel once the Secretary has accepted the land into trust; and (3) the Secretary's compliance with the NEPA.

II. STANDARDS OF REVIEW

[1] The APA instructs the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The standard of review is narrow, and "[t]he court is not empowered to substitute its judgment for that of the agency." *Citi-*

3. At the time of the NIGC's ruling, a tribe could obtain both a NIGC finding of restored lands and still have their reservation declared their initial reservation. In 2008, the regulations were amended so that a tribe can no longer avail itself of both the restored lands exception and the initial reservation exception. 25 C.F.R. § 292.6 (Aug. 25, 2008).

4. The Secretary first issued a Record of Decision in 2010 and a lawsuit was immediately filed challenging that decision. *See Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar et al.,* Civil Action No. 11–284. While that lawsuit was pending, in 2012, the Secretary revised and supplemented her 2010 decision. Because the Secretary lacked the authority to supplement the 2010 Record of Decision while a lawsuit was ongoing, this Court instructed the agency to rescind the 2010 Decision and issue a new decision within sixty days. *Id.* Dkt. # 83, Order (March 13, 2013).

zens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), abrogated on other grounds by *Califano v. Sanders,* 430 U.S. 99, 104, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[2] When reviewing the substance of an agency's interpretation of a law it administers, the court must apply the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron,* the first step begins with the statute. The court must examine the statute to determine whether Congress has spoken directly to the precise question at issue. *Natural Res. Def. Council v. EPA,* 643 F.3d 311, 322 (D.C.Cir.2011). Such an examination requires the court to use "the traditional tools of statutory interpretation—text, structure, purpose, and legislative history." *Consumer Elecs. Ass'n v. FCC,* 347 F.3d 291, 297 (D.C.Cir. 2003) (quoting *Pharm. Research & Mfs. of Am. v. Thompson,* 251 F.3d 219, 224 (D.C.Cir.2001)). If the court determines that Congress has directly spoken to the precise issue, that is the end of the analysis, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778.

[3–5] If the statute is "silent or ambiguous with respect to the specific issue," then the court proceeds to the second step of *Chevron*. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. The court must determine whether the agency's response to the question at issue is reasonable and based on a permissible construction of the statute. *Id.* If the agency provides a reasonable interpretation of the statute, the court must defer to the agency's interpretation. *Am. Library Ass'n v. FCC,* 406 F.3d 689, 699 (D.C.Cir.2005). The agency's interpretation need not be "the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 218, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009) (emphasis in original). Moreover, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778. The court is "principally concerned with ensuring that [the Agency] has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,' that the Agency's 'decision was based on a consideration of the relevant factors,' and that the Agency has made no 'clear error of judgment.' " *Bluewater Network v. EPA,* 370 F.3d 1, 11 (D.C.Cir.2004) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

[6] Finally, when interpreting an ambiguous statutory provision involving Indian affairs, "the governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cal. Valley Miwok Tribe v. United States,* 515 F.3d 1262, 1266 n. 7 (D.C.Cir.2008). However, the Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe. *Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334, 340 (9th Cir.1996).

III. ANALYSIS

A. The Secretary Did Not Violate the APA in Concluding that the IRA Authorizes Her to Acquire the Parcel in Trust for the Cowlitz

Plaintiffs argue that the Secretary lacks the authority to acquire land in trust for

the Cowlitz because the tribe is neither "recognized" nor "under Federal jurisdiction," as required by Section 19 of the IRA. Clark Cty Mot. at 9; Grand Ronde Mot. at 8. Furthermore, Clark County Plaintiffs maintain that the Tribe's membership expansion since its Federal acknowledgment violated federal regulations, and, therefore, the Secretary's decision to acquire the land in trust is void. Clark Cty Mot. at 9. In this section, the Court analyzes the parties' positions regarding: (1) whether the Cowlitz are a "recognized" Indian Tribe; (2) whether the Cowlitz are an Indian Tribe "now under Federal jurisdiction;" and, lastly, (3) whether the Secretary violated the pertinent regulations by not reviewing Cowlitz's membership numbers.

1. Recognition

a. The Secretary's Decision

As described earlier, the IRA authorizes the Secretary to acquire land in trust for "Indians," a term which is defined in Section 19 of the IRA to include, *inter alia*, "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The Secretary's decision determined that the Cowlitz was "recognized" under the IRA. ROD 87–89. The Secretary reasoned that the term "recognized" had historically been used in two distinct senses: (1) the "cognitive" or "quasi-anthropological" sense, under which an official "simply knew or realized that an Indian tribe existed," and (2) "the more formal or 'jurisdictional' sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique relationship with the United States." ROD at 87 (A.R.140468). The formal or jurisdictional sense of recognition, the Secretary explained, evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s, and eventually regulations established procedures pursuant to which an entity could demonstrate its status as an Indian tribe. *Id.*

Ultimately, however, the Secretary did not "reach the question of the precise meaning of 'recognized Indian tribe.' " *Id.* at 89. The Secretary reasoned that "whatever the precise meaning of the term 'recognized tribe,' the date of federal recognition does not affect the Secretary's authority under the IRA" because "the IRA imposes no time limit upon recognition," and "the tribe need only be 'recognized' as of the time the Department acquires the land into trust." *Id.* The Secretary concluded that the Cowlitz tribe had been "recognized" since at least 2002, when it received federal acknowledgment, and therefore it satisfied the recognition requirement. *Id.*

b. Parties' arguments

Plaintiffs argue that the phrase "now under Federal jurisdiction," (which under *Carcieri* strictly refers to tribes under jurisdiction in 1934) modifies the phrase "recognized Indian tribe," and both phrases should be temporally limited to 1934. In other words, Plaintiffs contend that a tribe must have been not only "under federal jurisdiction" in 1934 but also "recognized" in 1934 to qualify as an "Indian Tribe" under Section 19. Clark Cty Mot. at 10; Grand Ronde Mot. at 9. Plaintiffs point to the plain text as well as legislative history to support that the term "recognized" refers only to tribes "enrolled" in 1934. Grand Ronde Mot. at 10; Clark Cty Mot. at 12–13. Lastly, Plaintiff Grand Ronde argues that reading the phrase "recognized Indian tribe" in the context of the IRA as a whole supports that Congress intended the term "recognized" to mean tribes recognized in 1934. Grand Ronde Mot. at 10.

Defendants, unsurprisingly, maintain that the Secretary reasonably construed an ambiguous statutory term when she decided that there is no temporal limitation on recognition, and, therefore, the Court should defer to her interpretation. Gov't Mot. at 27; Cowlitz Mot. at 30.

c. *Carcieri v. Salazar*

The Supreme Court explained in *Carcieri v. Salazar,* 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), that the phrase "now under Federal jurisdiction" meant that a tribe had to be under federal jurisdiction in 1934, the year the IRA was passed, in order to qualify under Section 19's definition of "Indian." Less clear was whether an Indian Tribe also had to be "recognized" in 1934 to qualify as "Indian" under Section 19. The *Carcieri* majority makes no attempt to interpret what the word "recognized" means, and instead concerns itself solely with the interpretation of the phrase "now under Federal jurisdiction." *See id.* at 382, 129 S.Ct. 1058 (holding that "§ 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934"). Had the *Carcieri* majority believed that an Indian tribe needed to be recognized as of 1934, it could have easily said so and made that part of its holding. However, the majority chose not to follow that course, and instead held only that the phrase "now under federal jurisdiction" means tribes that were under federal jurisdiction in 1934. By ignoring the concept of recognition altogether, the *Carcieri* opinion in no way supports Plaintiffs' position that the term recognized should be read in conjunction with the phrase "now under federal jurisdiction."

Indeed, the only discussion of the term "recognized" in *Carcieri* directly contradicts Plaintiffs' arguments. In his concurrence, Justice Breyer explains that recognition and jurisdiction may be treated as two separate concepts and notes that Section 19 "imposes no time limit upon recognition." *Id.* at 399, 129 S.Ct. 1058. Additionally, Justices Souter and Ginsburg agreed with Justice Breyer that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content" and that "the [IRA] imposes no time limit upon recognition." *Id.* at 400, 129 S.Ct. 1058 (Souter, dissenting). Accordingly, the *Carcieri* majority opinion does not support that the term "recognized" in Section 19 unambiguously refers only to tribes recognized as of 1934. Moreover, the views expressed by Justices Breyer, Souter and Ginsburg support that, at the very least, Section 19 is ambiguous regarding whether a tribe must be "recognized" as of 1934 in order for its members to qualify as "Indians."

d. Plain Text

Plaintiffs urge that Section 19's plain text demonstrates that the term "recognized" refers to tribes recognized in 1934. Plaintiffs analogize to hypothetical statutes to argue that a tribe cannot be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934. Grand Ronde's Mot. at 10. For instance, Plaintiffs liken Section 19 to a statute that applies to any state resident practicing medicine in 1934. *Id.* Plaintiffs conclude that this hypothetical statute should not cover an individual who was practicing medicine in 1934 in a foreign country, but only became a state resident many years later. *Id.* Likewise, Plaintiffs argue, Section 19 should not cover a tribe who was under federal jurisdiction in 1934 but that was only recognized in recent years. *Id.*

While at first blush such comparisons seem appealing, they ultimately fail to per-

suade the Court. The danger in analogizing to such selectively crafted hypothetical statutes is a point aptly made by Defendants' hypothetical statute proffered in response—a statute that provides benefits to any certified veteran wounded in 1934. Def. Govt's Reply at 12 n11. Such a statute, the Government observes, could reasonably be interpreted to cover veterans who received certification after 1934, even if the veteran must have been wounded as of 1934. Arguably, recognition of an Indian tribe, like certification of a wounded veteran, is a status that can be conferred years after the tribe has been under federal jurisdiction. *Cf. Regions Hosp. v. Shalala*, 522 U.S. 448, 458, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998) (agreeing with the D.C. Circuit that the phrase "recognized as reasonable" in the Medicare Act "by itself, does not tell us whether Congress means to refer the Secretary to action already taken or to give directions on actions about to be taken" and, therefore, "might mean costs the Secretary (1) has recognized as reasonable . . ., or (2) will recognize as reasonable. . . ."). Accordingly, the Court rejects Plaintiffs' results-oriented approach and their contention that the text of Section 19 unambiguously requires recognition as of 1934.

e. Legislative History

The ambiguity of the statutory term "recognized" is further confirmed by a review of Section 19's legislative history. The Senate's Committee on Indian Affairs discussed Section 19's definition of "Indian" [5] during both the April 28, 1934 and May 17, 1934 hearings. A.R. 135115. At the April 28th hearing, Senator Elmer Thomas of Oklahoma expressed concern that in the past "when an Indian was divested of property and money" he was legally no longer considered an Indian and, as a result, "numerous Indians have gone from under the supervision of the Indian Office." *Id.* The following colloquy resulted between the Commissioner of Indian Affairs, John Collier, and Senator Thomas:

> Commissioner: This bill provides that any Indian who is a member of a recognized tribe or band shall be eligible to Government aid.
>
> Senator Thomas: Without regard to whether or not [the Indian] is *now* under your supervision?
>
> Commissioner: Without regard; yes. It definitely throws open Government aid to those rejected Indians.

A.R. 135115 (emphasis added). This discussion among the Committee suggests, therefore, that the term "recognized tribe" includes Indians who were not under the Indian Bureau's supervision in 1934.[6]

However, only a couple of weeks later, on May 17, 1934, another exchange took place between the Committee members suggesting just the opposite. Senator Thomas expressed concern that only tribe members "under the authority of the Indian Office" would be covered under the IRA, and "the policy [of the Indian Office] was not to recognize Indians except those already under authority." A.R. 135298. Senator Thomas viewed the proposed act

5. At the time of these discussions, the proposed Section 19 defined "Indian" to include, in relevant part, "all persons of Indian descent who are members of any recognized Indian tribe . . ." and did not include the "now under federal jurisdiction" requirement. A.R. 135269.

6. Such a definition of recognition that includes Indians not under supervision in 1934 strongly undermines Plaintiffs' position that "recognized Indian tribe" refers to tribes that the United States had formally acknowledged in a "jurisdictional or political sense" as of 1934. Clark Cty Mot. at 14–15; Pl. Grand Ronde at 18.

as excluding "roaming bands of Indians" that were "not registered," "not enrolled," and "not supervised." *Id.* The Chairman of the Committee, Senator Burton Wheeler, responded to Senator's Thomas concern by explaining that, "[o]f course, this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of at the present time." *Id.* Senator Wheeler later explained his view that the IRA should not cover "Indians of less than half blood," "unless they are enrolled at the present time." A.R. 135298–135299.

Thus, in contrast to the April 28th discussion, the May 17th dialogue supports the notion a "recognized Indian tribe" means a tribe that as of 1934 was "enrolled," "taken care of" or under the supervision of the Government. "The only conclusion that [the Court] can safely draw from these seemingly contradictory passages is that 'the little legislative history that exists for [Section 19] is as ambiguous as the statute itself." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1015 (D.C.Cir.1999) (quoting *Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1212 (D.C.Cir.1998)).

f. Statutory Context

Finally, Plaintiff Grand Ronde argues that the term "recognized" in its statutory context supports that it unambiguously refers to tribes recognized in 1934. Grand Ronde Mot. at 11. Grand Ronde points to language in Section 19 and Section 18 to bolster this argument.

Section 19 includes three definitions of Indian, two of which are relevant to Plaintiff Grand Ronde's argument. The first, discussed at length above, includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Section 19's second definition for Indian includes "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479. Plaintiff Grand Ronde argues that "the Secretary's conclusion that a tribe can be 'recognized' some 70 years after 1934 is . . . impossible to square with section 19's second definition of Indian," because "[t]ribes 'recognized' in 2002 do not have 'descendants' living on reservations in 1934." Grand Ronde Mot. at 11; *see also* Clark Cty at 12 n.5. However, some of the Cowlitz members reportedly lived on the Quinault Reservation in 1934 despite the Cowlitz Tribe only receiving formal recognition in 2002. Cowlitz Reply at 4 n.4. Arguably, then, the descendants of these Cowlitz tribal members who lived on the Quinault Reservation in 1934 would qualify under Section 19's second definition of Indian. Accordingly, Section 19's second definition of Indian is not incompatible with the Secretary's interpretation that "recognized Indian tribe" includes tribes recognized after 1934.

Similarly, the Court is not persuaded that Section 18 poses a challenge to the Secretary's interpretation of "recognized." *See* Grande Ronde's Mot. at 11. Section 18 states that the IRA "shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application" in a special election called one year after the IRA's passage and approval. 25 U.S.C. § 478. Plaintiff Grand Ronde's argument is based on the conclusion by a former member of this court that Section 18 "suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage." *City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 161 n. 6 (D.D.C.1980). Tellingly, however, the *City of Sault Ste. Marie* Court provides no further analysis and ultimately holds that "although the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might

have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934 . . ." because "[t]o hold otherwise would be to bind the government by its earlier errors or omissions." *Id.* (finding that a 1972 Memorandum conferred recognition under the IRA). Similarly, this Court does not view Section 18's voting provision as incompatible with an interpretation of Section 19 that allows for post–1934 recognition.[7]

g. Conclusion

[7] For the above reasons, the Court finds that the term "recognized" does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term. Moreover, given the above discussion and Justice Breyer's concurrence in *Carcieri*, this Court finds the Secretary's interpretation of the term "recognized" to be reasonable and defers to it. *See Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n.*, 717 F.3d 1020, 1025 (D.C.Cir.2013) (explaining that under *Chevron*, once the court determines that the statute is ambiguous with respect to the specific issue, the court must defer to the Secretary's interpretation so long as it is reasonable).

2. "Under Federal Jurisdiction"

The Secretary's legal authority to acquire the Parcel in trust also requires a finding that the Cowlitz Tribe was "under federal jurisdiction" in 1934. 25 U.S.C. § 479; *Carcieri*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). To determine whether the Cowlitz Tribe was "under federal jurisdiction" in 1934, the Secretary developed a two-part test. Plaintiffs argue that the Secretary's test violated the statutory text and legislative history of the IRA. Plaintiffs further argue that the Secretary's application of this two-part test to the Cowlitz was arbitrary and capricious. Below, the Court first describes the Secretary's test and then turns to the parties' specific arguments.

a. Secretary's Two–Part Test

The Secretary developed a two-part inquiry to determine whether a tribe was under federal jurisdiction in 1934.

> The first part of this test is
> whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or a series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.

Id. According to the Secretary, "some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealings with the tribe." A.R. 140476. The Secretary also determined that evidence regarding "actions by the Office of Indian Affairs" could satisfy this first stage. *Id.*

The second part of the Secretary's test is "to ascertain whether the tribe's jurisdictional status remained intact in 1934." *Id.* As part of this inquiry, the Secretary

7. It is unclear to the Court whether Grand Ronde is suggesting that the IRA covers only members and descendants of members of those reservations that could vote under Section 18 in 1934. To the extent that Grand Ronde makes such an argument, the Court rejects it. As the Government points out, tribes that were not permitted to vote under Section 18 because they did not have a reservation have nevertheless organized under IRA. *See* A.R. 134256 (Haas Report).

noted that "the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or a loss of the tribe's jurisdiction." *Id.* Similarly, the Secretary explained, "the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934." *Id.*

b. The Secretary's Two–Part Test Is Entitled to Deference

[8] Plaintiffs argue that the Secretary's interpretation of "under federal jurisdiction" contravenes the plain text of § 479 as well as its legislative history. First, Plaintiffs contend that the text of § 479 does not allow the Secretary to determine whether a tribe is "under federal jurisdiction" by looking at the actions taken by the Federal government towards *individual* tribal members. For instance, Grand Ronde faults the Secretary for considering the fact that the Federal government provided medical attention to individual Cowlitz Indians and allowed individual Cowlitz Indians to attend BIA-operated schools. Grand Ronde Mot. at 28. Plaintiffs insist that the statutory text requires the Secretary to focus exclusively on Federal actions taken for the tribe as a whole.[8] Clark Cty Mot. at 16; Grand Ronde Mot. at 21.

Next, Plaintiffs argue that the Secretary's interpretation of "under federal jurisdiction" contravenes legislative intent because Congress intended the "under federal jurisdiction" requirement to narrow the tribal groups that qualify as Indians under § 479. Clark County Plaintiffs contends that the Secretary's interpretation does not allow the phrase "under federal jurisdiction" to act as a limiting factor since almost all tribes have members that "interacted with or received benefits from the United States." Clark Cty Mot. at 17. Similarly, Grand Ronde further argues that § 479 should be interpreted as narrowing the types of tribal groups to only those "tribes that were under 'Government supervision and control' " in 1934, and faults the Secretary for finding that "mere dealings" with a tribe and its individual tribal members would suffice to show such supervision and control over a tribe. Grand Ronde Mot. at 28.

Defendants, for their part, insist that the Secretary's interpretation of "under Federal jurisdiction" is a permissible construction of the IRA and informed by the agency's expertise in Indian affairs, which they argue should be given deference. Cowlitz Mot. at 14.

Section 479 defines Indians as "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The Secretary acknowledged that the phrase "under Federal jurisdiction" qualifies the term "recognized tribe." A.R. 140475. The parties agree then that under § 479, the tribe, as opposed to its individual members, must be under federal jurisdiction. The statute does not, however, explain what it means for a tribe to be "under Federal jurisdiction," or describe what type of evidence a fact-finder may consider in making that analysis. Nothing in § 479 prohibits the Secretary from considering the relationship between the Fed-

8. Clark County Plaintiffs also argue that the Secretary's test is erroneous because it allows the Secretary to look at events occurring *prior* to 1934 to demonstrate that the tribe was under federal jurisdiction in 1934. Clark Cty Mot. at 16. This argument ignores the fact that the second part of the Secretary's test directly asks whether the tribe remained under federal jurisdiction in 1934. Accordingly, the Court is not persuaded by this argument and rejects it.

eral government and individual Indians when determining whether the tribe itself was under federal jurisdiction in 1934. Moreover, it strikes the Court as perfectly reasonable for the Secretary to consider the relationship to the part (the tribal members) when trying to assess the relationship to the whole (the tribe). As such, the Court finds that the Secretary's test did not violate the APA by considering the Federal government's relationship to individual tribal members when ascertaining whether a tribe as a whole was "under federal jurisdiction."

The Court is similarly unpersuaded that the legislative history for § 479 renders the Secretary's test erroneous. According to the May 18, 1934 hearing transcript, the phrase "under federal jurisdiction" was suggested by Commissioner Collier after a colloquy between Senator O'Mahoney and Chairman Wheeler. Chairman Wheeler expressed his concern that some "so called tribes' " were composed of "white people essentially," and yet because they were "under the supervision of the Government of the United States," they would receive benefits under the act. A.R. 135301. Senator O'Mahoney suggested in turn that the committee include a separate provision "excluding from the benefits of the act certain types." *Id.* At this point, Commissioner Collier proposed to add the phrase "now under Federal jurisdiction" after the words "recognized Indian tribe." *Id.* After this proposal, the hearing immediately ended and the phrase is not discussed any further.

This colloquy, as the Secretary's decision noted, is "ambiguous and confused." A.R. 140475. It remains entirely unclear what the legislators meant by the phrase "under Federal jurisdiction." While the legislative history suggests that the phrase "under federal jurisdiction" was added to narrow the types of tribes that qualify for benefits under the IRA, it is not clear as to what tribes the legislators intended to exclude.[9]

Plaintiffs insist that the Secretary's interpretation of "under federal jurisdiction" defies the legislative intent because "[v]irtually any tribal group will have members who have interacted with or received benefits from the United States." Clark Cty Mot. at 17. But such an argument falsely portrays the Secretary's test as one that automatically grants "under federal jurisdiction" status once a tribe can show that its members received federal benefits and services in 1934. This is a distortion of the test employed by the Secretary, which considers the federal services and benefits received by individual tribe members among other types of evidence, and asks if the evidence, when taken as a whole, is "sufficient to establish, or [ ] generally reflects federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." A.R. 140476.

In sum, the Court finds the legislative history to be exceedingly unhelpful, except

9. As noted, the Commissioner introduced the phrase ''under federal jurisdiction'' in response to Chairman Wheeler's desire to exclude tribes that he felt were not sufficiently Indian although they were still ''under the supervision of the Government of the United States.'' Thus, one may argue that a tribe that was ''under federal jurisdiction'' was not necessarily ''under the supervision of the Government.'' Such a conclusion, however, not only undermines Grand Ronde's argument that ''under federal jurisdiction'' means that the tribe ''must be under the supervision and control of the federal government,'' Grand Ronde Mot. at 20, but also contravenes the Secretary's interpretation of ''under federal jurisdiction,'' which requires some level of federal supervision. The Court notes this potential interpretation only to further highlight that the legislative history is ambiguous and not helpful.

that it confirms that the phrase "under federal jurisdiction" is indeed ambiguous and that *Chevron* deference is required.[10] Accordingly, the Court is not persuaded that the legislative history renders the Secretary's test to be arbitrary, capricious or legal error.

c. The Secretary's Application of the Two–Part Test to the Cowlitz Tribe

In the Record of Decision, the Secretary found that the United States' 1855 treaty negotiations with the Lower Band of Cowlitz Indians were "the first clear expression that the Cowlitz Tribe (or its predecessors) was under federal jurisdiction." A.R. 140478. The proposed treaty called for the Cowlitz and the other tribes in the area to "cede all their claims to territory covering much of the southwestern Washington in exchange for a single reservation to be provided later, most likely on the Pacific Ocean." *Id.* The Secretary determined that although the treaty negotiations failed, the government took the land, and "at a minimum, it demonstrates that the Federal Government acknowledged responsibility for the Tribe (or its predecessors)." *Id.*

According to the Secretary, for approximately a decade after the failed treaty negotiations, the Department of Interior recognized that Indian title to the Cowlitz's land had never been properly ceded. In 1904, the Cowlitz "began a prolonged effort to obtain legislation to bring a claim against the United States for the taking of their land." A.R. 140481. And although ultimately unsuccessful, the Tribe received support from both the Special Indian Agent who was tasked by the Department of Interior to review the claim and the local Superintendent. *Id.*

The Secretary further notes that from the mid–1850s until 1934, the Federal government continued a "course of dealings" with the Cowlitz Tribe. For instance, in 1868, Federal officials attempted to distribute goods and provisions to the Cowlitz Indians. A.R. 140479. In 1878, the Federal government "deemed it necessary to formally acknowledge two individuals to be 'chiefs' of the Lower and Upper Bands of the Cowlitz," and communicated with the Tribe through these individuals until 1912, when the chiefs died. *Id.* The Secretary also observes that the "local Superintendent also enumerated the members of both bands and then listed them together in that year's statistical tabulation," thereby demonstrating "unambiguous federal jurisdiction." A.R. 140479.

The Secretary further states that the Federal government provided for the Cowlitz's education and medical needs from the late 19th century and this "continued into the 20th century." A.R. 140479–140480. For instance, Cowlitz children attended schools operated by the Bureau of Indian Affairs and the Department of Interior authorized money for "health services, funeral expenses, or goods at a local store on behalf of Cowlitz Indians." A.R. 140480. Moreover, the Secretary notes that "[t]he local Indian Agency representatives repeatedly included Cowlitz Indians as among those for whom they believed they had supervisory responsibilities." *Id.* For instance, "during the 1920s

10. The ambiguity of the phrase is further corroborated by a memo written by then Assistant Solicitor of the Department of Interior and one of the primary drafters of the initial legislation, Felix Cohen. In this memo, Cohen observed that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under Federal jurisdiction, *whatever that may mean.*'" A.R. 140468. Based on his assessment, the Solicitor's Office recommended deleting the phrase "under federal jurisdiction," although that recommendation was evidently rejected or ignored.

the Superintendent of the Taholah Agency represented the interests of the Cowlitz Tribe vis a vis state parties for purposes of Cowlitz Tribe's fishing rights." *Id.* In 1927, the Superintendent of the Taholah Agency clarified that "the Cowlitz band are under the Taholah Agency," and wrote that his jurisdiction included *inter alia* "all those Indians belonging to the . . . Cowlitz." *Id.* The Superintendent also described his 1923 traveling expenses to include travel to the reservations under his jurisdiction, which included the "Cowlitz Reservation located in the Cowlitz River Valley" (even though the Cowlitz did not formally have a reservation). *Id.* A.R. 140480–140481.

Next, the Secretary notes that the Federal government issued "public domain" allotments to some Cowlitz Indians in the late 1800s and "took actions in support of these allotments," such as supervising the sale of lands and protesting a tax sale of land held in trust. A.R. 140482140483. Some Cowlitz Indians also received allotments due to "the Act of March 4, 1911" which directed the Secretary to make allotments to members of tribes in the State of Washington "who are affiliated with the Quinaielt and Quileute tribes." A.R. 140483. In its 1931 decision, *Halbert v. United States,* the Supreme Court determined that the Cowlitz members were entitled to such allotments. *Id.* (citing *Halbert v. United States,* 283 U.S. 753, 51 S.Ct. 615, 75 L.Ed. 1389 (1931)). The Secretary points to the history of the Federal government granting allotments to the Cowlitz members as further evidence that the Tribe was "under federal jurisdiction" in 1934. A.R. 140484.

Lastly, the Secretary considered as "important" evidence of jurisdiction, the Department of Interior's 1932 approval of an attorney contract for the Cowlitz Tribe. By law, attorney contracts between Indian tribes and attorneys had to be approved by the Commissioner of Indian Affairs and the Secretary. Thus, the Superintendent from the Taholah Agency was sent by the Commissioner to observe meetings between the Cowlitz Tribe and the attorneys who planned to bring claims on behalf of the Tribe against the United States. Ultimately, the Commissioner and Secretary's First Assistant approved these attorney contracts. A.R. 140484.

The Secretary, after her detailed and extensive historical review, concludes that "[a]ll of this evidence, taken together, supports [the agency's] conclusion that prior to and including 1934 the Cowlitz Tribe retained and did not lose its jurisdictional status as a tribe "under federal jurisdiction." A.R. 140484.

d. The Secretary's Application of the Two–Part Test to the Cowlitz Did Not Violate the APA

[9] According to Plaintiffs, the Secretary erred when she found that the Cowlitz Tribe was "under federal jurisdiction" as a result of the failed treaty negotiations. Grand Ronde Mot. at 27; Clark Cty at 19–20. According to Plaintiffs, "[a] failed treaty could never serve to bring a tribe under federal jurisdiction, because such failed negotiations create no 'obligations, duties, responsibility for or authority over the tribe' by the United States." Clark Cty Mot. at 20.

The Cowlitz Tribe argues in response that the treaty negotiations show that the Tribe was under federal jurisdiction because, upon the tribe's refusal of the treaty's terms, the United States "exercised its ultimate jurisdiction by simply dissolving the Tribe's aboriginal title [to its land] through an Executive Order." Cowlitz Mot. at 16. Similarly, the Government observes that the Upper Chehalis and Chinook tribes also took part in the same failed treaty negotiations as the Cowlitz,

and despite the unratified treaty, the Federal government assumed control over their tribal lands, "essentially treat[ing] the land as ceded." Govt's Reply at 4–5. The Government concludes that it "did not matter whether these tribes entered into a ratified treaty because the Federal government unilaterally asserted jurisdiction over the tribes and their lands regardless." *Id.* at 5.

As an initial matter, the Court agrees that the failed treaty negotiations do not, in and of themselves, "establish, or . . . generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." However, the Secretary relies on much more than the failed treaty negotiations to establish that the Cowlitz Tribe was "under federal jurisdiction" in 1934. More specifically, the Secretary relies on the "course of dealings" that came after those failed treaty negotiations—*e.g.,* the granting of allotments to Tribal members, the approval of the Tribe's attorney contracts, and the other federal services provided to the Tribe and its members up to and including 1934. *See supra* Part III.A.2.c. The Secretary's determination that the Cowlitz were "under federal jurisdiction" prior to and including 1934 was based on "[a]ll of this evidence, taken together." A.R. 140484.

Moreover, the Cowlitz's rejection of the proposed treaty does not mean that the Tribe was not under federal jurisdiction in 1934. If anything, the fact that the Federal Government ignored the Tribe's demands and ultimately took its tribal lands without compensation, corroborates that the Federal Government treated the Cowlitz as though the Tribe was under its authority. For these reasons, the Court finds the Secretary's determination that the Cowlitz Tribe was "under federal jurisdiction" prior to 1934 was reasonable and not in violation of the APA.

Next, Plaintiff's contend that the Cowlitz could not have been under federal jurisdiction in 1934 because the Tribe's relationship with the Federal Government had already been "terminated"—as found by the NIGC in its Restored Lands opinion. Grand Ronde Mot. at 22; *see also* Clark Cty. Mot. at 19–20, 24–46. Plaintiffs insist that termination "is the antithesis of 'Federal jurisdiction' " because it denotes the cessation of federal supervision and control over an Indian tribe. Grand Ronde Mot. at 22; *see also* Clark Cty Mot. at 21. In response, Defendants argue that a "termination" in the NIGC's restored lands opinion refers to an "administrative termination" by the Department of Interior under IGRA, which is the statute that the NIGC interprets in issuing a Restored Lands opinion. Such an "administrative termination," Defendants maintain, is different than a termination by Congress, which is the only entity that could legally terminate federal jurisdiction over a tribe.

The Court finds the NIGC's Restored Lands opinion to be of questionable value in determining whether the Cowlitz Tribe was "under federal jurisdiction" in 1934. The NIGC determined in its Restored Lands opinion that the Cowlitz qualified for the IGRA's restored lands exception because the Tribe had been ignored by the Department of Interior and the Department "no longer had a government-to-government relationship with the Tribe." A.R. 8200. In other words, the Cowlitz Tribe was no longer formally recognized from "at least the early 1900s" and was therefore deemed "terminated" under the IGRA. A.R. 8199. As the Secretary explained, modern notions of "federal recognition" and its inverse, "termination," are concepts that evolved in the 1970s, after the Department promulgated procedures

by which a tribe could demonstrate its status as an Indian tribe. A.R 140468. Federal courts have since construed the restored lands exception under IGRA so that a cessation of administrative services by the Department of Interior could amount to a *de facto* termination of a tribe. *See e.g., TOMAC v. Norton,* 433 F.3d 852, 865 (D.C.Cir.2006).

Using the NIGC's legal conclusions and findings, Plaintiffs argue that the Tribe cannot be "under federal jurisdiction" under the IRA, if there was no "government-to-government relationship" under IGRA. Such reasoning incorrectly assumes, however, that a government-to-government relationship, as defined by IGRA and the federal courts interpreting IGRA, is a prerequisite to a tribe being "under federal jurisdiction" pursuant to IRA. Importantly, under the Secretary's interpretation of "under federal jurisdiction," the actions or inactions of the Department of Interior are insufficient to extinguish the jurisdictional relationship between the federal government and an Indian tribe. In other words, "Congress's constitutional plenary authority over [an] Indian tribe[ ] cannot be divested," even if the Department of Interior ignored the tribe. A.R. 140476. Therefore, a tribe could be "under federal jurisdiction" under the IRA while lacking a "government-to-government" relationship under the IGRA. As noted by the Defendants, case law lends support to the Secretary's position. *See TOMAC v. Norton,* 433 F.3d 852, 856 (D.C.Cir.2006) (reciting Congress's statement that the Pokagon Band "was unfairly terminated as a result of both faulty and inconsistent administrative decisions contrary to the intent of Congress, federal Indian law and the trust responsibility of the United States"); *cf. United States v. John,* 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (holding that federal jurisdiction existed over the prosecution of a crime that occurred on a reservation despite the "long lapse" in federal recognition). According to the Secretary, the NIGC's Restored Lands opinion is an interpretation of the IGRA and not the IRA, and a finding of termination under the IGRA is not fatal to a finding that the Cowlitz were "under federal jurisdiction" pursuant to the IRA. In reaching this conclusion, the Secretary has exercised her expertise in Indian affairs to construe ambiguous statutory language and in reconciling different approaches taken by different agencies as they exercise their responsibilities to Indian tribes.

Finally, Plaintiffs contend that the Secretary erred by dismissing unfavorable evidence that they claim shows the Cowlitz were not "under federal jurisdiction" in 1934. Specifically, Plaintiffs point to a 1924 statement in which the then-Secretary opposed legislation that would have allowed the Cowlitz to file a claim against the federal government. The Secretary stated that that the Cowlitz Indians "are without any tribal organization, generally self-supporting, and have been absorbed into the body politic." Plaintiffs also note a 1933 letter from the Commissioner Collier denying enrollment to an individual person in the Cowlitz tribe; in this letter Collier states that the Cowlitz was not in existence as it did not have a reservation or tribal funds on deposit under the government's control.[11] Clark Cty Mot. at 22.

The Secretary did not ignore the evidence cited by Plaintiffs, but rather found that it was not persuasive in light of the rest of the record. With respect to Commissioner Collier's 1933 letter, the Secre-

11. Plaintiffs also point to evidence that the Cowlitz lacked formal recognition, *i.e.* had been "terminated." However, as discussed above, the Secretary reasonably concluded that formal recognition is not the same as being "under federal jurisdiction."

tary determined that Collier's statement that the Cowlitz did not exist was "conclusory and unsupported," and therefore unpersuasive given the evidence raised in "the thorough analysis of the historical record performed for the [Cowlitz's 2002] acknowledgment decision," *i.e.* evidence that supported that the Cowlitz Tribe was a continuous political entity throughout the 20th century. A.R. 140482. For this same reason, the Secretary discredited the 1924 statement by the then-Secretary of Interior describing the Cowlitz as "without any tribal organization," "self-supporting," and "absorbed into the body politic." A.R. 140480. Moreover, the Secretary determined the 1933 letter was further undermined by Commissioner Collier's statement the very next year, in 1934, in which he instructs the local Taholah Superintendent to enroll any Cowlitz Indians that were under his jurisdiction as Cowlitz even though they had received an allotment on the Quinault Reservation. A.R. 140482. Thus, the Secretary did all that the APA requires—she considered the 1933 letter and 1924 statement as well as other evidence and briefly explained why she remained persuaded that the totality of evidence tipped in favor of finding that the Cowlitz Tribe was under federal jurisdiction. *See Bowen v. Am. Hosp. Ass'n,* 476 U.S. 610, 626, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986) (describing an agency's requirements under APA).

3. Cowlitz's Membership Numbers

The Cowlitz Tribe increased its tribal members from 1,482 at the time it was first federally acknowledged in 2002, to 3,544 members in 2007. Pls. Clark Cty's Mot. at 24. Clark County Plaintiffs argue that the Secretary neglected her duty under 25 C.F.R. § 83.12 to confirm that the new Tribe members "maintained social and political ties with the tribe and either descend from members on the base roll or from the historic tribe." *Id.* at 24. The Secretary's failure to do so, Clark County Plaintiffs contend, voids the Secretary's decision that she was authorized to take the Parcel into trust on behalf of the Cowlitz. *Id.* at 27. Among other arguments,[12] Defendants counter that Clark County Plaintiffs never presented this argument at the administrative level and have therefore waived it. Cowlitz Mot. at 16; Gov't Mot. at 34, n.30. Clark County Plaintiffs insist that they "clearly raised the issue of the Tribe's greatly expanded enrollment" at least three times. Clark Cty Reply at 16.

[10, 11] "While there are surely limits on the level of congruity required between a party's arguments before an administrative agency and the court, respect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing [laws] are first raised in the administrative forum." *Koretoff v. Vilsack,* 707 F.3d 394, 397 (D.C.Cir.2013) (quoting *NRDC v. EPA,* 25 F.3d 1063, 1074 (D.C.Cir.1994)). Accordingly, courts require that a party in an APA action raise only the "specific argument" that was raised to the agency and "not merely the same general legal issue." *Id.* "This principle applies to legal, as well as factual,

12. Defendants also argue that Clark County Plaintiffs lack standing to raise this issue. "Although standing is usually a threshold inquiry, both the Supreme Court and this Circuit have long recognized the propriety of avoiding difficult, constitutionally-based justiciability issues when a case is more simply resolved on another basis." *Railway Labor Executives' Ass'n v. United States,* 987 F.2d 806, 811 (D.C.Cir.1993). Because the Court concludes that Clark County Plaintiffs waived this issue, the Court does not decide whether Clark County Plaintiffs had standing to challenge the Secretary's alleged failure to properly review the Cowlitz membership numbers.

arguments." *Tindal v. McHugh*, 945 F.Supp.2d 111, 129 (D.D.C.2013) (citing *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1290 (D.C.Cir.2004) (per curium) ("To preserve a legal or factual argument, . . . [a] proponent [must] have given the agency a 'fair opportunity" to entertain it in the administrative forum before raising it in the judicial one."))

Plaintiffs point to communications—one newspaper editorial and two legal correspondences—in which they took issue with the Cowtliz Tribe's membership expansion. Clark Cty. Reply at 16. In these communications, Clark County Plaintiffs argued that the BIA had tarnished the integrity of the NEPA process by relying on Cowlitz Tribe's overstated membership figures. *See* A.R. 92207; A.R. 86688; A.R. 572. More specifically, the Clark County Plaintiffs argued that the public should be given an opportunity to provide comments and challenge the membership figures. *Id.* Insofar as Clark County Plaintiffs challenge the integrity of the NEPA process before this Court (arguments which are discussed in detail later in this opinion), such arguments are preserved.

[12] However, Clark County Plaintiffs never voiced any concern at the administrative level that the Secretary's statutory authority to take the land in trust was somehow impugned because she had not reviewed the Cowlitz membership figures. Nor did the Clark County Plaintiffs previously argue that the Secretary has an ongoing obligation under 25 C.F.R. § 83.12 to review a tribe's membership figures before taking land into trust on the tribe's behalf. Under the waiver doctrine, Plaintiffs cannot raise such arguments now. *See NRDC v. EPA*, 25 F.3d 1063, 1074 (D.C.Cir.1994) ("failure to raise a particular question of statutory construction before an agency constitutes waiver of the argument in court," even if the party had made "other technical, policy, or legal arguments").

B. The Secretary Did Not Violate the APA in Concluding that the Parcel Qualifies for Gaming under the IGRA

As described above, Section 20 of the IGRA allows gaming on lands that the Secretary acquired in trust so long as the lands are the tribe's "initial reservation." 25 U.S.C. § 2719(b)(1)(B)(ii). Because the IGRA does not define "initial reservation," the Secretary determines whether the tribe meets the "initial reservation" exception when she decides to take land into trust. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 462–63 (D.C.Cir.2007). Under the pertinent agency regulations, a land may qualify as an "initial reservation" if, *inter alia*, it is "within an area where the tribe has significant historical connections." 25 C.F.R. § 292.6. A tribe demonstrates "significant historical connections" by presenting "historical documentation [of] the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." [13] 25 C.F.R. § 292.2. As the Secretary determined, the regulations do not define the term "vicinity."

Plaintiffs argue the Secretary erred in her determination that the Parcel is eligible for gaming under the "initial reservation" exception of the IGRA. More specifically, Plaintiffs contend that the Cowlitz cannot have "significant historical connections" to the Parcel because it was 14 miles outside of the Cowlitz's aboriginal territory, the boundaries of which were defined

13. Although not applicable here, a land may also be of "significant historical connections" if it is within the boundaries of the tribe's last reservation. 25 C.F.R. § 292.2.

by the Indian Claims Commission (ICC).[14] Grand Ronde Mot. at 33–34; *see also* Clark Cty at 30. According to Plaintiffs, both the regulation's text and the overarching purpose of the IGRA require the Secretary to interpret "significant historical connection" by considering whether the tribe has shown "long term" occupancy and use in the land "directly surrounding" the Parcel. Grand Ronde Reply at 36. Plaintiffs further argue that the Secretary's broad interpretation of "significant historical connection" "constitutes a wholesale departure" from the agency's prior decisions. Grand Ronde Mot. at 36.

Defendants counter that the regulations "do not require that the land be previously 'owned or possessed' by the tribe, or be at the center of its historic territory," but rather the Cowlitz need only show historic use and occupancy in the vicinity of the Parcel. Cowlitz Reply at 21. Defendants further argue that ICC-determined boundaries cannot demark the lands where the Cowlitz have "significant connections" because the ICC's boundaries are based on stricter standards, *i.e.* a tribe must show actual, exclusive, and continuous use and occupancy of the land. *Id.* at 45–46. Additionally, Defendants insist that the Secretary's decision is consistent with the agency's prior decisions that address the "significant historical connections" requirement under the IGRA. *Id.* at 46.

1. The Secretary's Interpretation of "Significant Historical Connection" Did Not Contravene the Plain Language of the Regulations or the IGRA's Purpose

The Secretary determined that the Parcel qualifies as the Cowlitz's "initial reservation." Specifically, the Secretary found that the Cowlitz Tribe had demonstrated its significant historical connection to the Parcel through evidence that the Tribe had occupied or used land in the vicinity of the Parcel. ROD 126; A.R. 140507. Plaintiffs fault the Secretary's interpretation of "significant historical connection" as overly broad. According to Plaintiffs, a tribe that seeks to demonstrate its "significant historical connections," must show that its occupancy or use of the land was "long-term" and took place on the land itself or "adjacent" to it, and that the tribe had some "claim of ownership . . . to the land." Grand Ronde Reply at 34. However, the plain language of 25 C.F.R. § 292.2 provides that a tribe seeking an initial reservation proclamation may demonstrate its significant historical connections to the land through evidence of the tribe's "occupancy or subsistence use in the vicinity of the land." The regulation does not require that the occupancy and use be "long term" or that the tribe claim any ownership or control, exclusive or otherwise, over the land. Nor does the regulation require the Cowlitz Tribe to have occupied or used the Parcel or the land adjacent to it.[15]

14. In *Plamondon v. United States*, 21 Ind. Cl. Comm. 143 (June 25, 1969), a Cowlitz tribal member petitioned the ICC to be compensated for Cowlitz lands taken by the United States in the nineteenth century. A.R. 140501–02; 140507. The tribal member petitioning the ICC was required to show "actual, exclusive, and continuous use and occupancy prior to loss of the land in order to be compensated for a taking of their aboriginal titles." A.R. 140501. After a thorough historical analysis, the ICC set forth the boundaries of the Cowlitz aboriginal territory in its *Plamondon* decision. A.R. 131966. These boundaries excluded the Parcel, which was situated fourteen miles to the south of the Cowlitz aboriginal territory. A.R. 140502.

15. Relatedly, Clark County Plaintiffs argue that the Secretary failed to address whether the Parcel was "*within an area* where the Tribe has significant historical connections" because she did not "define a specific area in order to determine that the Parcel falls 'within' it." Clark Cty Reply at 30. According to the Clark County Plaintiffs, the Secretary was

Indeed, during the notice and comment process for the rule, the agency specifically considered and rejected several changes to the definition of "substantial connection," which would have aligned with the Plaintiffs' stricter interpretation. One commenter expressed concern that "the word 'area,' as it relates to the term 'significant historical connection' is too broad," and sought to limit gaming to ancestral homelands. 73 Fed.Reg. 29,354, 29,360. In refusing to adopt the recommendation, the agency noted that "the actual land to which a tribe has significant historical connection may not be available." *Id.* Other comments suggested that "the significant historical connection requirement should be uninterrupted connection" or "show historically exclusive use," but the agency rejected both recommendations because such requirements "would create too large a barrier to tribes in acquiring lands and they are beyond the scope of the regulations and inconsistent with IGRA." *Id.* In sum, the agency rejected a more restrictive definition of "significant historical connection" because, among other reasons, it did not comport with the IGRA.

As the D.C. Circuit explained, the purpose of the "initial reservation" exception is to "ensur[e] that tribes lacking reservations when the IGRA was enacted are not disadvantaged relative to more established ones." *Citizens Exposing Truth about Casinos,* 492 F.3d at 467 (D.C.Cir.2007) (quoting *City of Roseville v. Norton,* 348 F.3d 1020, 1030 (D.C.Cir.2003)). A stricter approach to defining a significant historical connection may arguably frustrate this objective by making it more difficult to allow gaming on newly established reservations, thereby hurting the economic development of newly recognized tribes.

Plaintiffs argue that the Secretary's interpretation violates the IGRA's purpose because it "give[s] newly recognized tribes an advantage over pre-existing tribes," since the former can "choose the location of their land acquisitions so as to maximize casino revenue." Grand Ronde Mot. at 32. Such an argument might persuade the Court if the Secretary's test allowed newly recognized tribes to select their locations without limitation. But this is hardly the case. Instead, the Secretary, invoking her expertise in balancing the competing interests of newly recognized and pre-existing tribes, has issued regulations requiring that a newly recognized tribe seeking to game on its initial reservation meet three requirements. Specifically, "the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located . . . and within an area where the tribe has significant historical connections," as well as display "one or more . . . modern connections to the land," as defined by the regulation. 25 C.F.R. 292.6. Such a test is far from the free-for-all scenario that Plaintiffs suggest.

required to use ''the combination of historical connections—burial grounds, villages, occupancy and subsistence use'' to define the parameters of 'the area 'within' which a parcel qualifies as an initial reservation.'' *Id.* at 30–31.

Again, Plaintiffs are reading in additional requirements to the regulatory language. While the text of 25 C.F.R. § 292.6 requires that the Parcel be ''within an area'' where the Cowlitz had significant historical connections, the Secretary reasonably interpreted this to mean that the Cowlitz Tribe needed to have significant historical connections to the Parcel itself. Therefore, defining the ''parameters'' of an ''area'' would serve as a useless exercise. Accordingly, the Court rejects the argument that the Secretary erred by not defining ''an area'' pursuant to § 292.6. Such an argument masks the real disagreement among the parties: the limits of what lands are in the ''vicinity'' of the Parcel under 25 C.F.R. § 292.2.

[13] In sum, the plain language of the regulation does not unambiguously require a finding of "long term" use or occupancy on the land "directly surrounding" the Parcel. Moreover, the Secretary's interpretation does not frustrate the purpose of the IGRA and the initial reservation exception. Congress left it up to the Secretary's expertise to determine when a land qualifies as an "initial reservation." *See Teva Pharms. USA. Inc. v. FDA,* 441 F.3d 1, 5 (D.C.Cir.2006). ("It is up to the agency to bring its experience and expertise to bear in light of competing interests at stake and make a reasonable policy choice."); *id.* at 4 ("When a statute is ambiguous, Congress has left a gap for the agency to fill."). As such, the Court properly defers to the Secretary's interpretation.

2. The Secretary Did Not Depart from Prior Decisions in Her Interpretation of "Significant Historical Connection"

Plaintiffs argue that the Secretary's decision departs from agency precedent which they claim "had consistently required petitioners to show that their desired gaming site was within their historical territory." Grand Ronde Mot. at 37. In support, Plaintiffs note prior decisions where the Secretary relied on the location of the gaming site "within territory that the tribe ceded to the United States, settled on, or aboriginally controlled (or some combination of the three.)." *Id.* at 37. Plaintiffs also argue that the Secretary's prior decision, *Scotts Valley Band of Pomo Indians,* requires the Cowlitz to demonstrate that its tribal members used or occupied the Parcel itself and not just the land 14 miles outside of the Parcel. *Id.* at 39.

As discussed above, the regulations do not require the Cowlitz to demonstrate that the Parcel is within the Tribe's "historical territory," or that the Tribe used or occupied the Parcel itself. The regulations simply require that the Parcel be located within an area where the tribe has significant historical connections, which, in turn, can be demonstrated through tribal use or occupancy of land in the vicinity of the Parcel. Nevertheless, "[i]t is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently." *West Deptford Energy, LLC v. FERC,* 766 F.3d 10, 21, 2014 U.S.App. LEXIS 16406, *25 (D.C.Cir. 2014). Therefore, the Court turns to investigate whether the agency departed from its precedent in deciding that the Cowlitz Parcel qualified as an initial reservation.

In *Scotts Valley Band of Pomo Indians,* the agency elaborated on the regulatory meaning of "vicinity," explaining that a tribe's "subsistence use and occupancy requires something more than a transient or occasional presence in the area," and rejecting a definition of vicinity based solely on the land's proximity to the parcel. Doc. 23–7 at 218–19. The agency explained that "significant historical connection" may be found even if the "tribe lacks any direct evidence of actual use or ownership of the parcel itself." *Id.* at 219 ("[I]t would be unduly burdensome and unrealistic to require a tribe to produce direct evidence of actual use or occupancy on every parcel within a tribe's historic use and occupancy area."). The agency further elaborated that

> a determination of whether a particular site with direct evidence of historic use or occupancy is within the vicinity of newly acquired lands depends on the nature of the tribe's historic use and occupancy, whether those circumstances lead to the natural inference that the tribe used or occupied the newly ac-

quired land. This analysis is, necessarily, fact-intensive, and will vary based on the unique history and circumstances of any particular tribe.

Id. at 219, n.59. Thus, contrary to the Plaintiffs' argument, the *Scotts Valley* opinion did not require the Cowlitz to show direct evidence of historic use or occupancy of the Parcel itself, but rather that the Parcel was in the vicinity of "a particular site with direct evidence of historic use or occupancy."

The Secretary applied the *Scotts Valley* standard in finding that the Cowlitz had demonstrated "significant historical connections" to the Parcel. A.R. 140507 (quoting *Scotts Valley*). The Secretary begins her analysis by adopting the ICC's findings that the land 14 miles north of the Parcel was exclusively used and occupied by the Cowlitz. A.R. 140507. The Secretary explained that the ICC boundaries demarcated an area of exclusive use and occupation by the Cowlitz, but did not encompass all of the land that the Tribe historically occupied and used for subsistence. A.R. 140517. Applying *Scotts Valley,* the Secretary then turned to "look at how the Cowlitz Indians used and/or occupied the lands to the south of the exclusive use and occupancy area determined by the ICC," and ultimately concluded that there was sufficient evidence of use and occupancy in that area to support the natural inference that the Cowlitz used or occupied the Parcel as well. A.R. 140508.

In particular, the Secretary found the following evidence of the Cowlitz occupancy and use in the vicinity of the Parcel to be credible: (1) the Cowlitz's occupancy, namely hunting camp sites and "treaty-time" villages, at Warrior's Point, a site on the Columbia River and only three miles from the Parcel; (2) the Cowlitz reliance on the natural resources of the Columbia River for subsistence use and trade; (3) Cowlitz' "extensive and intensive" trading activities at both Bellevue Point (ten miles from the Parcel), and the intersection of the Lewis River and Columbia River (three miles from the Parcel); [16] (4) a major battle between the Cowlitz and the Chinook at a site three miles from the Parcel; (5) historical report about an individual Cowlitz who used the Lewis River area for subsistence hunting, (about 6 miles from the Parcel); (6) the fact that Cowlitz were expert boatmen and helped guide large boats carrying goods through

16. The Secretary acknowledged that the agency had previously rejected a trading route as demonstrating significant historical connections. A.R. 140514. In *Guidiville Band of Pomo Indians,* the agency found that "evidence of the Band's through a trade route . . . does not demonstrate the Band's subsistence use or occupancy within the vicinity of the Parcel," because "something more than evidence that a tribe merely passed through a particular area is needed to establish a significant historic connection to the land." Doc. 23–4 at 44. The Secretary, however, found that the facts surrounding the Cowlitz's "extensive and intensive trading activities" were "substantial enough to be more than 'a transient presence in an area,' " and rejected the notion that *Guidiville* had made a bright-line rule that "activities associated with a trade route or trading activities in general can never constitute evidence of significant historical connections." A.R. 140514. The Secretary explained that the Cowlitz's evidence showed the Tribe had not "merely passed through the vicinity of the Cowlitz Parcel or were a disparate group of traveling Indians." A.R. 140513. Because the Secretary offered a reasonable explanation as to why *Guidiville* was distinguishable from the Cowlitz's case, no violation of the APA has occurred. *ConAgra, Inc. v. NLRB,* 117 F.3d 1435, 1443–44 (D.C.Cir.1997) ("It is axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent." (internal quotations omitted)); *Manin v. NTSB,* 627 F.3d 1239, 1243 (D.C.Cir.2011) ("When an agency departs from its prior precedent *without explanation,* . . . its judgment cannot be upheld." (emphasis added)).

the mouth of the Lewis River, less than three miles from the Parcel; (7) census information showing that the Cowlitz occupied the lands in the vicinity of the Parcel. A.R. 140508–517. In making these findings, the Secretary reviewed and discussed several pieces of evidence, including those materials submitted by Defendants. A.R. 140517. The Secretary's analysis and fact-finding adequately supports and explains her conclusion that the Cowlitz had significant historical connections to the Parcel. Under such circumstances, the Court cannot substitute its judgment for that of the agency. *Verizon v. FCC,* 740 F.3d 623, 643–644 (D.C.Cir.2014) (noting that the Court must uphold the agency's "factual determinations if on the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion (internal citation omitted)); *Mine Safety and Health Admin. v. Fed. Mine Safety & Health Review Comm'n,* 111 F.3d 913, 918 (D.C.Cir.1997) ("An agency's conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.).

Plaintiffs argue that the evidence relied on by the Secretary cannot satisfy the significant historical connections requirement because, under agency precedent, the Parcel must be "within the Cowlitz "historical" territory, "as opposed to the fringes." Grand Ronde Mot. at 37. Plaintiffs specifically take issue with the fact that the Parcel is 14 miles from the ICC boundaries. *Id.* at 38. The Secretary reasonably explained, however, that the ICC boundaries demarked lands over which the Cowlitz had shown "actual, exclusive, and continuous use and occupancy," and that, while such a strict legal standard was required to establish aboriginal title before the ICC, it was not required to demonstrate "significant historical connections" under the regulations. A.R. 140501–502.

Naturally, if a proposed gaming site falls within a tribe's aboriginal title area, the Secretary will highlight that fact when determining that a tribe has significant historical connections to the site—*i.e.*, if a tribe can demonstrate actual, exclusive, and continuous use and occupancy, the tribe will *a fortiori* meet the less stringent standard for significant historical connections, which only requires occupancy or subsistence use in the vicinity of the land. Thus, it is unsurprising that Plaintiffs can list several prior agency decisions where the significant historical connections were found to exist because proposed gaming site was "within territory formerly occupied or controlled by [the] tribe." *See* Grand Ronde's Reply at 40 (table compiling agency precedent). However, this does not mean that a tribe *must* demonstrate that the proposed gaming site is within its aboriginal title area in order for the agency to find significant historical connections with the site. Nor do Plaintiffs point to conflicting agency precedent that invokes such a legal standard.[17] Finally, the Secretary's decision notes that it had previously determined that the Karuk Tribe of California had established significant historical connections "where the parcel owned by the Tribe was 38 miles from the tribal headquarters and not in an area

17. To be sure, Plaintiffs attempt to extrapolate such a rule by highlighting the factual findings of prior agency decisions where the parcel was in the tribe's historical territory. The Court agrees with Defendants that "Plaintiffs mistakenly emphasize the fact-specific differences between the various Indian land opinions based on each tribe's unique history instead of the legal test that is required to fit within the initial reservation exception." Govt's Reply at 37.

of exclusive use by the tribe." A.R. 140507.

For the above stated reasons, the Court finds that the Secretary's decision was not inconsistent with agency precedent, and does not violate the APA in her interpretation of "significant historical connection," nor in finding that the Cowlitz had demonstrated the Parcel qualified as an initial reservation under IGRA.

C. Environmental Challenges

Plaintiffs raise a host of challenges regarding the Secretary's compliance with NEPA. The Court first considers whether Grand Ronde has standing to pursue its NEPA claims, and then turns to the claims advanced by Clark County Plaintiffs.

1. Grand Ronde Lacks Standing to Pursue its NEPA Claims

The Government argues that Grand Ronde lacks standing to raise its NEPA challenges because it has failed to show a "particularized environmental interest." The Government contends that Grand Ronde's allegations of future economic injury are "insufficient for purposes of standing under NEPA." Govt's Mot. at 47–48. To the extent that Grand Ronde is claiming aesthetic and recreational interests as to the Parcel, the Government argues that the record is devoid of any "evidence as to the manner in which its members view or recreate at or near [the Parcel]," or of facts "regarding the manner in which the proposed federal action would injure those interests." Govt's Reply at 40.

Grand Ronde argues that it has standing due to "its deep cultural and historic connections to the land on the north shore of the Columbia River, including Clark County." Grand Ronde Reply at 43. More specifically, Grand Ronde states that its "tribal members are buried in that area," and that it "considers Clark County to be part of its "Non–Treaty Homelands" and "Cultural Interest Lands." [18] *Id.* Grand Ronde concludes that it "has important aesthetic and recreational interests in maintaining its historic ties to this land—and in having the land unaltered," and that such interests "would unquestionably" be injured by the Cowlitz development. *Id.* at 44.

[14, 15] The plaintiff bears the burden of establishing the elements of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). As relevant here, a plaintiff raising NEPA challenges must demonstrate that it is under threat of suffering an "injury in fact that is concrete and particularized." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing). "While generalized harm to . . . the environment will not alone support standing, if that harm in fact affects the recreational

18. Grand Ronde asserts that the "[Final Environmental Impact Statement] itself recognized that Grand Ronde . . . has significant cultural and historic interests in the parcel." Grand Ronde Reply at 43. This statement is misleading at best. The FEIS "identified three potentially interested parties in addition to the Cowlitz Indian Tribe: the Chehalis Confederated Tribes, the Yakima National, and the Shoalwater Bay Tribe." A.R. 75977. However, the FEIS explains that the agency reached out to Grand Ronde "per their request to be involved in the Native American consultation process." A.R. 75978. Thus, Grand Ronde cannot claim that the FEIS included them due to their cultural and historic ties to the Parcel when the tribe was not even identified as a "potentially interested party" but rather it asked to be involved.

or even the mere esthetic interests of the plaintiff, that will suffice." *Summers,* 555 U.S. at 494, 129 S.Ct. 1142. In making this showing, the plaintiff cannot rest on general factual allegations of injury resulting from defendant's conduct, but "must set forth by affidavit or other evidence specific facts." *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130.

Grand Ronde refers the Court to two documents highlighting its "historic and cultural connections to the north shore of the Columbia River." A.R. 8616, *see also* A.R. 8558–59. The first document was prepared by Grand Ronde and entitled "The La Center Casino Fiasco: a brief look at the legal and factual errors fatal to the Cowlitz Casino Project in La Center, Washington." A.R. 8609. Grand Ronde specifically points the Court to three bullet points which address Grand Ronde's "historic and cultural connection to the north shore of the Columbia River." A.R. 8616. The first bullet point notes the Willamette Valley Treaty of 1855 which "recognize[s] that bands to the south of the Columbia River have a legitimate claim to lands on the north shore of the River." The next bullet point observes that "Grand Ronde's tribal members are buried at Fort Vancouver on the north side of the Columbia River in Washington." *Id.* The last bullet point states that "Grand Ronde considers Clark County, Washington part of its 'Non–Treaty Homelands' and 'Cultural Interest Lands.' " *Id.*

The second document that Grand Ronde brings to the Court's attention is a 2007 letter from Grand Ronde to a Senior Cultural Resources Specialist employed by Analytical Environmental Services, a company that assisted in the agency in producing the Environmental Impact Statement. A.R. 8558. This letter states that Grand Ronde has historical and cultural connections to the Parcel, and specifically mentions the Willamette Valley treaty already described above. A.R. 8558.

[16] Assuming arguendo that these two documents sufficiently support Grand Ronde's recreational and esthetic interests in the north side of the Columbia River and Clark County, this is not enough to demonstrate a particularized, concrete injury-in-fact. Grand Ronde does not provide evidence that shows whether or to what extent the development of the Parcel (which covers only a part of Clark County) would injure them. As the Supreme Court has repeatedly made clear, "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity of it." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 565–566, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotations omitted). In other words, the Court must "assure itself that [Grand Ronde] plan[s] to make use of the specific sites upon which projects may take place." *Summers,* 555 U.S. at 499, 129 S.Ct. 1142. The evidence provided fails to demonstrate Grand Ronde's interest in the Parcel itself. *Id.* (explaining that standing "is not an ingenious academic exercise in the conceivable but requires a factual showing of perceptible harm").

Similarly, Grand Ronde neglects to provide any evidence—by affidavit or otherwise—that demonstrates how the proposed action would affect its recreational or esthetic interests in the Parcel. Instead, Grand Ronde simply asserts in its brief that "[a]llowing the Cowlitz to establish a reservation and build a casino on this site would unquestionably injure [its recreational and esthetic] interests." [19] Grand

19. Grand Ronde refers the Court to *TOMAC v. Norton,* 193 F.Supp.2d 182 (D.D.C.2002) to support its argument that injury is "unquestionable." Indeed, the court in *Tomac* found

Ronde Reply at 44. As discussed above, such generalized, vague notions of harm do not meet the injury in fact element required for Article III standing. Accordingly, the Court holds that Grand Ronde lacks standing to pursue its NEPA claims.

2. Clark County Plaintiffs' Environmental Challenges

a. The Secretary Reasonably Relied on the Environment, Public Health and Safety Ordinance

By way of background, in 2004, Clark County and the Cowlitz entered into a memorandum of understanding (MOU), whereby the County agreed to provide services (*e.g.,* law enforcement, fire protection, emergency medical services) and in return the Tribe agreed to abide by Clark County's codes and ordinances and pay the County to offset County expenditures and impacts to County revenues. A.R. 140389. However, subsequent litigation unrelated to the instant case called into question the legal enforceability of the MOU. *Id.* As a result, the Tribe enacted an Environment, Public Health and Safety (EPHS) Ordinance in 2007. *Id.*

According to the Secretary, the EPHS Ordinance:

> (i) obligated the Tribe to perform mitigation measures equivalent to those in the MOU, (ii) grants an irrevocable limited waiver of the Tribe's sovereign immunity to Clark County to allow an enforcement action by the County in state court, (iii) provides that the Tribe will not revoke or modify either the waiver of sovereign immunity or the environment, health and safety mitigation provisions of the Ordinance, and (iv) creates a Tribal Enforcement and Compliance Officer (TECO), whose duty is to ensure implementation and compliance with the EPHS Ordinance.

A.R. 140389–90. In addition, the Tribe "passed a Gaming Ordinance Amendment that amended the Tribe's existing gaming ordinance and incorporated the entire Tribal EPHS Ordinance." A.R. 140390. The NIGC approved this Gaming Ordinance Amendment in 2008. *Id.* Eventually, Clark County and the Tribe agreed to rescind the MOU and exclusively rely on the EPHS Ordinance and the Gaming Ordinance "to provide the same mitigation of impacts as was provided in the MOU." *Id.*

In her decision, the Secretary concluded that by incorporating the EPHS Ordinance, the Gaming Ordinance Amendment "includes mitigation measures equivalent to those in the MOU as part of the Tribe's gaming ordinance, giving the Federal Government enforcement authority to ensure that the mitigation measures are implemented." *Id.* Clark County Plaintiffs argue that the Secretary acted arbitrarily and capriciously in her conclusion that the EPHS Ordinance mitigated the "environmental and jurisdictional impacts" related to the Parcel's development. Clark Cty Mot. at 32. More specifically, Clark County Plaintiffs insist that "the EPHS Ordinance is revocable and . . . NIGC will not enforce it." *Id.* at 37. Furthermore, Clark County Plaintiffs argue that the Secretary violated the APA by not responding to comments and contrary authority concerning the NIGC's ability and authority

that the plaintiff had standing to challenge a proposed casino site. However, in that case, the plaintiff's members "live[d] within a few blocks of the casino, assert[ed] interests in viewing local wildlife, walking in their neighborhood, and enjoying their own properties." *Id.* at 187. Their properties were "immediately adjacent to a specific development project that will significantly and permanently alter the physical environment of their neighborhood." *Id.* at 187, n. 1. Unlike here, the *Tomac* court was not left to speculate whether in fact an interest in the casino property existed and how that interest would be injured.

to enforce the EPHS Ordinance. *Id.* at 36–37. The Defendants respond that the EPHS Ordinance is irrevocable and enforceable, and therefore the Secretary did not act arbitrarily or capriciously when she relied on the Ordinance for the mitigation measures.[20] Govt's Mot. at 62; Cowlitz Mot. at 54.

[17] The Secretary's decision explicitly acknowledged Clark County Plaintiffs' concerns that the EPHS Ordinance "was revocable at the discretion of the Tribe," "did not provide relief to Clark County in State Court," and was unenforceable by NIGC. A.R. 140411–12. The Secretary responded to such concerns by highlighting two mechanisms through which she maintains the EPHS Ordinance is enforceable. First, the Secretary found that Clark County could sue for relief or compliance in State Court because the Cowlitz Tribe had not only waived its sovereign immunity in the Ordinance but also reconfirmed the waiver in the MOU rescission agreement. A.R. 140412. This is unsatisfactory to Clark County Plaintiffs, who fault the Secretary for treating the EPHS Ordinance as a contract instead of a "unilateral and revocable" legislative act. Clark Cty Mot. at 35. However, "a tribe may voluntarily subject itself to suit by issuing a 'clear' waiver" of its sovereign immunity. *Marceau v. Blackfeet Hous. Auth.,* 455 F.3d 974, 978 (9th Cir.2006) (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001)). The Secretary's decision underscores her understanding that the Cowlitz had provided such a clear waiver and cannot, therefore, revoke the EPHS Ordinance without being held accountable in State Court.

Second, the Secretary explains in her decision that "the NIGC has the authority and ability to enforce" the EPHS Ordinance because it is part of a Gaming Ordinance and the NIGC has the power to close the gaming operation. A.R. 140412. Clark County Plaintiffs are concerned that the NIGC lacks the authority to enforce the EPHS Ordinance if the Cowlitz Tribe revokes or amends the Ordinance. A.R. 140412. However, assuming *arguendo* that the Cowlitz Tribe revokes the EPHS Ordinance, the regulations would allow NIGC to issue a Notice of Violation which may ultimately result in temporary closure of the gaming operation. *See* 25 C.F.R. §§ 573.3–573.4. Moreover, as discussed above, Clark County could itself sue the Tribe in State Court to prevent such revocation.

While Clark County Plaintiffs may have preferred a more detailed decision, the Court finds that the ROD contains a reasonable explanation as to why the Secretary believed the EPHS was irrevocable and enforceable and, accordingly, *Chevron* deference is warranted. *Miller v. Lehman,* 801 F.2d 492, 497 (D.C.Cir.1986) ("While the Secretary could have provided a more detailed explanation of his reasoning, we are required to uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. In addition, if the necessary articulation of basis for administrative action can be dis-

20. Defendants further argue that even if the EPHS Ordinance was revocable and unenforceable, "NEPA does not require that mitigation discussed in an EIS be enforceable and incapable of revocation," but rather requires only "a reasonably complete discussion of possible mitigation measures." Govt's Mot. at 62; Cowlitz Mot. at 59. As discussed above, the Court finds that the EIS discussed mitigation measures in "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Under NEPA, no more is required. *Id.*

cerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference." (internal quotations and citations omitted)).

b. Secretary Considered Reasonable Alternatives as Required by NEPA

Clark County Plaintiffs argue that the Secretary violated NEPA by using "unreasonable screening criteria" to exclude "reasonable alternatives" to the Parcel. Clark Cty Mot. at 38–39. According to the Clark County Plaintiffs, the Secretary's criteria were too restrictive and were applied unreasonably because even the Parcel did not meet the criteria. *Id.* at 40. Furthermore, Clark County Plaintiffs note that the Secretary eliminated certain alternatives by claiming that those sites could not adequately meet the Cowlitz Tribe's economic objectives. But such a determination, Clark County Plaintiffs argue, was erroneous because it was based on the Cowlitz Tribe's own assessment as to its economic needs and such an assessment was suspect. *Id.* at 41. Clark County Plaintiffs contend that the Secretary failed to conduct an independent evaluation as to the Tribe's enrollment figures and economic needs as required under 40 C.F.R. § 1506.5(a), and as such failed to make a "full informed and well-considered" decision as required by NEPA.[21] *Id.* at 42; Clark Cty Reply at 34–36.

Defendants maintain that the Secretary complied with NEPA's requirements, as the decision briefly discusses the reasons for eliminating alternatives deemed incompatible with the stated agency's objective. Cowlitz Mot. at 49. Furthermore, Defendants argue that it was permissible for the agency to consider and accept information from the Tribe's economic analysis, because an independent review of the Cowlitz economic needs would have been inappropriate given the Cowlitz's tribal sovereignty. Govt's Mot. at 52; Cowlitz Mot. at 47. Moreover, the Government argues that 40 C.F.R. § 1506.5(a) applies only to "environmental information," and, therefore, does not require an independent evaluation of the economic information supplied by the Cowlitz.

[18–20] Courts review an agency's selection of alternatives under the "rule of reason," which requires "considerable deference to the agency's expertise and policy-making role." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66,

21. In its reply, Clark County Plaintiffs argue that the agency "tinker[ed] with [the] purpose and need statement" after the draft EIS in order to make some alternatives less viable. Clark Cty Reply at 33. The Government responds that the changes to the purpose and need statement, which included references to the Unmet Needs Report, were made in response to public comments inquiring why sites located further north could not be analyzed. Govt's Reply at 43.

In *City of Grapevine v. Department of Transportation*, the petitioners similarly argued that the Federal Aviation Administration reacted to criticism to the draft EIS by "manipulat[ing] the statements of need and purpose to avoid considering any alternatives except for those that achieve what has been the FAA's unmistakable goal from day one." 17 F.3d 1502, 1506 (D.C.Cir.1994). The D.C. Circuit "pass[ed] over the facile implication that the [agency] harbored an improper motive for changing the statement of purpose in the FEIS." *Id.* The Circuit explained that "[t]he very purpose of a DEIS is to elicit suggestions for change," and that "[t]he resulting FEIS must be evaluated for what it is, not for why the drafter may have made it so." *Id.*

Thus, like *City of Grapevine*, the agency here was permitted to change the purpose and need statement after the draft EIS. So long as the agency provided a reasoned consideration to the alternatives, NEPA is satisfied. *Id.* (stating that a "hard look" is all that was required, even when the agency had changed the purpose statement in reaction to criticism after the draft EIS).

73 (D.C.Cir.2011). Under this approach, courts "first consider whether the agency has reasonably identified and defined its objectives. The agency's choice of alternatives are, then, evaluated in light of these stated objectives; an alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not 'bring about the ends of the federal action.' " *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C.Cir.1999). Courts must reject an "unreasonably narrow" objective "that compels the selection of a particular alternative." *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73 (quoting *Citizens Against Burlington*, 938 F.2d at 195–96).

Here, the agency's reasonably identified its objective in its FEIS:

> to establish a Tribal Headquarters from which [the Cowlitz] Tribal Government can operate to provide housing, health care and other government services, and from which it can conduct the economic development necessary to fund these Tribal Government services and provide employment opportunities for its members.

A.R. 75837. Clark County Plaintiffs and Defendants do not disagree that this broad purpose statement invites "a very wide range of alternatives." Clark Cty Mot. at 39; *see* Govt's Mot. at 51. Indeed, the agency originally identified 19 possible project locations. A.R. 75882. The agency then applied specific criteria to narrow 19 alternatives down to the 11 alternatives that were deemed feasible.[22] Such action was proper, since the agency was only required to consider feasible alternatives. *City of Grapevine v. Department of Transp.*, 17 F.3d 1502, 1506 (D.C.Cir.1994). ("The range of alternatives that the agency must consider is not infinite, of course, but it does include all "feasible" or "reasonable" alternatives to the proposed action."). The FEIS discusses each of these alternatives and briefly provides reasons for dismissing all but one of the alternatives to the Parcel.[23] A.R. 75882–75886; *City of Grapevine*, 17 F.3d at 1506 (The "rule of reason governs both which alternatives the agency must discuss, and the extent to which it must discuss them.").

Clark County Plaintiffs specifically take issue with the agency's exclusion of five alternative sites that were located farther north than the Parcel. The agency commissioned three individual market studies which found that these alternative sites were too "inconvenient to both the Seattle and Portland/Vancouver markets" and therefore could "not adequately meet the economic objectives and needs of the Tribal government."[24] A.R. 75886. Given that economic development of the Tribe was the main objective of the project, this explanation is plainly reasonable. *See Citizens Against Burlington*, 938 F.2d at 196 (an agency is required to "take into account the needs and goals of the parties involved in the application").

22. To determine the feasibility, the agency analyzed each of the 19 alternative sites using the following factors: 1) Proximity to the I–5 freeway; 2) Contiguous properties forming 20 acres or more; 3) Contiguous ownership; 4) Availability for purchase; 5) Environmental constraints; 6) Availability of public services; and 7) Underlying zoning designation. A.R. 75886.

23. Along with the Parcel site, the FEIS analyzed the possibility of development on the ''Ridgefield Interchange Site.''

24. The FEIS also notes that ''these alternative sites [were] located in more rural, less developed areas where the potential for adverse impacts would likely be more significant.'' A.R. 75886.

Nevertheless, Clark County Plaintiffs challenge the agency's reasoning because the Cowlitz's "economic objectives and needs" were measured using the Tribe's own report. Indeed, the agency adopted the Cowlitz's self-assessment of its financial and socioeconomic needs; the Statement of Purpose explicitly refers to the Cowlitz's Tribal Business Report (also referred to as Unmet Needs Report).[25] A.R. 75837. Again, "the rule of reason" guides the Court's evaluation. *Citizens Against Burlington*, 938 F.2d at 196 (noting that courts evaluate an agency's methodology by applying the "rule of reason"). Specifically, the Court inquires whether the agency acted reasonably in relying on the Cowlitz Tribe's self-reporting as to its needs.

[21] After reviewing the record on which the agency relied, the Court finds that the agency actions were reasonable. First, the Cowlitz's Report is not unreasonably conclusory, but rather provides a detailed assessment of the Tribe's current socioeconomic status, highlights Tribal programs that either need improvement or are currently not offered, and offers a qualitative and quantitative description of future tribal programs. A.R. 92993–93019. Additionally, second-guessing a tribe's economic needs and socioeconomic development goals would result in the agency undermining the tribe's sovereignty. Such an outcome would be especially troubling given that the agency perceives its main role in the project as advancing the Tribe's "self-determination" by "promoting the Tribe's self-governance capability." A.R. 75837. Finally, Clark County Plaintiffs fail to point to any statute or regulation that would require the agency to conduct an independent evaluation of the economic data provided by the Cowlitz Tribe. The only regulation that Clark County Plaintiffs point to, 40 C.F.R. § 1506.5(a), requires an agency to independently evaluate "*environmental* information," not the type of socioeconomic information that is at issue here. Because Clark County Plaintiffs' interpretation of § 1506.5(a) would render the term "environmental" superfluous, the Court finds it unpersuasive. *See Amoco Prod. Co. v. Watson*, 410 F.3d 722, 733 (D.C.Cir.2005) (instructing courts to "construe a statute so as to give effect to every clause and word" where possible). As such, the Court is persuaded that the agency's adoption of the Cowlitz's Report was not arbitrary or capricious and that the Secretary acted reasonably in reviewing alternative sites.

c. The Secretary Sufficiently Addressed Water Issues [26]

By way of background, the East Fork Lewis River is "the primary surface water

25. The Cowlitz Tribal Business Report, describes a need of $113 million annually to fund its anticipated Tribal programs for its 3,544 tribal members, 20% of which are unemployed. These Tribal programs include: Tribal Government, Health Care and Social Services, Housing, Elder Care Services, Education, Cultural Preservation, Transportation, Environment and Natural Resources, and Tribal Enterprises.

26. In addition to water issues, Clark County states in a footnote that the FEIS relied on "incorrect land [use] designation" for the Parcel because it states that it is "light industrial" when in fact the correct designation is "agricultural resource lands." Clark Cty Mot. at 37 n.18. The Government responds that "[r]egardless of the designation, ... the FEIS stated the current land uses at the site and in the surrounding area and described how Cowlitz's proposal would affect those uses." Therefore, the Government concludes that any change in land designation "did not present any significant new information bearing on the proposed action's impacts." Govt's Mot. at 2. Clark County did not reply to the Government's argument, and, therefore, the Court treats Clark County Plaintiffs' argument regarding land designation as con-

within the vicinity" of the Parcel. A.R. 75913. McCormick Creek is also "within the watershed" in which the Parcel is located. A.R. 75916. Both of these bodies of water are listed as "impaired waters" based on their fecal coliform numbers and temperature issues. A.R. 75916. Impaired waters are regulated under the Clean Water Act using Total Maximum Daily Loads (TMDLs). A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards. 33 U.S.C. § 1313(d). Although the East Fork Lewis River is "currently in the study phase of TMDL development for fecal coliform and temperature," it lacks a TMDL to help determine "how much existing pollution needs to be reduced to keep the water healthy." A.R. 75916.

The Clean Water Act prohibits discharge into surface waters like the East Fork Lewis River and McCormick Creek unless the source has a National Pollution Discharge Elimination System (NPDES) permit. Under CWA regulations, a NPDES permit cannot be issued "[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). Thus, arguably, a NPDES permit cannot be given to the Cowlitz for their casino-resort (a new source) unless TMDLs are developed for the East Fork Lewis River.

Clark County Plaintiffs argue that the FEIS's consideration of water impacts is inadequate because it does not address the "highly likely possibility" that the Cowlitz will be unable to obtain a National Pollutant Discharge Elimination System (NPDES) permit for the casino-resort development. Clark Cty Reply at 40; Clark Cty Mot. at 42. According to Clark County Plaintiffs, the FEIS cannot "simply state[ ] that the Tribe will comply with the Clean Water Act and NPDES requirements," but rather, under NEPA, the Secretary must be provided with information assuring her that the environmental impacts on water can be mitigated and that the Cowlitz will be able to comply with the Clean Water Act. Clark County Reply at 41–42.

Defendants respond that the agency satisfied NEPA by taking a "hard look" at the water impacts of the project. Cowlitz Mot. at 51; Govt's Mot. at 60. The Cowlitz Tribe maintains that the DEIS "evaluated existing water resources and the potential impacts of the Project on those resources," and then the FEIS "reviewed and responded to public comments on the DEIS analysis and added a supplemental water study." Cowlitz Mot. at 52. Similarly, the Government notes that the FEIS includes the fact that the Cowlitz will need a NPDES permit and that the FEIS appendices "include extensive reports on wastewater treatment." Govt's Mot. at 60. According to the Government, the agency was not required "to consider the possibility that a permit could not be obtained and Cowlitz would operate its facilities unlawfully." Govt's Reply at 43.

The critical issue here is whether NEPA required the EIS to include the possibility that an NPDES permit would not be issued. In determining that no such requirement exists, the Court finds guidance in *Robertson v. Methow Valley Citizens Council et al.* In that case, the Forest Service had prepared an EIS as part of its

ceded. *Buggs v. Powell,* 293 F.Supp.2d 135, 141 (D.D.C.2003) ("It is understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.").

decision to issue a special-use permit for the operation of a ski area in federal lands. 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). The Ninth Circuit found the EIS inadequate under NEPA because "not only ha[d] the effectiveness of the[ ] mitigation measures not yet been assessed, but the mitigation measures themselves ha[d] yet to be developed." *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 817 (9th Cir.1987). For instance, the Ninth Circuit found that the EIS's discussion on air quality was inadequate because it included an air quality management program as a mitigation measure when that program had not yet been developed. *Id.* The Ninth Circuit interpreted NEPA to require "this type of inquiry and analysis" before the Forest Service issued the special-use permit for the ski-area. *Id.* at 818. Moreover, the Ninth Circuit held that the EIS's discussion concerning the impact that the project would have on a large migratory deer herd was inadequate because the study on the impacts to the herd was ongoing. *Id.* The Ninth Circuit stated that if the Forest Service had difficulty obtaining adequate information to make a reasoned assessment of the environmental impact on the herd, it had a duty to make a so called "worst case analysis." *Id.* at 817–18.

In reversing the Ninth Circuit's decision, the Supreme Court clarified an agency's duties under NEPA to take a "hard look" at the environmental consequences of a proposed federal action. The Supreme Court explained that "there is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352–53, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). In other words, NEPA does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Id.* Under *Robertson,* then, the EIS is not required to discuss the outcome of mitigation measures.

[22] As in *Robertson,* the EIS here was not required to provide a full evaluation as to whether the NPDS permit, a mitigation measure, would issue or predict what would happen in "the worst case scenario," *i.e.,* that the Cowlitz would be denied the permit altogether. *Id.* at 353, 109 S.Ct. 1835. ("Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures."). Neither NEPA nor its regulations require the EIS to evaluate the likelihood that permits will be obtained by a project applicant. Instead, the EIS need only list those permits required and discuss water impacts "in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id.*; 40 C.F.R. 1502.25(b) (requiring the draft EIS to list "all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal"). It is clear that the FEIS in the instant case met these requirements.

The FEIS describes the quality of surface water (*i.e.,* the East Fork Lewis River, McCormick Creek, and an unnamed stream by the proposed casino site) by reporting in detail on fecal coliform, ammonia, turbidity, and temperature conditions. A.R. 75913–75918. The FEIS also thoroughly discusses wastewater treatment programs and the expected quality of treated wastewater, again addressing anticipated fecal coliform, ammonia, turbidity, and temperature conditions. A.R.

76082–76085. Moreover, both the draft EIS and FEIS listed the NPDS permit when discussing mitigation measures that the Cowlitz would implement. *See e.g.,* A.R. 106594106603; 106638; 106651; 106653. Under *Robertson,* NEPA requires no more for informed decision-making.

d. Supplemental EIS is Not Required

[23] A couple of months after the Secretary issued her ROD, in June 2013, Clark County "adopted stronger storm water management and erosion control standards that apply to all new development, redevelopment, and drainage projects." Clark Cty Mot. at 45. Clark County Plaintiffs argue that the FEIS does not address these "new changes in the law regarding storm water" which would "set a much higher bar for storm water management than what was reviewed in the FEIS." *Id.* at 45. Thus, Clark County Plaintiffs ask that the Court remand and require the agency to prepare a supplemental EIS. Clark Cty Mot. at 43. Defendants respond that the changes to the Clark County Code do not present "changes to the project or its resulting impacts," and therefore do not warrant supplementation. Govt's Suppl. Response at 1.[27] The Court agrees with Defendants.

A supplemental EIS is required when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). These stormwater changes are not "significant" because, as Defendants point out, local environmental laws will not apply to the Parcel once it is accepted into trust, but rather the Parcel shall be subject only to federal and tribal environmental laws.[28] A.R. 140491. Clark County Plaintiffs insist that the local Code still plays a significant role because the Tribe will not be issued a NPDES permit unless it meets Washington's water quality standards, which include "stormwater flow conditions similar to those required of Clark County." Clark Cty Pls.' Mot. at 4–5. However, for the reasons already discussed above, NEPA does not require that the Secretary evaluate the likelihood that the NPDES permit will issue. *See supra* Part III.C.2.c. Accordingly, the Court agrees that no supplemental EIS is required under these circumstances.

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiffs' motions for summary judgment and grants Defendants' cross-motions for summary judgment. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued.

27. Defendants originally failed to respond to Clark County Plaintiffs' argument that a supplemental EIS was necessary. In an effort to provide some finality to this drawn out dispute, the Court ordered Defendants to respond to Clark County Plaintiff's argument. *See* Minute Order (Nov. 12, 2014). The Court has considered the parties' supplemental briefing in reaching its decision.

28. The Tribe did agree to comply with some local standards when it executed the EPHS Ordinance/Gaming Ordinance that was discussed earlier. These standards included the stormwater law that was in place in 2004. A.R. 76073.

[pursued] to evaluate HFS' recommendations."

On this record we have little difficulty agreeing with the district court that Edison did not exercise the "care, skill, prudence, and diligence under the circumstances" that ERISA demands in the selection of these retail mutual funds. 29 U.S.C. § 1104(a)(1)(B). Its cross appeal thus fails.

VIII

For the foregoing reasons, the judgment of the district court is **AFFIRMED.** The parties shall bear their own costs on appeal.

GILA RIVER INDIAN COMMUNITY, a federally recognized Indian Tribe; Delvin John Terry; Celestino Rios; Brandon Rios; Damon Rios; Cameron Rios, Plaintiffs,

John McComish, Arizona Legislature, Majority Leader; Chuck Gray, Arizona Legislature, Senate Majority Leader; State of Arizona; Kirk Adams, Arizona Legislature, Speaker of the House, Intervenor–Plaintiffs,

and

City of Glendale; Michael Socaciu; Gary Hirsch, Plaintiffs–Appellants,

v.

UNITED STATES of America; United States Department of the Interior; Kenneth Lee Salazar, in his official capacity as United States Secretary of the Interior; Larry Echo Hawk, in his official capacity as the Assistant Secretary for Indian Affairs of the United States Department of the Interior, Defendants–Appellees,

Tohono O'odham Nation, Intervenor–Defendant–Appellee.

Gila River Indian Community, a federally recognized Indian Tribe; City of Glendale; Michael Socaciu; Delvin John Terry; Celestino Rios; Brandon Rios; Damon Rios; Cameron Rios; Gary Hirsch, Plaintiffs,

John McComish, Arizona Legislature, Majority Leader; Chuck Gray, Arizona Legislature, Senature Majority Leader; Kirk Adams, Arizona Legislature, Speaker of the House, Petitioners–Intervenors,

and

State of Arizona, Intervenor–Plaintiff–Appellant,

v.

United States of America; United States Department of the Interior; Kenneth Lee Salazar, in his official capacity as United States Secretary of the Interior; Larry Echo Hawk, in his official capacity as the Assistant Secretary for Indian Affairs of the United States Department of the Interior, Defendants–Appellees,

Tohono O'odham Nation, Intervenor–Defendant–Appellee.

Gila River Indian Community, a federally recognized Indian Tribe, Plaintiff–Appellant,

and

City of Glendale; Michael Socaciu; Delvin John Terry; Celestino Rios; Brandon Rios; Damon Rios; Cameron Rios, Gary Hirsch, Plaintiffs,

John McComish, Arizona Legislature, Majority Leader; Chuck Gray, Arizona Legislature, Senature Majority Leader; State of Arizona, Kirk Adams, Arizona Legislature, Speaker of the House, Intervenor–Plaintiffs,

v.

United States of America; United States Department of The Interior; Kenneth Lee Salazar, in his official capacity as United States Secretary of the Interior; Larry Echo Hawk, in his official capacity as the Assistant Secretary for Indian Affairs of the United States Department of the Interior, Defendants–Appellees,

Tohono O'odham Nation, Intervenor–Defendant–Appellee.

Gila River Indian Community, a federally recognized Indian Tribe; City of Glendale; Michael Socaciu; Gary Hirsch, Plaintiffs,

John McComish, Arizona Legislature, Majority Leader; Chuck Gray, Arizona Legislature, Senature Majority Leader; State of Arizona, Kirk Adams, Arizona Legislature, Speaker of the House, Intervenor–Plaintiffs,

and

Delvin John Terry; Celestino Rios; Brandon Rios; Damon Rios; Cameron Rios, Plaintiffs–Appellants,

v.

United States of America; United States Department of the Interior; Kenneth Lee Salazar, in his official capacity as United States Secretary of the Interior; Larry Echo Hawk, in his official capacity as the Assistant Secretary for Indian Affairs of the United States Department of the Interior, Defendants–Appellees,

Tohono O'odham Nation, Intervenor–Defendant–Appellee.

Gila River Indian Community, a federally recognized Indian Tribe; City of Glendale; Michael Socaciu; Delvin John Terry; Celestino Rios; Brandon Rios; Damon Rios; Cameron Rios; Gary Hirsch, Plaintiffs,

State of Arizona, Intervenor–Plaintiff,

and

John McComish, Arizona Legislature, Majority Leader; Chuck Gray, Arizona Legislature, Senature Majority Leader; Kirk Adams, Arizona Legislature, Speaker of the House; Andy Tobin, House Majority Whip, Intervenor–Plaintiff–Appellants,

v.

United States of America; United States Department of the Interior; Kenneth Lee Salazar, in his official capacity as United States Secretary of the Interior; Larry Echo Hawk, in his official capacity as the Assistant Secretary for Indian Affairs of the United States Department of the Interior, Defendants–Appellees,

Tohono O'odham Nation, Intervenor–Defendant–Appellee.

Nos. 11–15631, 11–15633, 11–15639, 11–15641, 11–15642.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 16, 2012.

Filed May 20, 2013.

Amended July 9, 2013.

Background: City and Indian tribe brought actions challenging Department of Interior's (DOI) decision to accept property in trust for benefit of another tribe. State legislative and executive branch leaders intervened as parties plaintiff, and other tribe intervened as party defendant. The United States District Court for the

District of Arizona, David G. Campbell, J., 776 F.Supp.2d 977, granted summary judgment for the government, and city and other parties appealed.

Holdings: On denial of rehearing en banc, the Court of Appeals, McKeown, Circuit Judge, held that:

(1) Gila Bend Indian Reservation Lands Replacement Act created a cap only on land held in trust for the tribe, not on total land acquisition by the tribe under the Act;

(2) Department of Interior's interpretation of Act to render parcel located on a county island fully surrounded by city land eligible for trust treatment was not entitled to *Chevron* deference; and

(3) Act was valid exercise of Congress's power under the Indian Commerce Clause.

Affirmed in part, reversed in part, and remanded.

N.R. Smith, Circuit Judge, filed dissenting opinion.

Opinion, 697 F.3d 886, withdrawn and superseded.

1. Indians ⚿152, 158

Gila Bend Indian Reservation Lands Replacement Act created a cap only on land held in trust for the tribe, not on total land acquisition by the tribe under the Act; statute limited the size of newly acquired trust land to that of the previous reservation. Gila Bend Indian Reservation Lands Replacement Act, § 6(c), 100 Stat. 1798.

2. Administrative Law and Procedure ⚿438(9)

Indians ⚿158, 252

Department of Interior's interpretation of Gila Bend Indian Reservation Lands Replacement Act to exclude from city corporate limits, and therefore render eligible for trust under the Act, a parcel located on a county island fully surrounded by city land, was not entitled to *Chevron* deference; Act was ambiguous as to key phrase "within the corporate limits," and Department mistakenly determined that its interpretation was mandated by plain meaning. Gila Bend Indian Reservation Lands Replacement Act, § 6(d), 100 Stat. 1798.

3. Commerce ⚿6, 82.20

Indians ⚿157

States ⚿4.16(1)

Gila Bend Indian Reservation Lands Replacement Act was valid exercise of Congress's power under the Indian Commerce Clause, and therefore did not violate Arizona's Tenth Amendment rights. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const.Amend. 10; Gila Bend Indian Reservation Lands Replacement Act, § 1 et seq., 100 Stat. 1798.

Patricia A. Millett (argued), Akin Gump Strauss Hauer & Feld, Washington, D.C. for Plaintiff–Appellant Gila River Indian Community; Catherine E. Stetson (argued), Hogan Lovells, Washington, D.C. for Plaintiff–Appellant City of Glendale; David R. Cole (argued), Dep. State Atty. Gen., Phoenix, AZ, for Plaintiff–Intervenor–Appellant State of Arizona.

Aaron P. Avila (argued), Dep't of Just., Washington, D.C., for Defendants–Appellees the United States of America, et. al.; Seth P. Waxman (argued), Wilmer Cutler Pickering Hale and Dorr, Washington, D.C., for Defendant–Intervenor–Appellee the Tohono O'odham Nation.

Appeal from the United States District Court for the District of Arizona, David G. Campbell, District Judge, Presiding. D.C. Nos. 2:10–cv–01993–DGC, 2:10–cv–02017–DGC, 2:10–cv–02138–DGC.

Before: M. MARGARET McKEOWN, N. RANDY SMITH, and JACQUELINE H. NGUYEN,* Circuit Judges.

ORDER

The opinion filed on September 11, 2012, and appearing at 697 F.3d 886 (9th Cir. 2012) is withdrawn.

A superseding opinion will be filed concurrently with this order.

With the filing of the superseding opinion, Judge McKeown and Judge Nguyen vote to deny the petition for panel rehearing. Judge N.R. Smith votes to grant the petition.

The full court has been advised of the petitions for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petitions for rehearing and rehearing en banc are denied.

OPINION

McKEOWN, Circuit Judge:

This case illustrates the nuances of our federalist system of government, pitting Indian tribe against Indian tribe, and State and local governments against the federal government and an Indian tribe. The City of Glendale and various other parties ("Glendale") seek to set aside the Department of the Interior's decision to accept in trust, for the benefit of the Tohono O'odham Nation ("the Nation"), a 54–acre parcel of land known as Parcel 2. The Nation hopes to build a destination resort and casino on Parcel 2, which is unincorporated county land, entirely surrounded by the City of Glendale. To say this plan has been controversial is an understatement. But the strong feelings and emotional drama of the casino fight do not dictate the outcome here. This appeal relates only to the status of the land as trust land and does not involve the particulars of Indian gaming, which are the subject of separate proceedings and pending legislation. The district court granted summary judgment for the government after concluding that the Secretary of the Interior reasonably applied the Gila Bend Indian Reservation Lands Replacement Act ("Gila Bend Act"), and that the Act did not violate the Indian Commerce Clause or the Tenth Amendment. We affirm in part, reverse in part, and remand.

Background

I. The Gila Bend Act

The Nation, earlier known as the Papago Tribe of Arizona, is a federally recognized Indian Tribe with over 28,000 members. The Gila Bend Reservation was established as early as 1882. Today, the reservation includes noncontiguous land located near Tucson, Phoenix, and the town of Gila Bend, as well as points in between. In 1960, the federal government completed construction of the Painted Rock Dam ten miles downstream from the Gila Bend Reservation. During the late 1970s and early 1980s, the reservation was plagued by flooding from the dam, which eventually destroyed a large farm developed by the Nation, leaving the land unsuitable for economic use.

Congress responded to the flooding and the Nation's petition for a new reservation with the Gila Bend Act. The purpose of the Act was to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming ... and promote the economic self-sufficiency of" the Nation. Pub.L. No. 99–503, 100 Stat. 1798, § 2(4). Under § 4

* The Honorable Jacqueline H. Nguyen was a District Judge for the U.S. District Court for the Central District of California sitting by designation at the time of argument and submission.

of the Act, the Nation transferred 9,880 acres of reservation land to the United States in return for $30 million and the right to replace the lost reservation acre-for-acre. *Id.* at §§ 4(a), 6(c). Subject to the requirements and limitations of the Act, the Secretary of the Interior is required to take up to 9,880 acres of land into trust for the benefit of the Nation, effectively making the land part of the Nation's reservation. *Id.* at § 6(d).

The Act permits the Nation to use the funds for various purposes, including the purchase of land, and economic and community development. § 6(a).[1] Section 6(c) imposes an acreage limit.[2] Section 6(d) establishes that trust land refers to land under subsection (c), and that such land cannot be taken into trust as reservation land if it is (i) outside certain counties, or (ii) "within the corporate limits of any city or town." [3]

Over the decades after passage of the Act, the Nation acquired land in Arizona but only one parcel has been taken into trust. Then, in 2003, the Nation purchased the disputed land as part of a 135–acre acquisition. The land is a "county island," surrounded entirely by the City of Glendale. A county island is unincorporated land surrounded entirely by lands incorporated by the municipality. *See Town of Gilbert v. Maricopa Cnty.*, 213 Ariz. 241, 141 P.3d 416, 418 n. 1 (Ariz.Ct.App.2006) (describing county island).

In 2009, the Nation announced plans to use the land for gaming purposes and filed an application with the Department of the Interior to have the land held in trust under the Gila Bend Act. In response, the City of Glendale sought to annex a portion of the 135 acres. The Nation filed suit in state court challenging the annexation effort.[4] Due to ongoing state litigation, without relinquishing its claim to the full 135 acres, the Nation requested that the Department of the Interior accept into trust only a 54–acre portion of the land not at issue in state court: Parcel 2, the subject of this appeal.[5]

1. "The Tribe shall invest sums received under section 4 in interest bearing deposits and securities until expended. The ... [Nation] may spend the principal and the interest and dividends accruing on such sums ... for land and water rights acquisition, economic and community development, and relocation costs." § 6(a).

2. "The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres." § 6(c).

3. "The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town." § 6(d).

4. The Nation ultimately prevailed on appeal. *See Tohono O'odham Nation v. City of Glendale,* 227 Ariz. 113, 253 P.3d 632 (Ariz.Ct.App.2011), *petition for review denied* Oct. 25, 2011.

5. The dissent recounts various facts at length to provide, in its view, "the rest of the story." In effect, the dissent along with the parties opposing the trust designation, infuse the appeal with the Nation's economic motives and plans for Indian gaming on the trust land. But those issues are not on appeal. We do not and are not called upon to express an opinion as to the availability of the trust land for use as a casino. That question is tied up in other litigation and the legislation that recently passed the House of Representatives. *See* Gila Bend Indian Reservation Lands Replacement Clarification Act. H.R. REP. No. 112–440 (2012). This issue does not bear on our interpretation of the Gila Bend Act.

II. Prior Proceedings and Decisions

Although the Department of the Interior treated the Nation's trust application as an ex parte filing, in March 2009, both the City of Glendale and the Gila River Indian Community [6] filed lengthy submissions opposing the trust application. Their submissions argued that Parcel 2 fell "within the corporate limits" of the City of Glendale and was therefore ineligible for trust status under § 6(d) of the Gila Bend Act.

The Secretary of the Interior concluded that the requirements of the Gila Bend Act were met. Specifically, Parcel 2 is wholly within Maricopa County and is outside the City of Glendale's corporate limits. In considering whether the land qualified for trust status under § 6(d), the Secretary explained that "[t]he Western Regional Director of the BIA [Bureau of Indian Affairs], acting under authority of the Secretary, issued a waiver under Section 6(d) . . . that allowed the Nation to purchase up to five (5) separate areas of replacement land, rather than three, and further waived the requirement that one of these areas be contiguous to the San Lucy reservation." In any event, since Parcel 2 is only the second replacement land area to be held in trust under the Act, those waivers do not directly implicate the analysis here. Thus, in accord with the mandate of the Act, the Secretary determined that Parcel 2 must be held in trust for the Nation.

In upholding the Secretary of the Interior's decision, in a careful, comprehensive opinion, the district court concluded that Glendale had waived its argument regarding a total acreage cap under § 6(c) of the Act, because it failed to raise the issue in the administrative proceeding.[7] The district court then deemed the statutory language "within the corporate limits" in § 6(d) to be ambiguous as to county islands like Parcel 2, and concluded that Arizona law was inconclusive. Applying *Chevron*, the court deferred to the agency's interpretation of the statute and affirmed the trust decision as "based on a permissible construction of the statute." *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Finally, the district court rejected the constitutional arguments under the Tenth Amendment and the Indian Commerce Clause.

"We review the grant of summary judgment de novo, thus reviewing directly the agency's action under the Administrative Procedure Act's (APA) arbitrary and capricious standard." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir.2004).

Analysis

We first consider two questions of statutory interpretation: Whether the Gila Bend Act's trust land acreage limit is implicated, and whether Parcel 2 is "within" the corporate limits of the City of Glendale. We evaluate an agency's interpretation of a statute it is entrusted to administer by first determining "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. If Congress has directly spoken, "the agency (and the court) must give effect to Congress's clearly expressed intent." *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1143 (9th Cir.2012). If, on the other hand, a stat-

6. The Gila River Indian Community is a separate tribe whose gaming interests are implicated by the Nation's plans to develop a casino on Parcel 2.

7. We note that, according to the Secretary, the normal "notice and comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d), requiring that the BIA notify state and local governments of the land-into-trust application, are not applicable" to this transaction.

ute is ambiguous, we defer to the agency's interpretation where the "interpretation was 'a reasonable policy choice for the agency to make.'" *Id.* (quoting *Chevron,* 467 U.S. at 845, 104 S.Ct. 2778).

The remaining issues pertain to the limits of congressional power under the Indian Commerce Clause and the Tenth Amendment.[8]

I. The Acreage Limit in Section 6(c)

Section 6(c) of the Gila Bend Act provides that the Nation "is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, 9,880 acres." In turn, the following subsection, 6(d), describes trust land as being land acquired "pursuant to subsection (c)." Before the district court, Glendale argued for the first time that § 6(c) precludes the Nation from acquiring more than 9,880 acres with money from the Act and that the Nation already had exceeded that acreage cap before acquiring Parcel 2. The Nation responds that the cap only applies to land held in trust via § 6(d), and not to land remaining in fee status.

While the Secretary of the Interior did not squarely consider the acreage cap because the issue was never framed as a barrier to taking Parcel 2 in trust, reading the Secretary's decision in context is telling. In determining whether the § 6(d) trustee requirements were met, the Secretary read the statute as creating a cap on land that could be held in trust under the Gila Bend Act, not as a cap on the total acreage that the Nation could acquire. The Secretary explained the basis of this reading, noting that "[t]he first, and so far only, land acquired in trust for the Nation" was 3,200.53 acres acquired in September 2004. The decision goes on to state that there was another trust application for 3,759.52 acres but that the land was still held in fee. Therefore, the Secretary did not consider land held in fee as relevant to the analysis of the acquisition limitations under the Gila Bend Act. The decision explicitly counts only the fee-to-trust lands, not lands remaining in fee status.

During agency proceedings, the Gila River Indian Community, one of the parties now raising the acreage cap argument, noted, in contrast to its current position, that "[s]ection 6(c) limits the number of acres that may be placed into trust to no more than 9,880 acres." Appellants, including the Gila River Indian Community, now take the opposite position and argue that because the agency proceedings were non-adversarial, the issue should be considered on the merits. The Nation and the government maintain that the acreage cap argument was waived. The ultimate question is one of statutory construction.

[1] Assuming, without deciding, that the argument was not waived, we hold that the statute read as a whole is unambiguous and that § 6(c) creates a cap only on land held in trust for the Nation, not on total land acquisition by the tribe under the Act.

Our goal is to understand the statute "as a symmetrical and coherent regulatory scheme" and to "fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (citations omitted). Section 6(a) authorizes the Nation to use funds received under the Gila Bend Act "for land and water rights acquisition, economic and community development, and relocation costs." This authorization is broader than land acquisition and does not address trust

8. The Gila River Indian Community and the Terry and Rios appellants appeal only as to the acreage issue. The City of Glendale and the various Arizona appellants (collectively "Arizona appellants") appeal as to all of the issues.

acreage to replace the Nation's lost reservation land.

Apart from the general provisions of § 6(a), three provisions of the Act concern the divestment and replacement of reservation land. Section 4 concerns the original 9,880–acre reservation, and specifies the conditions under which the Nation would forfeit its "right, title, and interest . . . in nine thousand eight hundred and eighty acres of [reservation] land." Subsections 6(c) and 6(d) provide for the replacement of this precise number of acres of reservation land. Section 6(d) explains the mechanism for restoring reservation land, which requires placing land in trust, and limits the location of reservation land. More specifically, § 6(d) provides:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes.

Section 6(c), in turn, limits the size of newly acquired trust land to that of the previous reservation: 9,880 acres. Thus, § 6(c) imposes a limit upon the size of land placed in trust for reservation purposes, under § 6(d), rather than upon total land acquisition under § 6(a). Subsection 6(c) and 6(d) are internally cross-referenced and must be read together.

Aside from its inapplicability to non-reservation land, treating § 6(c) as a limit on land acquired under § 6(a) is problematic for other reasons. Congress crafted the Gila Bend Act to allow the Nation substantial autonomy in the use of funds and the acquisition of new reservation land. Because Congress did not expect the Nation to spend the Gila Bend Act funds immediately or all at once, Congress provided that the funds be invested in "interest bearing deposits and securities until expended." § 6(a). This requirement underscores that Congress did not intend for the tribe to spend a fixed dollar amount, or to spend a specific amount on land, or to acquire the land at any particular time. Rather, the Nation was to have broad discretion in the use of Gila Bend Act funds, and the yield on those funds. The ability to buy land without regard to the cap on trust acreage and then designate the parcels for conversion to trust is well within the "great flexibility" Congress authorized for the Nation. *See* H.R.Rep. No. 99–851, at 10 (1986) (envisioning the Nation to "have great flexibility in determining the use of funds provided under the Act.").

Of course, the Nation does not need statutory authorization to acquire and hold land in fee simple. The Nation has the right to buy and sell land just like other persons or entities. *See Cohen's Handbook of Federal Indian Law* § 15.04 (describing various forms of tribal land acquisition, including the purchase of fee simple title). Glendale's reading would mean that the Gila Bend Act purported to curtail the Nation's independent right to buy and sell land, an outcome we do not endorse and one that is inconsistent with decades of Indian law.

Further, § 6(b) relieves the Secretary of any audit or oversight responsibility for expenditure of funds under § 6(a): "The Secretary [of the Interior] shall not be responsible for the review, approval, or audit of the use and expenditure" of the replacement land funds. § 6(b). If § 6(a) were cabined by § 6(c), the Secretary would necessarily undertake a monitoring function as to expenditure of money for trust lands, a responsibility specifically disclaimed by the Act.

Finally, as a practical matter, even Glendale's interpretation would permit the Sec-

retary to accept Parcel 2 in trust. This argument boils down to the view that the first 9,880 acres acquired must go into trust. Nothing in the Act specifies that the lands must go into trust in a chronological order pegged to the time of acquisition. There is no FIFO (first in, first out) principle incorporated in the Act. The Act allows the Nation to replace, acre-for-acre, the 9,880 acres of reservation land it relinquished to federal control under § 4(a). To date, the Secretary of the Interior has taken just one parcel into trust for the Nation, an approximately 3,200–acre parcel known as San Lucy Farms. Acquisition in trust of the 54 acres in Parcel 2 would be the Nation's second trust acquisition and, after acquisition, the Nation would remain well below the 9,880–acre cap on trust land. That the Nation may have purchased other land is irrelevant to the clear limitation that only 9,880 acres may be held in trust.

II. The Corporate Limits Restriction in Section 6(D)

[2] Section 6(d) of the Gila Bend Act prohibits the Secretary of the Interior from taking land into trust "if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or *within the corporate limits of any city or town.*" (emphasis added). It is undisputed that Parcel 2 is in Maricopa county; the issue is whether Parcel 2, located on a county island fully surrounded by city land, is *within* the City of Glendale's corporate limits.

The Secretary, invoking plain meaning, interpreted the phrase "within the corporate limits" as "show[ing] a clear intent to make a given piece of property eligible under the Act if it is on the unincorporated side of a city's boundary line," and concluded Parcel 2 therefore could be taken into trust. Similarly, the government and the Nation argue for a jurisdictional meaning: Any land not subject to a city's corporate jurisdiction is not "within" the city.[9] The Arizona appellants contend the phrase should have a geographical meaning: Any land entirely surrounded by a city's corporate limits is "within" the city. Who knew that such a straightforward sounding phrase, "within the corporate limits," could generate such competing views.

As explained below, we conclude the statute is ambiguous. The Secretary's decision reflects a failure to grapple with the ambiguity and prompts us to remand for the Secretary to bring his expertise to bear to interpret the provision anew. *See Negusie v. Holder*, 555 U.S. 511, 523, 129 S.Ct. 1159, 173 L.Ed.2d 20 (2009) ("[I]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see.") (internal quotation marks omitted).

The Department of the Interior's treatment of the provision is telling. The Department's Office of the Solicitor prepared a memorandum for the Secretary on the meaning of "corporate limits" and concluded the term was ambiguous. The Field Solicitor, considering submissions from both the Nation and the City, explained: "A close review of the statutes and case law of the State of Arizona reveals that this question has no clear or dispositive answer, and that there is ambiguity about it, even to the point of one of the Justices of the Arizona Supreme Court admitting as much." Although the Field Solicitor was inclined to accord the term a jurisdic-

9. The dissent's suggestion that the government took a differing view in prior litigation is not borne out by the record. In totally unrelated litigation, the government made passing reference to geographical restrictions on trust land. But, in doing so, the brief did not consider the distinction under § 6(d) nor was this section at issue in the litigation.

tional meaning in reliance on *Speros v. Yu*, 207 Ariz. 153, 83 P.3d 1094 (Ariz.Ct.App. 2004), he emphasized that such a position was "reached with some degree of caution, since the concepts of 'exterior boundaries' and 'corporate limits' are neither expressly defined nor used with any real consistency under Arizona law." Ultimately, the Field Solicitor determined that to resolve the inconsistency he was "obliged to invoke the rule regarding canons of construction regarding Federal Indian law and Indian jurisprudence," which counsels that ambiguous statutes are to be construed in favor of Indians. *See Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). Applying that canon, the Field Solicitor interpreted the term to have a jurisdictional meaning.

In the trust decision, the Secretary referenced but parted ways with the Field Solicitor's report and concluded that the term "corporate limits" was not ambiguous. The Secretary determined the term had the plain meaning of indicating the jurisdictional status of fee land: "The use of 'corporate limits' shows a *clear intent* to make a given piece of property eligible under the [Gila Bend] Act if it is on the unincorporated side of the city's boundary line." (emphasis added). The Secretary reasoned that, had Congress intended to exclude county islands from possible trust acquisition, it could have done so by using language such as "exterior boundary," "within one mile of any city" or "city limits." *See, e.g.*, 16 U.S.C. § 485 (Secretary of Agriculture may accept "title to any lands within the exterior boundaries of the national forests"); 25 U.S.C. § 465 (certain funds may not be "used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation"). In a footnote of the trust decision, the Secretary added, in the alternative, that "[e]ven if Congress's intent was less clear . . . we interpret the term not to support a conclusion that Parcel 2 is ineligible under the Act, with or without consideration of the [Indian] canon."

We hold that the Secretary was mistaken in concluding that the term has a plain meaning.[10] Giving the key phrase "within the corporate limits" its plain, natural, and common meaning does not resolve the ambiguity. *United States v. Romo–Romo*, 246 F.3d 1272, 1275 (9th Cir.2001) ("[W]e should usually give words their plain, natural, ordinary and commonly understood meanings."). Here, either reading of the term as used in the statute is plausible. Further, we agree with the Field Solicitor's conclusion that Arizona law does not conclusively solve the dilemma.

The history of Arizona's treatment of county islands underscores the lack of uniformity of interpretation and uncertainty that carries over to the Gila Bend Act's use of the "within the corporate limits" designation. In past ordinances, the City of Glendale has characterized county islands as lying outside its corporate limits and requiring annexation to be included within the City's limits. For example, when the City of Glendale incorporated a strip of land that surrounds Parcel 2 and other unincorporated territory, the annexation ordinance provided that "the present corporate limits [are] extended and increased to include" only the strip of land precisely described with metes and bounds. City of Glendale, AZ, Ordinance 986 New Series, (July 26, 1977). Similarly, numerous City of Glendale annexation ordinances address land "located within an

10. Curiously, the dissent takes the view that the text of § 6(d) has a plain meaning but then surprisingly comes to an interpretation at odds with the Secretary. Even the division within our panel underscores the lack of clarity in the statute.

existing county island" and confirm that as a result of the annexation, the newly annexed county island will "be included within the corporate limits of the City of Glendale." *See, e.g.,* City of Glendale, AZ, Ordinance 2693 New Series, (Sept. 23, 2009); City of Glendale, AZ, Ordinance 2674 New Series, (Mar. 18, 2009); City of Glendale, AZ, Ordinance 2668 New Series, (Mar. 11, 2009). Some Arizona statutes also refer to county islands as falling outside corporate limits. *See, e.g.,* Ariz.Rev. Stat. Ann. § 9–500.23 (authorizing a city to "provide fire and emergency medical services outside its corporate limits to a county island"). However, Arizona statutes do not explicitly define the term and Arizona courts have used "corporate limits" and "exterior boundaries" interchangeably. *See, e.g., Flagstaff Vending Co. v. City of Flagstaff,* 118 Ariz. 556, 578 P.2d 985, 987 (1978) (holding that a state-owned university campus was "within" city limits for purposes of local tax ordinances).

Having resolved that the statute is ambiguous, the question is how to treat the Secretary's decision under *Chevron.* We conclude that the Secretary's interpretation warrants no deference because it rests on a mistaken conclusion that the language has a plain meaning.

Were the statute clear, we would simply "stop the music at step one," as we did with § 6(c), *supra,* in order to "give effect to [Congress's] unambiguously expressed intent." *Northpoint Tech., Ltd. v. FCC,* 412 F.3d 145, 151 (D.C.Cir.2005) (internal quotation marks omitted). Here, we must move to step two because Congress's intent is not clear. At this stage, normally we would defer as a matter of course to the agency's expertise and discretion in interpreting the statute. However, because the agency misapprehended the clarity of the statute, such deference is not in order. "[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.' " *PDK Labs. Inc. v. DEA,* 362 F.3d 786, 798 (D.C.Cir.2004) (quoting *Arizona v. Thompson,* 281 F.3d 248, 254 (D.C.Cir.2002)).

The principle that *Chevron* deference does not apply where an agency mistakenly determines that its interpretation is mandated by plain meaning, or some other binding rule, is best illustrated by the Supreme Court's decision in *Negusie.* There, the Court declined to uphold the BIA's interpretation of an ambiguous provision of the Immigration and Nationality Act where the BIA mistakenly thought itself bound by Supreme Court precedent construing similar language in a different statute. *Negusie,* 555 U.S. at 518–19, 129 S.Ct. 1159. Although the Court explained that the chosen interpretation might ultimately be reasonable, it declined to apply *Chevron* deference and remanded because the agency "deemed its interpretation to be mandated by [precedent], and that error prevented it from a *full consideration* of the statutory question here presented." *Id.* at 521, 129 S.Ct. 1159 (emphasis added);[11] *see also Delgado v. Holder,* 648 F.3d 1095, 1103 & n. 12 (9th Cir.2011) (en banc) (upholding BIA interpretation of ambiguous statute despite its reliance on plain text because the BIA's decision "did not rely on plain text alone" but also "emphasized that its interpretation is supported by the history and background" of the statute) (internal quotation marks omitted).

11. The Nation and the government view *Negusie* as inapposite because the Secretary here only believed himself bound by plain meaning rather than by precedent. This is a distinction without a difference. If the agency fails to bring its expertise to bear because it believes itself constrained for whatever reason from fully considering policy and practical considerations, the rationale for *Chevron*—agency expertise—is absent.

The present case has a twist that bears further consideration. Unlike in *Negusie,* the agency here did not rest entirely on the purportedly clear congressional intent, but added that it would reach the same conclusion "[e]ven if Congress's intent was less clear." This one-sentence caveat in a footnote is not entitled to *Chevron* deference, because the Secretary did not provide any explanation for this decision. In short, the passing footnote reflects "that the [Department of the Interior] has not yet exercised its *Chevron* discretion to interpret the statute in question" and thus "the proper course . . . is to remand to the agency for additional investigation or explanation." *Negusie,* 555 U.S. at 523, 129 S.Ct. 1159 (internal question marks omitted).

The essence of *Chevron* deference at step two is to give meaning to the "delegation[ ] of authority to the agency to fill the statutory gap in reasonable fashion" through resolution of "difficult policy choices that agencies are better equipped to make than courts." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). Without an explanation of the agency's reasons, it is impossible to know whether the agency employed its expertise or "simply pick[ed] a permissible interpretation out of a hat." *Vill. of Barrington v. Surface Transp. Bd.,* 636 F.3d 650, 660 (D.C.Cir.2011) (holding that an agency warrants deference at *Chevron* step two "only if the agency has offered a *reasoned explanation* for why it chose that interpretation" judged according to "only the rationales the [agency] actually offered in its decision") (emphasis added); *see also Local Union 1261, United Mine Workers of Am. v. FMSHRC,* 917 F.2d 42, 43 (D.C.Cir.1990) (upholding agency's interpretation at *Chevron* step two even where the court disagreed with the agency's conclusion that the meaning of the statute was "plain" because the court concluded that the agency's decision "adequately stated the *practical and policy considerations* ultimately motivating its interpretation") (emphasis added).

The Secretary's discussion focuses on why the statutory text is clear and does not articulate any other factors counseling in favor of adopting the alternative position dropped into the footnote. The government argues that the Field Solicitor's report suffices to show that the Secretary grappled with the ambiguity of the statute. But the Secretary's decision merely referenced the Field Solicitor's determination that (some) Arizona law supports the conclusion that Parcel 2 is not within the corporate limits in support of the proposition that the statutory text was plain. The Secretary's decision goes out of its way to disclaim the ambiguity that the Field Solicitor highlighted, asserting repeatedly that the meaning is "plain" and that the language shows a "clear intent" to adopt a jurisdictional meaning. The Secretary declined to consider the impact of the Indian canon—even though the Field Solicitor concluded application of the canon was necessary because Arizona law was too unsettled on the issue to yield a straightforward answer—and mentioned no policy or practical concerns.

The Supreme Court has explained that, although the "scope of review under the arbitrary and capricious standard is narrow," "the agency must . . . articulate a satisfactory explanation for its action." *Motor Veh. Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks and citation omitted). In this situation, deferring to the Secretary's unexplained caveat would permit the agency to sidestep its duty to bring its expertise to bear on the "difficult policy choices" it is tasked with making. *Negusie,* 555 U.S. at 523, 129 S.Ct. 1159.

Because the Secretary relied on the text alone, we "remand to require the agency to consider the question afresh in light of the ambiguity we see." *Delgado,* 648 F.3d at 1103 n. 12 (quoting *Negusie,* 555 U.S. at 523, 129 S.Ct. 1159); *see also PDK Labs., Inc.,* 362 F.3d at 797–98 (holding that where there is ambiguity in the statutory text "it is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake.") (footnote and citation omitted).[12]

We are puzzled by the dissent's invocation of the clear statement or "federalism" canon. The clear statement rule, which is a canon of statutory construction, not a rule of constitutional law, applies where courts "confront[ ] a statute susceptible of two plausible interpretations, one of which . . . alter[s] the existing balance of federal and state powers." *Salinas v. United States,* 522 U.S. 52, 59, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *see also Hilton v. South Carolina Pub. Rys. Comm'n,* 502 U.S. 197, 205–06, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) (distinguishing between a rule of constitutional law and a rule of statutory construction and using the plain statement rule as an example of a rule of statutory construction). The rule counsels that "absent a clear indication of Congress' intent to change the balance, the proper course [is] to adopt a construction which maintains the existing balance." *Salinas,* 522 U.S. at 59, 118 S.Ct. 469.

To begin, in the nine briefs filed with the court, it is no surprise that not a single brief referenced this argument.[13] It is also telling that no party argued that the Secretary's construction of § 6(d), in particular, raised serious constitutional problems or implicated state sovereignty. The Arizona appellants' effort at oral argument to reframe the rule to one of constitutional avoidance is unavailing because § 6(d) does not implicate constitutional sovereignty concerns. Not only is this recharacterization of the claim an eleventh hour effort to change gears, but this canon of construction does not bear on our interpretation of the Gila Bend Act.

Neither the dissent nor the Arizona appellants have articulated a state sovereignty or constitutional interest vis-a-vis

12. Aside from the issue of *Chevron* deference, the Nation argues that the Department of the Interior's trust decision is compelled by the Indian canon's requirement that when there is doubt as to the proper interpretation of an ambiguous provision in a federal statute enacted for the benefit of an Indian tribe, "the doubt [will] benefit the Tribe." (quoting *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 729 (9th Cir.2003)). The Gila River Indian Community counters that the canon is inapplicable when there are competing tribal interests.

If by application of canons, or other "traditional tools of statutory construction," we could "ascertain[ ] that Congress had an intention on the precise question at issue," we would resolve the ambiguity at step one. *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778. However, the application of the Indian canon in these circumstances is unsettled. We therefore leave it to the Secretary to consider application of the Indian canon, and other relevant canons of statutory construction, in the first instance on remand. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). The Secretary is best positioned to take stock initially of whether and how to weigh the competing interests. At this stage, the job of considering the statutory ambiguity in light of the conflicting interests "is not a task we ought to undertake on the agency's behalf." *Dep't of Treasury, IRS v. Fed. Labor Relations Auth.,* 494 U.S. 922, 933, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990).

13. In an order from the panel after briefing and just before argument, the parties were asked to discuss the clear statement rule at oral argument.

§ 6(d). Whatever our interpretation of the phrase "within the corporate limits of any city or town," it does not raise a question of federal encroachment on state power. In short, the Gila Bend Act does not implicate an "existing balance of federal and state powers." In *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the Court does not indicate that the clear statement rule applies to any and all regulation of state governmental functions. Justice White, in his partial concurrence, partial dissent in *Gregory* raises this issue explicitly: "The majority's approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule.... Second, the majority does not explain its requirement that Congress' intent to regulate a particular state activity be 'plain to anyone reading [the federal statute].'" *Id.* at 478, 111 S.Ct. 2395. Virtually any federal legislation could be construed to have at least minor, derivative implications for traditional state functions. For example, does federal legislation appropriating funds for building and maintaining interstate highways require a plain statement of congressional intent to interfere with the traditional state functions of zoning and land use that the dissent flags in this case? The plain statement rule should not be applied in a way that makes it into a useless tautology.

To the extent one is searching for a clear statement, Congress was clear: The Nation is entitled to swap out 9,880 acres of trust land ceded to the federal government for land of equivalent total acreage. This swap does not implicate state interests nor can the Arizona appellants seriously argue that state sovereign interests restrict the Secretary from establishing a reservation on trust land.[14] As we know, "[s]tate sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001); *see also Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 50 S.Ct. 455, 74 L.Ed. 1091 (1930) (citing Indian reservations as examples of federally managed land within state territory).

Even under the dissent's reading of the statute, nothing would prevent the Nation from acquiring land in trust immediately adjacent to a city's outermost boundary or even land that was almost, but not entirely encircled by corporate land. This circumstance is not one in which "an administrative interpretation of a statute invokes the outer limits of Congress' power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). Neither plausible construction of the statute "raise[s] serious constitutional problems" that counsel invocation of the clear statement rule. *Id.* The dissent's real concern about a casino abutting the City of Glendale is revealed in its effort to transform statutory interpretation of a federal trust land provision into a blocking effort by the city. At this stage, no one knows whether a casino will be approved. The Nation faces regulatory and court battles that are beyond the scope of this appeal. To convert this issue from one of *Chevron* deference to a sovereignty battle over regulation of Indian gaming distorts the clear statement rule.

Although we disagree with the dissent's position that the clear statement rule is dispositive here, the agency is free on re-

14. To the extent the Arizona appellants argue that the Gila Bend Act impermissibly interferes with the state's interest in maintaining its taxable land base, the text of the Act provides a definitive answer: "With respect to any private land acquired by the Tribe under section 6 and held in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes." § 7(a).

mand to consider the rule, along with the Indian canon and other canons of statutory construction, to assist it in dispatching its duty to bring its policy and practical expertise to bear in interpreting § 6(d). Because we do not consider a jurisdictional interpretation of the provision to be foreclosed, "the agency has the option of adhering to its decision" on remand. *Negusie,* 555 U.S. at 525, 129 S.Ct. 1159 (Scalia, J., concurring).

III. The Indian Commerce Clause and the Tenth Amendment

[3] The final issue is the claim that the Gila Bend Act exceeds Congress's power under the Indian Commerce Clause and violates the Tenth Amendment. In rejecting this argument, the district court noted that "counsel for Glendale agreed during oral argument [that] Plaintiffs ask the Court to break new ground on this issue—to depart from every court decision that has previously addressed it." *See, e.g., Carcieri v. Kempthorne,* 497 F.3d 15, 39–40 (1st Cir.2007) (en banc), *rev'd on other grounds,* 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009) (emphasizing that powers expressly delegated to Congress do not implicate the Tenth Amendment, and that "[b]ecause Congress has plenary authority to regulate Indian affairs, [the challenged act] does not offend the Tenth Amendment."). On appeal, the Arizona appellants offer no such acknowledgment. The gist of their argument is that the Gila Bend Act infringes on Arizona's sovereignty. Their effort to invoke *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which considered the Eleventh Amendment's express grant of state sovereign immunity, is unpersuasive and fails in the face of the broad powers delegated to Congress under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court has read this Amendment as a "tautology": "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States,* 505 U.S. 144, 156–57, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The question here is straightforward: Did Congress act within its powers under the Indian Commerce Clause in passing the Gila Bend Act? If so, the Tenth Amendment is not implicated, and the constitutional challenge fails.

The Indian Commerce Clause empowers Congress "[t]o regulate Commerce ... with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has interpreted this clause broadly: "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). That "Indian relations [are] the exclusive province of federal law" is beyond dispute. *Cnty. of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). *See also Morton v. Mancari,* 417 U.S. 535, 552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (holding that the Indian Commerce Clause empowers Congress to "single[ ] Indians out as a proper subject for separate legislation.").

In passing the Gila Bend Act, Congress acted within its authority and expressly stated that it was fulfilling "its responsibility to exercise plenary power over Indian affairs to find alternative land for the [Nation]." H.R. Rep. 99–851 at 7. As we learned from *Garcia v. San Antonio Metro. Transit Auth.,* courts "have no license

to employ freestanding conceptions of state sovereignty when measuring congressional authority under" a constitutionally enumerated power. 469 U.S. 528, 550, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Passage of the Gila Bend Act was well within congressional power under the Indian Commerce Clause and is not trumped by the Tenth Amendment.

AFFIRMED in part, REVERSED AND REMANDED in part as to the interpretation of § 6(d).

Each party shall bear its own expenses on appeal.

N.R. SMITH, Circuit Judge, dissenting:

"Of all the attributes of sovereignty, none is more indisputable than that of [a State's] action upon its own territory." *Green v. Biddle,* 21 U.S. 1, 43, 8 Wheat. 1, 5 L.Ed. 547 (1823). Yet today, the majority holds that it was permissible for an agency to exercise what Chief Justice Roberts has called "an extraordinary assertion of power" [1] by taking land into trust for an Indian reservation in the middle of one of Arizona's most populated cities, contrary to the plain language of the Gila Bend Indian Reservation Lands Replacement Act, Pub.L. No. 99–503, 100 Stat. 1798 (1986) ("Gila Bend Act"). The statutory text of the Gila Bend Act clearly prohibits the Secretary's ability to take land, that is "within the corporate limits" of a city, into trust when the city's limits wholly surround that land, such as the parcel at issue in this case.

Furthermore, even if the Gila Bend Act is "ambiguous," as the majority argues, the Supreme Court has made clear that courts should "not extend *Chevron* deference" to an agency decision where the "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" such as the regulation of a State's land not authorized by "a clear statement from Congress." *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172–74, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *see also Gregory v. Ashcroft,* 501 U.S. 452, 460–64, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Rather, courts should assume that, "the background principles of our federal system ... belie the notion that Congress would use ... an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Gonzales v. Oregon,* 546 U.S. 243, 274, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). These concerns are particularly relevant here, where the Department of Interior made its decision in an ex-parte proceeding that did not involve the participation of the State of Arizona and without formal proceedings or a hearing for any other protesting parties.

The majority's decision to remand to the agency is improper, because "Congress has directly spoken to the precise question" before us. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We should resolve this case against the agency under *Chevron* step one, because the Secretary's interpretation (1) is contrary to the plain language of the statute and (2) effectively renders political protections afforded to States in our federalism system virtually nonexistent. Thus, I must respectfully dissent.

I.

I generally agree with the facts and procedural history as set forth by the majority. Nevertheless, additional facts are relevant to my analysis in Part II. Thus, as the late Paul Harvey would say, "here's the rest of the story."

1. *Carcieri v. Kempthorne,* No. 07–526, Oral Arg. Tr. 36:13–17 (Nov. 3, 2008).

A.

The Tohono O'odham Nation ("the Nation") is a federally recognized Indian tribe with the second largest Tribal land base in the United States at 2.8 million acres. That land base amounts to 4,375 square miles of reservation in South and Central Arizona. To put this size in perspective, the State of Connecticut is only slightly larger, at 5,006 square miles in area. The State of Delaware is less than half the size, at 2,026 square miles.

The Gila Bend Reservation had previously been part of the Nation's land base. The reservation was nearly 10,000 acres—less than .4 percent of the Nation's total land holdings. When part of the Nation's land was flooded as a result of problems with a federal dam project, Congress enacted the Gila Bend Act in 1986 to "replace[ ] . . . [Gila Bend Indian Reservation] lands with lands suitable for sustained economic use which is not principally farming. . . ." Pub.L. No. 99–503, § 2(4) 100 Stat. 1798. Under this Act, the Nation assigned to the United States all rights and title to 9,880 acres of the Gila Bend Reservation for $30 million. *Id.* at § 4(a). The Nation was then authorized to purchase replacement land, and the Secretary was authorized to take 9,880 acres of replacement land into trust, which would create a new Indian reservation. *Id.* at § 6.

In 2002, the Nation, along with many other tribes, publicly supported Proposition 202—a ballot measure designed to prevent construction of new casinos in Arizona cities. The Nation publicly asserted that it would not authorize additional Indian casinos in any cities.

Then in 2003, the Nation bought Parcel 2 within the City of Glendale through a series of complex transactions using a shell company with an out-of-state address. Parcel 2 is land that is physically within Glendale's corporate limits, but as a "county island," it is unincorporated land under the jurisdiction of Maricopa County. County islands stem from a once-common practice called "strip annexation." This type of annexation occurs when a city "extend[s its] boundaries by annexing long strips of property" that encircle other, unincorporated areas. *Republic Inv. Fund I v. Town of Surprise,* 166 Ariz. 143, 800 P.2d 1251, 1254–55 (1990) (en banc).

The practical benefits a city enjoys once unincorporated land is surrounded by the city's jurisdictional boundaries are twofold. First, cities are able to "exercise a strong degree of control over zoning and development" of county islands, because a city's land-use planning documents and zoning ordinances are able to guide the zoning and subdivision of county islands. *Carefree Improvement Ass'n v. City of Scottsdale,* 133 Ariz. 106, 649 P.2d 985, 986–87, 992 (Ariz.Ct.App.1982); Ariz.Rev. Stat. § 11–814(G) ("The rezoning or subdivision plat of any *unincorporated area completely surrounded* by a city or town shall use as a guideline the adopted general plan and standards as prescribed in the subdivision and zoning ordinances of the city or town after April 10, 1986." (emphasis added)). Second, generally no other municipality can annex unincorporated land such as Parcel 2 that is within a city's geographic limits. *See Carefree Improvement Ass'n,* 649 P.2d at 986; Ariz.Rev. Stat. § 9–101.01.

The City of Glendale's exterior corporate boundary was extended to encircle Parcel 2 in 1977. Since that time, Glendale has controlled and guided the zoning and subdivision development of Parcel 2 and the surrounding land. Indeed, Parcel 2 is part of Glendale's Municipal Planning Area and is included in Glendale's General Plan. Currently, Parcel 2 has a rural zoning designation (R–43) that would allow only limited development.

The City of Glendale developed the surrounding area in reliance on its ability to control the zoning designation and land-use of Parcel 2 under this legal scheme. For instance, in 2005 Glendale finished building a new public high school directly across the street from what Glendale later learned was the Nation's acreage. Glendale, as well as private parties, has also invested significant resources in the area by building a $450 million stadium, a $240 million arena, and a $120 million Major League Baseball training facility.

In January 2009, the Nation transferred ownership of Parcel 2 to itself. Only days later, it filed its application asking the Secretary to take the property into trust and grant the Nation permission to establish a Class III, Las Vegas-style gambling facility. 25 U.S.C. § 2703. The Nation has advertised that this "new casino will be the largest in the state." There are currently no gaming facilities within the City of Glendale. More than 30,000 people live within two miles of the proposed casino in what is currently described as a "family friendly" area.

B.

Pursuant to usual practices, the Department of Interior treated the Nation's land-into-trust application as an ex parte filing. It never notified the public of the application, created a docket, set a pleading schedule, or held a hearing, because it was not required to do so under the notice and comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d). Opponents of the application (who happened to be aware of the proceedings) were able to submit arguments against the application by letter only. Though the majority makes much of these "lengthy submissions," Maj. Op. at 1143–44, the length of the letters submitted by these parties hardly improved the process by which these parties could contest the Secretary's actions. The opposing parties were never alerted when the Secretary filed amendments to its application. Further, the State of Arizona did not even participate in this limited fashion.

In 2010, the Secretary concluded that Parcel 2 was eligible to be taken into trust under the Gila Bend Act. The Secretary determined that "the meaning of 'corporate limits' is plain" and "shows a clear intent to make property eligible under the Act if it is on the unincorporated side of a city's boundary line." The Department of Interior then published a Federal Register notice announcing its final determination "to acquire Parcel 2 consisting of 53.54 acres of land into trust for the Tohono O'odham Nation . . . ." 75 Fed.Reg. 52550–01, 52550 (Aug. 26, 2010). The Secretary has stayed the acquisition for litigation proceedings.

Plaintiffs sought review in district court. There, they raised both statutory and constitutional arguments that had been raised before the agency. The district concluded that the "within the corporate limits" phrase was "ambiguous" and applied *Chevron* deference to uphold the agency's decision. *See Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778.[2] Plaintiffs sought an injunc-

2. The majority says that the district court "conclud[ed] that the Secretary of the Interior correctly applied the" Gila Bend Act. Majority Op. at 1142. This is a slight misstatement. The district court found "the meaning of 'within the corporate limits' to be ambiguous" in the Gila Bend Act. *Gila River Indian Cmty. v. United States,* 776 F.Supp.2d 977, 987 (D.Ariz.2011). After conducting its own analysis and finding both parties' interpretation plausible, the district court contemplated what it must do when "both sides advocate reasonable interpretations" and concluded that it "must defer to the agency's interpretation." *Id.* at 989. Thus, the court deferred to the agency's interpretation because it was reasonable, but it did not necessarily find that it was the correct interpretation.

tion to block the Secretary from taking Parcel 2 into trust during the appeal; the district court granted the injunction, concluding that Plaintiffs raised "difficult" and "substantial legal questions warranting more deliberative consideration on appeal." The district court also concluded there would be irreparable harm, because Glendale would lose its right to annex the land if it were taken into trust, which would lead to "irreparable quality-of-life injuries from gaming activities on Parcel 2." [3]

II.

The majority concludes that the phrase "within the corporate limits" in the Gila Bend Act is "ambiguous," and thus remands to the agency to allow the Secretary "to bring his expertise to bear to interpret the provision anew." Maj. Op. at 1147. I disagree that the phrase is ambiguous for two reasons.

A.

First, as the Supreme Court has held, "the susceptibility of [a] word ... to alternative meanings does not render the word whenever it is used, ambiguous, particularly where all but one of the meanings is ordinarily eliminated by context." *Carcieri v. Salazar*, 555 U.S. 379, 390, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009) (alterations and internal quotation marks omitted). In *Carcieri*, the Supreme Court ruled in favor of the State and prevented an Indian tribe from taking land into trust in the middle of a city by concluding that the statute was "clear." *Id.* The Court arrived at this conclusion despite the conclusion of the court of appeals below that the statute was ambiguous.

Here, as in *Carcieri*, the statutory context makes clear that "within the corporate limits" refers to land that is geographically enclosed in the jurisdictional limits of a city. Under the Gila Bend Act, the Secretary can only take land into trust upon the completion of certain statutory conditions, the most important of which are in Section 6(d) and relate to the size and location of land parcels:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection.... Land *does not* meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or *within the corporate limits of any city or town.* Land meets the requirements of this subsection only if it constitutes *not more than three separate areas consisting of contiguous tracts,* at least *one of which areas shall be contiguous to San Lucy Village.* The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are *appropriate.*

Pub.L. No. 99–503, § 6(d) 100 Stat. 1798 (emphasis added).

Thus, the plain language of the Gila Bend Act makes clear that it was aimed at allowing the Nation to assemble new reservation land consisting of a few large tracts of land, none of which were within a city. While the Secretary could waive the contiguity and three-tract requirements where "appropriate," the committee report indicates that Congress anticipated "appropriate" circumstances to include only those situations where parcels were "not entirely contiguous," but were "sufficiently close to be reasonably managed as a single economic unit or residential unit." H.R.Rep. No. 99–851, at 11 (1986). Parcel

3. The district court also enjoined Glendale from annexing Parcel 2 to preserve the status quo.

2 is more than 100 miles from the Nation's existing reservation. Nothing in the text of Section 6(d) anticipates that Arizona expected trust land to be purchased in little patches sprinkled throughout the State, and particularly not inside the exterior boundary of cities. Rather, the Gila Bend Act makes land ineligible to be taken into trust if it lies physically inside, or within, the boundary, or limits of a city.

When there is "no evidence that the words . . . have acquired any special meaning in trade or commerce, they must receive their ordinary meaning" based on "the common language of the people. . . ." *Nix v. Hedden*, 149 U.S. 304, 306–07, 13 S.Ct. 881, 37 L.Ed. 745 (1893). The ordinary meaning of "within" is defined as "[i]n or into the inner part; inside." *The American Heritage Dictionary* 1471 (1976). "Limit" means "the final or furthest confines, bounds, or restriction of something." *Id.* at 758. Thus, Parcel 2 is *within* Glendale's corporate limits, because it is "inside" the "final or furthest confines" or "bounds" of the City.[4] This is the obvious, plain meaning of the text that Congress likely understood when enacting Section 6(d) of the Gila Bend Act.

In contrast to this natural reading of the statute, the United States and the Nation argue that there are "two relevant boundaries: the city's exterior boundary and the interior boundary," and "only land that is between those two boundaries" is within corporate limits. Such an interpretation strains common sense, and is certainly not the obvious reading of the statute based on the "common language of the people." *Nix*, 149 U.S. at 307, 13 S.Ct. 881. If Congress had wanted to refer to two boundaries, or to incorporated land only, it could have easily made that distinction.

Indeed, other statutes by Congress in similar circumstances indicate that, if Congress only wished to refer to a municipality's incorporated or annexed land, it knew how to do so. *See, e.g.*, 25 U.S.C. § 1724(i)(2) (allowing Indian tribe to use government-provided funds to purchase "acreage within . . . *unincorporated areas* of the State of Maine" (emphasis added)); *see also* Pub.L. No. 102–402, § 4(d)(1), 106 Stat.1961, 1965 (1992) (referring to "*annexation of lands* within the refuge by any unit of general local government" (emphasis added)); Pub.L. No. 101–514, 104 Stat. 2074, 2076 (1991) (referring to "all *incorporated units* within the town of Matewan" (emphasis added)); Pub.L. No. 100–693, § 3(a), 102 Stat. 4559 (1988) (referring to "the *incorporated area* of the cities of Union City and Fremont" (emphasis added)). This contradicts the argument of the United States and the Nation that "within the corporate limits" means both within the exterior and the interior corporate limits of a city.

Furthermore, even if the "within the corporate limits" phrase does have a specific "settled meaning," (as the United States and the Nation contend), the background legal norms, against which Congress is presumed to be aware when it legislates, most clearly supports the City of Glendale's interpretation of the statute. The most relevant background legal norm to the Gila Bend Act is Arizona state law, because the Gila Bend Act only affects Arizona, and it is "a fair and reasonable presumption . . . that [C]ongress" is aware of "state legislation" when the act of Con-

4. In its cross motion for summary judgment, the United States also agreed to the Black's Law Dictionary definition "within" and "limit." "Within" is defined as "[i]n inner or interior part of." *Black's Law Dictionary* 1602 (6th ed.1990). "Limit" is defined as "[b]oundary, border, or outer line of a thing." *Id.* at 926. These definitions also support a plain meaning interpretation of the Gila Bend Act supporting the City's interpretation, because Parcel 2 is in the "inner or interior part of" the City's "[b]oundary, border, or outer line."

gress has an effect on that law. *See Prigg v. Commw. of Pa.*, 41 U.S. 539, 598–99, 16 Pet. 539, 10 L.Ed. 1060 (1842); *see also Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1358 n. 8 (9th Cir.1985) ("[B]ecause Congress is composed predominately of lawyers, court[s] may assume that Congress is aware of existing law.").

Notably, Arizona's zoning ordinances use the "within corporate limits" phrase in the geographical sense. For instance, Arizona Revised Statutes Section 9–461.11(A) allows a municipality to exercise its "planning powers" over "unincorporated territory" that is "*within its corporate limits*...." (emphasis added). *See also id.* § 9–462.07(A) (same).

The Arizona Supreme Court has also interpreted the words "corporate limits" to refer to a municipality's "exterior boundar[ies]," holding that a state university campus was located "within" the City of Flagstaff's corporate limits, because it was "completely surround[ed]" by the "exterior boundary of Flagstaff." *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 578 P.2d 985, 987 (1978) (in banc). The court emphasized that "the ordinary meaning of 'within' " is "on the innerside ... inside the bounds of a region." *Id.* (internal quotation marks omitted) (quoting *Webster's Third New International Dictionary* 2627 (1965)). Notably, the Arizona Supreme Court's interpretation turned on the geographic location of the campus, not its jurisdictional status.

While not binding on this court, *Flagstaff Vending* is persuasive authority that Congress understood "within the corporate limits" to refer to the geographic boundaries of a city when the Gila Bend Act was passed. This is particularly likely, because *Flagstaff Vending* was decided only eight years before two of Arizona's representatives (Representative Morris K. Udall and then Representative John McCain) sponsored the Gila Bend Act.

Though the majority relies on situations where Congress has used the phrase "exterior boundaries," these statutes are completely inapposite. Maj. Op. at 1148 (citing 16 U.S.C. § 485; 25 U.S.C. § 465). These statutes are in no way referring to unincorporated islands of land surrounded by an outer corporate limit, and thus there is nothing to indicate these statutes would have any bearing on this factually distinct situation. Rather, they merely refer to the "exterior boundary" of an area, such as a national forest. Furthermore, as discussed above, the Arizona Supreme Court had already interpreted "corporate limit[ ]" to be synonymous with "exterior boundary." *Flagstaff Vending Co.*, 578 P.2d at 987. It is likely that Congress also viewed these phrases as synonymous, so there is nothing significant about Congress using the "exterior boundaries" phrase in these statutes.

The Nation is correct that Arizona's 1977 annexation ordinance "extended" the City of Glendale's "present corporate limits ... to include" a strip of land surrounding Parcel 2. But that merely meant that the annexed strip then formed part of the "corporate limits." The encircled land (Parcel 2) still fell within those limits. Nothing about this ordinance defined the term "within" in a way that would detract from this plain meaning.[5]

5. The majority cites to Arizona Revised Statutes Section 9–500.23, a non-zoning ordinance about fire and safety, which "outside corporate limits" in a jurisdictional sense. However, the jurisdictional usage makes sense in this context, because which entity is authorized to provide fire and safety services is an issue of authority and jurisdiction. In fact, this ordinance is entitled "Authority to provide fire protection and emergency services outside corporate limits." Thus, the jurisdictional nature of the "corporate limits" phrase used there is distinguishable from the geographic nature of the phrase used in a

Notably, in a 1992 Legal Brief, the Department of the Interior itself recognized that Section 6(d) created "geographical requirements" to take the land into trust only if it was "outside the corporate limits of any city or town." Brief for Appellee at 4, *Tohono O'odham Nation v. Bureau of Indian Affairs*, 22 IBIA 220 (I.B.I.A. Aug. 14, 1992). This position is directly contrary to the Department's July 2010 position in this case that the "within the corporate limits" phrase is "jurisdictional in nature."

"If the plain language of [the Act] renders its meaning reasonably clear," the court "will not investigate further unless its application leads to unreasonable or impracticable results." *United States v. Fei Ye*, 436 F.3d 1117, 1120 (9th Cir.2006) (internal quotation marks omitted). Therefore, because the meaning of the Act is clear at step one of the *Chevron* analysis, no deference is owed to the Secretary's interpretation. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.").

B.

Even if the majority is correct that the statute is ambiguous, there is a second reason that the majority's decision to remand is incorrect. The Supreme Court's federalism canon of construction,[6] which

zoning context, and the majority's reliance on this ordinance is misplaced.

Other state cases interpreting identical "within the corporate limits" language have come to the same conclusion as the Supreme Court of Arizona. *See, e.g., Village of Frankfort v. Ill. EPA*, 366 Ill.App.3d 649, 304 Ill. Dec. 272, 852 N.E.2d 522, 524 (2006) (referring to unincorporated land "within the corporate limits of Frankfort"); *City of Des Moines v. City Dev. Bd.*, 335 N.W.2d 449, 450 (Iowa Ct.App.1983) (city "notified respondent . . . that the city would not provide essential services to isolated unincorporated areas within the corporate limits of the city"); *Town of Germantown v. Village of Germantown*, 70 Wis.2d 704, 235 N.W.2d 486, 491 (1975) (interpreting statute as giving municipalities an opportunity to annex islands "lying within the corporate boundaries").

6. The United States argues that the Indian canon of construction, requiring a liberal interpretation of statutes in favor of Indians, requires a ruling for the Nation if the Gila Bend Act is ambiguous. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). However, the district court found that the Secretary's interpretation would adversely affect the economic interests of other Indian tribes in Arizona. This canon does not appear to apply when it will benefit one tribe at the expense of other Indian tribes. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir.1996) (declining to apply canon where multiple tribes dispute fishing rights); *see also Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7, 96 S.Ct. 1793, 48 L.Ed.2d 274 (1976) (declining to apply canon because the "contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members").

Furthermore, Supreme Court precedent suggests that when the Indian canon conflicts with the federalism canon, the federalism canon prevails. *See, e.g.*, William N. Eskridge, Jr. et. al., *Legislation and Statutory Interpretation* 374–75 (2d ed. 2006) ("[T]he canon promoting interpretations favoring Native Americans has weakened considerably in recent years, in the aftermath of jurisdictional disputes where states have prevailed over tribes." (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989)); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1 (1999)); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi–Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 Vand. L.Rev. 593, 628 (1992)

operates at step one of the *Chevron* analysis [7] as a normal tool of judicial interpretation,[8] makes clear that this court is required to interpret an ambiguous statute in favor of substantial state interests absent a clear indication that Congress intended otherwise. *See SWANCC,* 531 U.S. at 172–74, 121 S.Ct. 675; *Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 208–09, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998); *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544–45, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994); *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395; *see also Gonzales v. Oregon,* 546 U.S. at 295–300, 126 S.Ct. 904 (discussing the clear statement rule); *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)); *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). A discussion of the background justifications for this clear statement rule illustrates the relevance of this canon here.

The debate over what constitutes the appropriate balance of power between the states and federal government and—more relevant to this case—how that balance of power should be enforced, dates back to the founding of this nation. Regarding the specific interpretation that should be given to the Tenth Amendment, one position in this debate has been that it is the role of the judiciary to protect state interests by interpreting the Tenth Amendment as a substantive limit on federal power. The competing argument is that States are able to adequately protect their interests through the political process, so no additional judicial protections should be provided. Over the course of American history, federal courts have not always taken consistent positions on this issue.[9]

("*Gregory,* and the federal criminal cases also may have dramatically deflated the longstanding canon presuming that states have no regulatory role in Indian country.").

7. Generally, "canons of interpretation are considered to be part of the traditional tools available to the Court at Step One" of the *Chevron* analysis. *See* William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* 335 (2d ed.2006); *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking,* 118 Yale L.J. 64, 77 (2008) ("The largest group of cases to consider the place of normative canons in review of agency interpretations treats them as the type of 'traditional tools' that courts may use to resolve textual ambiguity, even when faced with an agency construction that might otherwise be entitled to deferential *Chevron* review.").

8. "In determining if Congress has 'an intention on the precise question at issue,' [the Court] employ[s] 'traditional tools of statutory construction.' " *Hamilton v. Madigan,* 961 F.2d 838, 840 n. 3 (9th Cir.1992) (quoting *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778).

9. *Compare Hammer v. Dagenhart,* 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918) (holding that a federal law prohibiting interstate shipment of goods that utilized child labor violated the Constitution, because "[t]he power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government"); *Bailey v. Drexel Furniture Co.,* 259 U.S. 20, 38, 42 S.Ct. 449, 66 L.Ed. 817 (1922) (same), *with United States v. Darby,* 312 U.S. 100, 124, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (holding that a federal law prohibiting shipment of goods made by children was Constitutional, because the Tenth Amendment was merely a reminder that "all is retained which has not been surrendered").

For instance, prior to *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the Supreme Court had, from time to time, employed the Tenth Amendment as a substantive limit on the federal government's ability to exercise power.[10] The case of *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) was a Supreme Court case that used the Tenth Amendment in this manner.

In *Garcia,* the Court expressly overruled *National League of Cities,* because using the Tenth Amendment as a substantive limit on Congress proved "unworkable in practice," even if it had some basis in Constitutional theory. 469 U.S. at 545–47, 105 S.Ct. 1005. The Court in *Garcia* did argue for judicial restraint when it came to rules that "look[ed] to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions . . . ." *Id.* at 546, 105 S.Ct. 1005. The Court also emphasized that States continue to "occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 556, 105 S.Ct. 1005.

However, the Court explained that the protection of State interests occurred through the political process and not the judiciary. "[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the states *will not be promulgated.*" *Id.* (emphasis added) The Court observed that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended." *Id.*

Only six years after *Garcia,* the Supreme Court apparently sought to strike a compromise between these competing positions when it decided *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410. There, the Court used the Tenth Amendment and federalism considerations as a rule of construction preventing federal laws from being interpreted in a way that burdened substantial state interests unless Congress clearly authorized such an interpretation of the law. The Court explained, "inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise." 501 U.S. at 464, 111 S.Ct. 2395; *see also* 1 Laurence Tribe, *American Constitutional Law* 1176 (3d ed. 2000) ("[T]o give the state-displacing weight of federal law to mere constitutional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.").

In other words, to the extent that *Garcia* anticipated that States would be protected by "the internal safeguards of the political process" when the political process "performed as intended," *Gregory* created a rule of construction aimed at ensuring that these political safeguards actually *had* "performed as intended" before significant state interests would be burdened. *Garcia,* 469 U.S. at 556, 105 S.Ct. 1005. Thus, the *Gregory* Court explained that Congress's authority under the Su-

10. *See, e.g., Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 on federalism grounds); *United States v. Butler,* 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936) (striking down part of the Agricultural Adjustment Act that imposed taxes on agricultural processors under the Tenth Amendment).

premacy Clause to preempt state law "in areas traditionally regulated by the States" is "an extraordinary power in a federalist system" that "we must assume Congress does not exercise lightly." 501 U.S. at 460, 111 S.Ct. 2395.

A canon of construction favoring a State's sovereign interests is not new. The Supreme Court has long explained that when federal law is arguably inconsistent with state law, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).[11] However, the Supreme Court's decision in *Gregory* appears to have transformed this presumption into a much more exacting clear statement rule requiring additional clarity from Congress.[12]

As the dissent in *Gregory* noted, to overcome a federalism presumption, Congress would be required both to make clear 1) that the statute was intended to extend "to the States" at all, and 2) Congress must also be clear as to whether "the precise details of the statute's application" were meant to apply to the specific state activities at issue. 501 U.S. at 476, 111 S.Ct. 2395 (White, J., dissenting).[13]

11. *See also Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare,* 411 U.S. 279, 284–85, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); *Bass,* 404 U.S. at 349, 92 S.Ct. 515.

12. *See* William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* 368 (2d ed.2006); Note, *Federalism—Clear Congressional Mandate Required to Preempt State Law: Gregory v. Ashcroft,* 105 Harv. L.Rev. 196, 201–02 (1991) ("The Court has long required Congress to state clearly its intent to upset the usual balance of power between the states and the federal government.... *Gregory* 's plain statement rule, however, represents a new, more exacting rule of statutory construction.").

13. *See also Federalism—Clear Congressional Mandate Required to Preempt State Law: Gregory v. Ashcroft, supra* note 11, at 202 ("In *Gregory,* the Court created a two-tier inquiry. First, Congress must clearly intend to extend a law to the states.... Second, Congress must delineate which specific state governmental functions it wishes to include within the sweep of the federal law.").

That this two-tier analysis exists is demonstrated by the fact that the Supreme Court has upheld the imposition of the exact same federal statute against states in some instances where the statute's application was clear, but not in other instances where the statute's application was less than clear. For example, in *SWANCC,* 531 U.S. at 162, 121 S.Ct. 675, the statutory interpretation question was whether an abandoned sand and gravel pit constituted "navigable waters," as interpreted by the United States Army Corps of Engineers. The Supreme Court struck down the application of the "navigable waters" provision in the Clean Water Act to a land-locked gravel pit in one instance. 531 U.S. at 162, 121 S.Ct. 675 ("We are asked to decide whether the provisions of § 404(a) may be fairly extended to *these* waters...." (emphasis added)). This was because, though it was clear that the Clean Water Act could be applied by agencies against the states *in general,* the intrusive application in *SWANCC* was not clearly authorized by Congress in that case, where the application raised heightened federalism concerns. But the Court noted that, in *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 134, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), the Court upheld the application of the exact same statute to water that was adjacent to and "inseparably bound up with" navigable waters. *Id.* at 167, 106 S.Ct. 455.

Similarly, in *Gregory,* the Supreme Court struck down the application of the ADEA to potentially include retirement requirements on state judges. 501 U.S. 452, 111 S.Ct. 2395. But in *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), the Supreme Court found the same statute, the ADEA, satisfied the clear statement rule regarding Congress's intention to abrogate states' Eleventh Amendment immunity.

Thus, even if the Gila Bend Act is, as the majority concludes, "ambiguous" and "less than crystal clear," this only means that Congress never actually considered the issue of creating an Indian reservation on an unincorporated island within the geographic limits of a city. While statutory ambiguity in other contexts generally requires courts to defer to an agency's interpretation, *Chevron,* 467 U.S. 837, 104 S.Ct. 2778, the federalism clear statement rule prevents Congress from punting this highly charged political decision to the less politically accountable agency, *SWANCC,* 531 U.S. at 172, 121 S.Ct. 675; *Gregory,* 501 U.S. 452, 111 S.Ct. 2395.[14]

For instance, in *SWANCC,* the agency specifically requested that *Chevron* deference be provided, because Congress "did not address the precise question of [the statute's] scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, [the Court] should give deference to the [agency's] 'Migratory Bird Rule.' " 531 U.S. at 172, 121 S.Ct. 675. The Seventh Circuit had deferred to the agency's interpretation after determining that the interpretation was "reasonable." *Id.* at 166, 121 S.Ct. 675. However, the Court reversed the Seventh Circuit and explicitly stated that, "even were we to agree with respondents, we would not extend *Chevron* deference here." *Id.* at 172, 121 S.Ct. 675. The Court invoked the federalism cannon of statutory interpretation and explained that its concern with the agency's interpretation was "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173, 121 S.Ct. 675 (citing *Bass,* 404 U.S. at 349, 92 S.Ct. 515 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")). Thus, because the Court found "nothing approaching a clear statement from Congress that it intended" the statute to be applied as it was in the present case, the Court "read the statute as written to avoid the significant constitutional and federalism questions ... and therefore *reject[ed] the request for administrative deference.*" *Id.* (emphasis added).

Similarly, in *Gregory,* 501 U.S. 452, 111 S.Ct. 2395, the majority rejected the EEOC's interpretation of the statute without even mentioning deference to the agency. It was only in Justice Blackmun's dissent where *Chevron* was discussed, and he argued that the Court should have deferred to the EEOC's interpretation of a vague statute. *Id.* at 493, 111 S.Ct. 2395 (Blackmun, J., dissenting); *see also Gonzales v. Oregon,* 546 U.S. at 264, 274, 126 S.Ct. 904 (finding that the Attorney General's interpretive rule was "not entitle[d] ... to *Chevron* deference," based on, *inter alia,* "background principles of our federal system"). In other words, in areas where federalism concerns are implicated, it appears that a clear authorization of Congressional authority is a preliminary requirement for any deference to be accorded to the agency's interpretation of a statute.[15]

14. Clear statement canons "trump *Chevron,*" because "Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear." Bamberger, *supra* note 6, at 80 (quoting Cass R. Sunstein, *Nondelegation Canons,* 67 U. Chi. L.Rev. 316, 331 (2000)).

15. Clear statement "canons reflect a singular requirement that certain important issues be addressed by legislative deliberation alone. More specifically, they operate as clear statement rules that bar the interpretation of a statute to push the bounds of federal power absent an unambiguous declaration of intent by Congress." Bamberger, *supra* note 6, at 79 (citing Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is,* 115 Yale L.J. 2580, 2607 (2006)). The canons also "force a democratically elected Congress to deliberate on, and then raise, a question via

Contrary to the majority's concerns about hypothetical applications of this rule, the federalism canon of construction does not preclude deference to any agency interpretation of "any and all ... federal legislation [that] could be construed to have at least minor, derivative implications for traditional state functions." Maj. Op. at 1152. Rather, the Supreme Court has only applied this rule in narrow circumstances when the following three types of specific concerns arise. First, this rule has only been used by the Supreme Court in particular substantive legal "areas traditionally supervised by the States' police power." *Gonzales v. Oregon,* 546 U.S. at 274, 126 S.Ct. 904. The Supreme Court has demonstrated its commitment to protecting a State's ability to regulate the land use and private property rights within its own territory. For instance, in *SWANCC,* the Supreme Court recognized that the agency's interpretation would result in "a significant impingement of the States' traditional and primary power over land and water use" as a justification for invoking the clear statement rule. 531 U.S. at 174, 121 S.Ct. 675; *see also Hess v. Port Auth. Trans–Hudson Corp.,* 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). Similarly, in *BFP,* 511 U.S. at 544–45, 114 S.Ct. 1757, the majority opinion invoked the *Gregory* clear statement rule in support of a reading that prevented federal law from trumping state law concerning the regulation of private property rights.

Second, the clear statement rule only applies when "a statute [is] susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers." *Salinas v. United States,* 522 U.S. 52, 59, 118 S.Ct. 469, 474, 139 L.Ed.2d 352 (1997); *see also United States v. Nordic Vill., Inc.,* 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (applying a similar rule of construction where a was "susceptible of at least two interpretations," one of which was more intrusive on a state's interests). For instance, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 557 U.S. 261, 265, 273, 129 S.Ct. 2458, 174 L.Ed.2d 193 (2009), the clear statement rule did not apply, because the question was merely about *which* agency had authority to issue discharge permits, rather than *whether* an agency had authority to perform the action at all. Though the Court explained that the statute may be ambiguous, either interpretation had a similar effect on the State's interests, and thus the Court deferred to the agency's interpretation rather than applying the clear statement rule. *Id.* at 274–75, 129 S.Ct. 2458.

In contrast, in *Gregory,* one interpretation of the ADEA would have allowed an agency to regulate retirement requirements for state judges—a significant intrusion on state interests, whereas the other interpretation would not allow such regulation. 501 U.S. at 469, 111 S.Ct. 2395. Similarly in *SWANCC,* the potential ambiguity in the Clean Water Act was over whether or not the Army Corps could regulate a land-locked, abandoned gravel pit "wholly located within two Illinois counties," despite the fact that the agency *did* clearly have authority under the same statute to regulate other state land that "actually abutted on a navigable waterway." 531 U.S. at 167, 171, 121 S.Ct. 675. The Court noted that, while the text of the Clean Water Act supported the latter interpretation, there was nothing to indicate

explicit statement by operating in a manner that constrains any interpretive discretion on the part of courts and agencies." *Id.* at 80.

that Congress had supported the former "more expansive" interpretation of "navigable waters." *Id.* at 168–71, 121 S.Ct. 675. In other words, the type of ambiguity in the statute must be such that it is not clear that the State was able to protect its significant interests through the political process, because the State may not have been on notice that its important interests were at stake.

Third (and this factor applies only in the administrative context), the Supreme Court seems more likely to apply this clear statement requirement when the agency interprets the scope of its own statutory authority to regulate in the traditional state realm at issue. For instance, in *Gonzales v. Oregon*, the Supreme Court explained that it is a "commonsense conclusion" that "[j]ust as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." 546 U.S. at 274, 126 S.Ct. 904. The Court thus explained that "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable." *Id.* at 267, 126 S.Ct. 904. The Court quoted *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), where it had previously explained that "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.*[16]

This concern regarding the agency's interpretation of its own statutory authority compounds when the agency's interpretation of the authority-granting statute itself strains the bounds of Congress's constitutional authority. For example, in *SWANCC*, the Court explained that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." 531 U.S. at 172, 121 S.Ct. 675. The Court explained that this concern stems from the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172–73, 121 S.Ct. 675. However, while constitutional limits may heighten concerns about authority, clear statement rules "cannot be defended as a simple invocation of the rule about avoiding serious constitutional questions," because these rules apply even in situations where, "if Congress acted with the requisite clarity, the statute would be constitutional." William N. Eskridge, Jr., et. al., *Legislation and Statutory Interpretation* 368 (2d ed.2006).

Under this third concern, the federalism clear statement rule is satisfied when a statutory grant of authority to an agency

16. *See also Wyeth v. Levine*, 555 U.S. 555, 576–77, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (the Court gave no weight to the agency's conclusion that state law is pre-empted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 Admin.L.Rev. 69, 171 (2010) ("The Roberts Court's track record to date indicates that it will generally accord far less deference to a federal agency when the agency is determining the scope of its own jurisdictional authority. This inclination is particularly strong when the agency is expanding its authority into realms that the Court perceives as the states'—for example, regulation of doctors, *retention of legal authority over land, and land-use planning.*" (emphasis added)).

is without reservation and clearly encompasses the scope of the subject matter. *See Yeskey,* 524 U.S. at 208–10, 118 S.Ct. 1952. But when there is some reservation of authority and it is not clear if the agency's interpretation is statutorily authorized, the clear statement rule applies in full force. *SWANCC,* 531 U.S. at 172–74, 121 S.Ct. 675; *Gregory,* 501 U.S. 452, 111 S.Ct. 2395; *see also Gonzales v. Oregon,* 546 U.S. at 295–300, 126 S.Ct. 904.

All three of the specific concerns related to the federalism canon are present in this case. First, the Secretary's interpretation of the Gila Bend Act clearly implicates Arizona's "traditional and primary power over land ... use" and private property rights within its territory. *See SWANCC,* 531 U.S. at 174, 121 S.Ct. 675. I am surprised by the majority's argument that no "encroachment on *state power*" is at issue in this case. Maj. Op. at 1152 (emphasis added). Although the City of Glendale is a municipality, in *SWANCC,* the land at issue was only a "*municipal* landfill," and yet the Supreme Court still determined that the federal government's attempt to regulate this land constituted "a significant impingement of the States' traditional and primary power." *Id.* at 173–74, 121 S.Ct. 675 (emphasis added). Moreover, as discussed below, it is Arizona's state-wide zoning scheme created under Arizona state law (a scheme that allows cities to develop and lay claim to land enclosed within a cities corporate limits, even if that land is not incorporated) that will be interrupted by the Secretary's application of the Gila Bend Act in this case. It is Arizona state citizens that will be affected by Parcel 2 being taken into trust just across the street from their neighborhoods. It is also land located within Arizona's "own territory" that will be effectively transferred to another sovereign. *Green v. Biddle,* 21 U.S. at 43. Even the Federal Government's brief recognizes that "jurisdiction over Indian lands involves 'an accommodation between the interests of the Tribes and the federal government, on the one hand, and *those of the State,* on the other.'" Federal Appellees' Answering Br. 48 (emphasis added) (quoting *Nevada v. Hicks,* 533 U.S. 353, 361–62, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001)). The Federal Government's brief also notes that the Secretary's decision to take Parcel 2 into law will result in a "[d]isplacement of *state* law...." *Id.* at 50 (emphasis added).

The majority's argument that Arizona never "articulated a state sovereignty or constitutional interest vis-a-vis § 6(d)" also "puzzled" me. Maj. Op. at 1151–52. Arizona clearly argued (multiple times throughout both the opening and reply brief) that the Gila Bend Act, which includes Section 6(d), "as applied violates the Tenth Amendment" and invades "essential attributes inhering in [Arizona's] sovereign status." Arizona Appellants' Opening Br. 49, 51. All parties were also ordered by our panel to discuss the application of the federalism clear statement rule to this case at oral argument, at which time Arizona argued that the clear statement rule specifically applies to an interpretation of Section 6(d), and state sovereignty concerns require construing any ambiguity in the Gila Bend Act in Arizona's favor.[17] I do

17. It is worth noting that, in *BFP,* 511 U.S. 531, 114 S.Ct. 1757, the Supreme Court invoked the clear statement canon in favor of the State despite the fact that neither the Ninth Circuit nor any party had discussed the clear statement rule. Our precedent is also clear that, even if Arizona did make a concession about a question of law, there is "no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties." *United States v. Miller,* 822 F.2d 828, 832 (9th Cir.1987) (quoting *Smith Engineering Co. v. Rice,* 102 F.2d 492, 499 (9th Cir.1938)). "The rule has been repeated in a variety of circumstances. Even if a con-

not address Arizona's argument that the Tenth Amendment and state sovereignty concerns create a substantive constitutional limit that prevents the Secretary from "tak[ing Parcel 2] into trust in the first place," Arizona Appellants' Reply Br. 27, nor do I address Arizona's other concerns with the Gila Bend Act and the Secretary's interpretation of it, because I conclude that the federalism canon's procedural requirement for added clarity, as applied to Section 6(d)'s language alone, requires a ruling for Arizona and Glendale.

Second, the statutory interpretation debate over the Gila Bend Act is over one interpretation that would significantly burden Arizona's substantial state interests and another interpretation that is much less intrusive. The Secretary's application of the Gila Bend Act would interfere with Arizona's sovereign powers more than the typical creation of an Indian reservation, regardless of whether a casino is ever actually built on Parcel 2. It is a commonsense conclusion that a state has a greater concern about how land within its cities is used than land outside its cities. *SWANCC,* 531 U.S. at 167, 171, 121 S.Ct. 675 (recognizing a heightened concern over land "wholly located within two Illinois counties" compared to land that "actually abutted on a navigable waterway").

Furthermore, ordinary land use concerns are heightened by the fact that in Arizona, municipalities expect to be able to "exercise a strong degree of control over zoning and development" over land within their geographic boundaries, even if the land is not incorporated. *Carefree Improvement Ass'n,* 649 P.2d at 987; Ariz. Rev.Stat. § 11–814(G). A city's land-use planning documents and zoning ordinances are able to guide the zoning and subdivision of county islands. *Carefree Improvement Ass'n,* 649 P.2d at 986–87, 992. In addition, in Arizona, generally no other municipality can annex unincorporated land such as Parcel 2 that is within a city's geographic limits. *Id.* at 986; Ariz.Rev. Stat. § 9–101.01; *see also Kane v. City of Beaverton,* 202 Or.App. 431, 122 P.3d 137, 142 (2005) ("[T]here are a number of rational and legitimate reasons for disparate treatment of 'island' territories . . . ."). Thus, Glendale had reasonable expectations that it would be able to guide and control Parcel 2's development, and that this land could not be claimed by any other entity capable of changing the land use development. In reliance on this zoning scheme, the City of Glendale zoned Parcel 2 as residential and developed the surrounding area consistent with that zoning designation. These reliance interests would not exist to the same extent in the hypothetical the majority poses, regarding "acquiring land in trust immediately adjacent to a city's outermost boundary or even land that was almost, but not entirely encircled by corporate land." [18] Maj. Op. at 1152.

The State's territorial control—the ability to tax, to regulate, and to control land use—is effectively eliminated when state

cession is made by the government, we are not bound by the government's 'erroneous view of the law.' " *Id.* (quoting *Flamingo Resort, Inc. v. United States,* 664 F.2d 1387, 1391 n. 5 (9th Cir.1982)). This is particularly true where all parties had the chance to address this issue at oral argument.

18. Furthermore, the question of whether land immediately adjacent to Parcel 2 and outside Glendale's city limits could be taken into trust is not a question before this court, given that it is not clear whether such land would meet other requirements of the Gila Bend Act, including that the land be "three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village," Pub.L. No. 99–503, § 6(d) 100 Stat. 1798, or else that non-contiguous parcels are "sufficiently close to be reasonably managed as a single economic unit or residential unit." H.R.Rep. No. 99–851, at 11 (1986).

land is taken into trust. As courts have noted, "federally-recognized reservations ... are, in many ways, separate jurisdictions from the state in which they are located." *Tworek v. United States,* 46 Fed.Cl. 82, 87 (2000). Importantly for this case, tribal sovereignty blocks "state action that impairs the ability of a tribe to exercise traditional governmental functions such as *zoning* ... or the exercise of general civil jurisdiction over the members of the tribe." *Crow Tribe of Indians v. Montana,* 650 F.2d 1104, 1110 (9th Cir. 1981) (emphasis added); *see also Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1390–94 (9th Cir.1987) (rejecting a State's attempts to apply local laws such as zoning ordinances to reservation lands). The Supreme Court has explained that one of the independent "barriers to the assertion of state regulatory authority over tribal reservations and members" is the sovereign "right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *see also United States v. Wheeler,* 435 U.S. 313, 322, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) ("The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished."). Thus, upholding the Secretary's interpretation would strip Glendale of its long-standing authority to control land use on Parcel 2 and transfer that control to a separate sovereign.

The transfer of Arizona's sovereign authority, over land enclosed within one of its major cities, is a significant encroachment on Arizona's state interests, regardless of how Parcel 2 is ultimately developed. Moreover, the fact that taking Parcel 2 into trust would create the very real potential that a new casino would be built across the street from a high school, a quarter-mile from churches, and within Glendale's carefully developed residential area (where millions of dollars have been invested) understandably heightens the State's concerns.

Furthermore, not only would the Secretary's decision affect the State's ordinary land use powers, the agency's decision here will likely implicate major budgetary decisions. For example, if a casino is built, city officials estimate that the casino complex will require Glendale to build significant additional infrastructure in the area (e.g., fire, police, etc.), as well as to spend millions of additional dollars of expenditures for public safety outlays. The Supreme Court has explained that "[f]ederalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities." *Horne v. Flores,* 557 U.S. 433, 448, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009).

The political process justifications for the federalism clear statement rule are also particularly relevant here. In contrast to *Garcia,* "[i]n the factual setting of [this case] the internal safeguards of the political process" have *not* "performed as intended." *Garcia,* 469 U.S. at 556, 105 S.Ct. 1005. As discussed above, the text of the Gila Bend Act readily lends itself to an interpretation that would prevent any reservations from being created within the geographic boundaries of a city. Thus, when two of Arizona's own representatives sponsored the Gila Bend Act in the House of Representatives, there was nothing from the text of the statute that would have alerted Arizona to the fact that it was consenting, through the political process, to legislation that would be adverse to its significant state interests. Indeed, the Arizona Supreme Court's recent decision in *Flagstaff Vending,* 578 P.2d at 987, as well as Arizona's zoning ordinances discussing unincorporated territory "within the corporate limits," Ariz.Rev.Stat. § 9–461.11(A); *id.* § 9–462.07(A), likely rein-

forced Arizona's understanding that land like Parcel 2 would not be eligible to be taken into trust.

To further complicate Arizona's dilemma, when the Department of Interior was considering the Nation's land-into-trust application, Arizona did not participate in this ex parte filing and had no way to formally do so. There was no public notification, no docket, no pleading schedule, and no hearing for interested parties. Opponents of the application who happened to be aware of the proceedings were able to submit arguments against the application by letter only, but they were not alerted when the Secretary filed amendments to its application. Thus, the statutory interpretation tools and facts of this case indicate that the ambiguity at issue in the "within the corporate limits" phrase was of the type that prevented Arizona from adequately protecting its state interests through the political process.

Third and lastly, the Secretary's interpretation here concerns the scope of its own authority to take this land into trust. While the Gila Bend Act clearly provides authority for the Secretary to take land into trust to create Indian reservations in certain locations, this grant of authority is based on significant limitations, including that such reservations not be created "within the corporate limits" of a city. The majority concedes that the Gila Bend Act is "ambiguous" regarding whether the "within the corporate limits" language was meant to authorize the Secretary's action of taking Parcel 2 into trust. Maj. Op. at 1147. As in *Gregory, SWANCC*, and *Gonzales v. Oregon*, courts should not defer to an agency's interpretation of an ambiguous grant of authority when the interpretation buts up against the limit of the agency's own authority. This is especially true where such an interpretation may also press the outer limits of Congress's authority under the Indian Commerce Clause. *See United States v. Lara*, 541 U.S. 193, 205, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (indicating that Congress could run up against "constitutional limits" if its Indian legislation "interfere[d] with the power or authority of any State").

Therefore, even assuming the Gila Bend Act is ambiguous, ambiguity of this nature can only be interpreted in a State's favor. Though the majority is correct that this "case illustrates the nuances of our federalist system of government," Maj. Op. at 1142, the majority misunderstands that Arizona's sovereign interests must prevail in this case, and this court is precluded from applying *Chevron* deference to the Secretary's interpretation. The majority's decision to remand (and set the stage for unwarranted *Chevron* deference) eviscerates the very political protections on which the Supreme Court relied when it decided in *Garcia* that States can protect their sovereign interests through the political process.

III.

Because both the plain language of the Gila Bend Act and the canon of construction favoring a State's interests requiring an interpretation of "within the corporate limits" contrary to that of the Secretary, I must respectfully dissent.

concerns. It noted that Hernandez Counsel had "taken extraordinary steps to neutralize the effect of the ethical violation, including associating new counsel, disclaiming any fees for the conflicted representation, and agreeing to accept the costs of re-notice." Lastly, White Counsel are correct that the district court concluded that White Counsel had placed an unreasonably high valuation on the case, and factored that concern into its decision not to appoint White Counsel as lead counsel. But this was not an abuse of discretion. District courts are properly given discretion to decide matters of class representation and class action administration both because they are responsible for protecting absent class members' due process interests, and because they are far more familiar with the case, the class, and the attorneys who may be vying for control of the litigation. Here, the district court properly held that Hernandez Counsel remained adequate and best able to represent the consumer class.

V.

We previously found that Hernandez Counsel created a significant conflict of interest between themselves, their clients, and the rest of the class, and nothing in the present order diminishes or qualifies that holding. We are not convinced, however, that the conflict we found requires automatic disqualification of class counsel. We believe that, given the unique ethical and due process concerns involved in class actions, district courts must have the discretion to address attorney representation and disqualification issues based on the details of each case, and we further believe the California Supreme Court would agree. Accordingly, we hold that the district court did not abuse its discretion in denying White Counsel's motion to disqualify Hernandez Counsel and to be appointed as class counsel, and granting Hernandez Counsel's cross-motion to be appointed as class counsel.

AFFIRMED.

State of ARIZONA; Salt River Pima–Maricopa Indian Community, Plaintiffs,

and

Gila River Indian Community, Plaintiff–Appellant,

v.

TOHONO O'ODHAM NATION, Defendant–Appellee.

State of Arizona, Plaintiff–Appellant,

and

Gila River Indian Community; Salt River Pima–Maricopa Indian Community, Plaintiffs,

v.

Tohono O'odham Nation, Defendant–Appellee.

State of Arizona; Gila River Indian Community, Plaintiffs,

and

Salt River Pima–Maricopa Indian Community, Plaintiff–Appellant,

v.

Tohono O'odham Nation, Defendant–Appellee.

Nos. 13–16517, 13–16519, 13–16520.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 7, 2015.

Filed March 29, 2016.

Background: State of Arizona and two Indian communities brought action, seek-

ing to enjoin Indian tribe from constructing and operating major casino on unincorporated land within outer boundaries of city on grounds that proposed casino violated Gaming Compact between state and tribe. Following dismissal of claims in part, 2011 WL 2357833, parties filed cross-motions for summary judgment. The United States District Court for the District of Arizona, David G. Campbell, J., 944 F.Supp.2d 748, granted tribe's motion. State appealed.

Holdings: The Court of Appeals, Bea, Circuit Judge, held that:

(1) Indian Gaming Regulatory Act (IGRA) did not bar tribe from gaming on parcel;

(2) it was within district court's discretion to determine that tribe was not judicially estopped from asserting that it had a right to conduct gaming on parcel under IGRA;

(3) tribe was authorized under Gaming Compact with State of Arizona to conduct gaming on parcel; and

(4) tribal sovereign immunity barred State of Arizona's claims against tribe for promissory estoppel, fraudulent inducement, and material misrepresentation.

Affirmed.

1. Federal Courts ⚿3604(4)

A district court's grant or denial of summary judgment is reviewed de novo.

2. Federal Civil Procedure ⚿2470, 2470.4

Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

3. Federal Courts ⚿3581(1)

The Court of Appeals reviews de novo a district court's dismissal for lack of subject matter jurisdiction.

4. Indians ⚿235, 252

Whether Congress has abrogated the sovereign immunity of Indian tribes by statute is a question of statutory interpretation and is reviewed de novo.

5. Indians ⚿342

A district court's construction or interpretation of Indian Gaming Regulatory Act (IGRA) is question of law, and is reviewed de novo on appeal. Indian Gaming Regulatory Act, §§ 2–22, 25 U.S.C.A. §§ 2701–2721.

6. Eminent Domain ⚿2.17(5)
Indians ⚿335

Land acquired and taken into trust pursuant to Gila Bend Indian Reservation Lands Replacement Act (LRA) was land taken into trust as part of a settlement of a land claim under Indian Gaming Regulatory Act (IGRA), and thus IGRA did not bar tribe from gaming on parcel; tribe had "land claims" for damage to its reservation lands, and flooding of reservation due to federal government's construction of dam gave rise to a trespass claim severe enough to constitute an unlawful taking without just compensation since continual flooding of its lands due to dam exceeded scope of government's flowage easement, which allowed government "occasionally" to "overflow, flood, and submerge" tribe's lands. Indian Gaming Regulatory Act, § 20(b)(1)(B)(i), 25 U.S.C.A. § 2719(b)(1)(B)(i).

7. Administrative Law and Procedure ⚿431

The Court of Appeals reviews an agency's interpretation of a statute it is charged with administering under the fa-

miliar two-step framework set forth in *Chevron*.

8. Administrative Law and Procedure ⚿432

When reviewing an agency's interpretation of a statute, the Court of Appeals must first determine whether Congress has directly spoken to the precise question at issue; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

9. Administrative Law and Procedure ⚿433

When reviewing an agency's interpretation of a statute, if the statute is silent or ambiguous with respect to the specific issue, however, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

10. Administrative Law and Procedure ⚿433

When reviewing an agency's interpretation of a statute, if a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

11. Statutes ⚿1102

A statute is "ambiguous" if it is susceptible to more than one reasonable interpretation.

See publication Words and Phrases for other judicial constructions and definitions.

12. Statutes ⚿1079

The starting point when interpreting a statute is the statutory text.

13. Statutes ⚿1091

When a statute does not define a term, the court generally interprets that term by employing the ordinary, contemporary, and common meaning of the words that Congress used.

14. Statutes ⚿1102

For statutory construction purposes, a word or phrase is not "ambiguous" just because it has a broad general meaning under the generalia verba sunt generaliter intelligenda canon of statutory construction.

15. Estoppel ⚿68(2)

It was within district court's discretion to determine that tribe was not judicially estopped from asserting that it had a right to conduct gaming on parcel under Indian Gaming Regulatory Act (IGRA); although state argued that tribe took position in supplemental brief submitted to arbitrator during unsuccessful arbitration proceeding relating to negotiations of Gaming Compact between tribe and State of Arizona, sentences in tribe's brief were not "clearly inconsistent" with tribe's argument that land it acquired in trust under Gila Bend Indian Reservation Lands Replacement Act (LRA) qualified as a "settlement of a land claim" pursuant to IGRA, arbitrator expressed no view on whether and how IGRA after-acquired land exceptions would apply, and since arbitration failed to produce a binding compact, Secretary of the Interior sent tribe and state back to negotiations, where state was free to pursue any compact terms it desired. Indian Gaming Regulatory Act, § 20(b)(1)(B)(i), 25 U.S.C.A. § 2719(b)(1)(B)(i).

16. Estoppel ⚿68(2)

Judicial estoppel is an equitable doctrine invoked by a court at its discretion to protect the integrity of the judicial process.

17. Federal Courts ⚿3589

The Court of Appeals reviews the district court's decision whether to invoke judicial estoppel for an abuse of discretion.

18. Indians ⚿335

Tribe did not waive its right to conduct gaming on parcel under Indian Gaming Regulatory Act (IGRA) by being present when a handout was distributed at meeting between Arizona legislative staff and representatives of various Arizona Indian tribes, which handout stated that "Another exception to the prohibition of gaming on after acquired lands is when the lands are taken into trust as part of a settlement of land claim. This will not effect [sic] Arizona because aboriginal land claims in Arizona have already been settled pursuant to the Indian Claims Commission Act of 1946," since there was no evidence that representatives of tribe either drafted or distributed handout or were primary speakers at meeting. Indian Gaming Regulatory Act, § 20(b)(1)(B)(i), 25 U.S.C.A. § 2719(b)(1)(B)(i).

19. Estoppel ⚿52.10(2)

A "waiver" is an intentional relinquishment or abandonment of a known right or privilege; it can preclude the assertion of legal rights.

See publication Words and Phrases for other judicial constructions and definitions.

20. Estoppel ⚿52.10(3)

An implied waiver of rights will be found where there is clear, decisive, and unequivocal conduct which indicates a purpose to waive the legal rights involved.

21. Indians ⚿337(3)

Tribe was authorized under Gaming Compact with State of Arizona to conduct gaming on parcel; although state argued that parties understood that Compact would bar tribe from opening a casino in metropolitan area, Compact contained no such limitation, Indian Gaming Regulatory Act (IGRA) authorized gaming on settlement property, and Compact's plain terms authorized tribe to game where IGRA permitted. Indian Gaming Regulatory Act, § 20(b)(1)(B)(i), 25 U.S.C.A. § 2719(b)(1)(B)(i).

22. Evidence ⚿448

Federal common law follows the traditional approach for the parol evidence rule: a contract must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the contract.

23. Evidence ⚿448

Under Arizona's parol evidence rule, the judge first considers the offered evidence, and if he or she finds that the contract language is reasonably susceptible to the interpretation asserted by the proponent, the evidence is admissible to determine the meaning intended by the parties.

24. Indians ⚿337(3)

Tribe's choice to conduct gaming on parcel in accordance with the express terms of Gaming Compact with State of Arizona did not deviate from the agreed common purpose of Compact, and therefore did not breach the implied covenant of good faith and fair dealing under Arizona law.

25. Contracts ⚿168

There is an implied covenant in every contract that each party will do nothing to deprive the other of the benefits arising from the contract.

26. Contracts ⚿168

The covenant of fair dealing imposes the duty on each party to do everything that the contract presupposes will be done in order to accomplish the purpose of the

contract; however, this implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties.

27. Indians ⚿337(3), 342

Tribal sovereign immunity barred State of Arizona's claims against tribe for promissory estoppel, fraudulent inducement, and material misrepresentation, where Gaming Compact between state and tribe expressly stated that it did not waive tribal sovereign immunity, under Indian Gaming Regulatory Act (IGRA) Congress abrogated tribal sovereign immunity for claims alleging only violations of the Compact, and claims for fraud in the inducement, material misrepresentation, and promissory estoppel did not constitute claims for a violation of Compact. Indian Gaming Regulatory Act, § 11(d)(7)(A)(ii), 25 U.S.C.A. § 2710(d)(7)(A)(ii).

28. Indians ⚿235

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.

29. Estoppel ⚿85

A promissory estoppel claim is not the same as a contract claim under Arizona law; promissory estoppel is not a theory of contract liability.

30. Fraud ⚿31

Fraudulent inducement and material misrepresentation are tort claims under Arizona law, not breach of contract claims.

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Appeal from the United States District Court for the District of Arizona, David G. Campbell, District Judge, Presiding. D.C. No. 2:11–cv–00296–DGC.

Before: DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, and CARLOS T. BEA, Circuit Judges.

OPINION

BEA, Circuit Judge:

This appeal requires us to consider whether sophisticated, represented parties really meant what they wrote in a gaming compact that was duly executed after years of tedious negotiations. Like the district court, we hold the parties to their words, and affirm the district court's orders in favor of the Tohono O'odham Nation.

I.

In 2002, the Tohono O'odham Nation ("the Nation") and the State of Arizona

executed a gaming compact ("the Compact") pursuant to the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. The Compact expressly authorizes Class III gaming [1] on the "Indian Lands" of the Nation. The Compact defines "Indian Lands" as "lands defined in 25 U.S.C. § 2703(4)(A) and (B),[2] subject to the provisions of 25 U.S.C. § 2719." In turn, § 2719 of IGRA provides that although Class III gaming is generally barred on land taken into trust after IGRA's effective date (October 17, 1988), that bar does not apply to land "taken into trust as part of . . . a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B). Additionally, the Compact contains an integration clause, which provides that the Compact "contains the entire agreement of the parties with respect to matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding."

After the Compact was approved by the Secretary of the Interior and became effective in 2003, the Nation purchased an unincorporated parcel of land within the outer boundaries of Glendale, Arizona, pursuant to federal Gila Bend Indian Reservation Lands Replacement Act ("LRA"). Congress enacted the LRA in 1986 after continuous heavy flooding caused by a federally-constructed dam rendered over 9,000 acres of the Nation's reservation lands, which it had used principally for agriculture, economically useless. The LRA gave the Nation $30 million in "settlement funds" to purchase replacement reservation lands, provided the Nation "assign[ed] to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of land within the Gila Bend Indian Reservation" and "execute[d] a waiver and release" "of any and all claims of water rights or injuries to land or water rights . . . with respect to the lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Tribe of such a waiver." In 1987, the Nation entered into a written agreement with the United States pursuant to the LRA in which the Nation waived and released its claims against the United States and assigned the United States "all right, title and interest" in 9,880 acres of its destroyed reservation lands in exchange for $30 million.

On July 7, 2014, the United States took a portion of the Glendale-area land, known as "Parcel 2," into trust for the Nation pursuant to the LRA. We recently affirmed the legality of the Secretary's taking of Parcel 2 into trust for the benefit of the Nation under the LRA. *See Nation v. City of Glendale,* 804 F.3d 1292, 1301 (9th Cir.2015). The Nation desires to build a casino and conduct Class III gaming on Parcel 2.

The State of Arizona, the Gila River Indian Community, and the Salt River Pima–Maricopa Indian community (the "Plaintiffs") brought an action in federal district court in Arizona against the Nation, seeking to enjoin the Nation's plan to conduct Class III gaming on Parcel 2. To bring their action, the Plaintiffs invoked § 2710(d)(7)(A)(ii) of IGRA, which grants the United States district courts jurisdiction over "any cause of action initiated by

1. Class III gaming includes table card games, such as blackjack, and slot machines. *See* 25 U.S.C. § 2703(7)-(8).

2. Section 2703(4) defines "Indian lands" as "all lands within the limits of any Indian reservation; and any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4).

a State or Indian tribe to enjoin a [C]lass III gaming activity located on Indian lands and conducted in violation of any Tribal–State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). Plaintiffs alleged that Class III gaming on Parcel 2, since it was acquired after IGRA's effective date (October 17, 1988), would violate the Compact because the LRA was not a "settlement of a land claim" under IGRA § 2719, and because the Compact *implicitly* bars the Nation from gaming in the Phoenix area. Plaintiffs also alleged other non-Compact-based claims, including promissory estoppel, fraud in the inducement, and material misrepresentation.

After a year of discovery, the parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the Nation because it concluded that land acquired and taken into trust pursuant to the LRA was land "taken into trust as part of ... a settlement of a land claim" under IGRA § 2719(b)(1)(B)(1), and thus IGRA did not bar the Nation from gaming on Parcel 2. The court also granted summary judgment in favor of the Nation on Plaintiffs' breach of Compact claims, because the Compact specifically authorizes Class III gaming on Indian lands that qualify for gaming under IGRA § 2719. The court also ruled that the doctrine of tribal sovereign immunity barred the Plaintiffs' non-Compact-based claims for promissory estoppel, fraud in the inducement, and material misrepresentation, and thus dismissed these claims for lack of subject matter jurisdiction. Plaintiffs appeal the district court's rulings in favor of the Nation.

II

[1, 2] A district court's grant or denial of summary judgment is reviewed *de novo*. *Arce v. Douglas*, 793 F.3d 968, 975–76 (9th Cir.2015). "The district court may grant summary judgment on 'each claim or defense—or the part of each claim or defense—on which summary judgment is sought.' Fed.R.Civ.P. 56(a). Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' *Id.; see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)." *Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir.2015).

[3, 4] This court reviews "de novo a district court's dismissal for lack of subject matter jurisdiction." *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir.2013). "Whether Congress has abrogated the sovereign immunity of Indian tribes by statute is a question of statutory interpretation and is reviewed *de novo*." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir.2004), *as amended on denial of reh'g en banc* (Apr. 6, 2004).

[5] A district court's construction or interpretation of IGRA is question of law, and is reviewed *de novo* on appeal. *See United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1095 (9th Cir.2000).

III

A. *Interpretation of IGRA § 2719*

[6] Plaintiffs argue that the district court erroneously concluded that land acquired and taken into trust pursuant to the LRA qualifies as land "taken into trust as part of ... a settlement of a land claim" under § 2719(b)(1)(B)(i) of IGRA. If land acquired and taken into trust pursuant to the LRA qualifies as land "taken into trust as part of ... a settlement of a land claim," then it is exempt from IGRA's prohibition of Class III gaming on Indian lands acquired and taken into trust after

October 17, 1988. 25 U.S.C. § 2719(b)(1)(B)(i).

To determine if land taken into trust pursuant to the LRA qualifies as land "taken into trust as part of . . . a settlement of a land claim" under § 2719(b)(1)(B)(i) of IGRA, we must first discern the meaning of the term "land claim." Plaintiffs argue that a "land claim" "applies to claims to title or possession of land, not to injuries to land," and base their argument on a Department of the Interior ("DOI") regulation that defines a "land claim" as follows:

> Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:
>
> (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
>
> (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
>
> (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

25 C.F.R. § 292.2.

[7–10] "We review an agency's interpretation of a statute it is charged with administering under the familiar two-step framework set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)." *Ctr. for Biological Diversity v. Salazar,* 695 F.3d 893, 902 (9th Cir.2012). We must first determine whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778. "[I]f the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Salazar,* 695 F.3d at 902 (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)).

[11–14] Thus, we must first determine whether "land claim," as it is used in § 2719(b)(1)(B)(i), is ambiguous. "A statute is ambiguous if it is susceptible to more than one reasonable interpretation." *Alaska Wilderness League v. EPA,* 727 F.3d 934, 938 (9th Cir.2013). The starting point is the statutory text. *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778. "Land claim" is not defined in IGRA, and is not used elsewhere in the statute. *See* 25 U.S.C. § 2703 (definitions section). The statutory context and surrounding language do not produce much clarity either.[3] "When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used." *United States v. Gallegos,* 613 F.3d 1211, 1214 (9th Cir.2010) (quoting

3. The language of the full exception reads: "Subsection (a) of this section will not apply when lands are taken into trust as part of: (i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B).

United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir.1998)). Here, the language used has a broad, general meaning. *See Black's Law Dictionary* (10th ed. 2014) (defining "claim" as "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional ... [a] demand for money, property, or a legal remedy to which one asserts a right"). Thus, a "land claim" can be a claim for impairment to title of land, or as a claim for damage to land. But a word or phrase is not ambiguous just because it has a broad general meaning under the *generalia verba sunt generaliter intelligenda* [4] canon of statutory construction. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) ("As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). We do not find "land claim" to be ambiguous as used in § 2719(b)(1)(B)(i). As noted above, "claim" is a broad and general word, and therefore a claim for impairment to title of land, a claim for dispossession of land, and a claim for damage to land would all be encompassed by it. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) ("Without some indication to the contrary, general words ... are to be accorded their full and fair scope."). Here, under the ordinary meaning of the words used in the statutory text, the Nation plainly had "land claims" for damage to its reservation lands.

In any case, were we to find the term "land claim" to be ambiguous, and proceed under *Chevron* to apply the DOI's definition of the term, then we would find that the Nation also had a claim concerning the *impairment of title or other real property interest* or *loss of possession of its reservation land.*[5] The flooding of the Nation's reservation due to the federal government's construction of the Painted Rock dam gave rise for a trespass claim severe enough to constitute an unlawful taking without just compensation. *Arkansas Game & Fish Comm'n v. United States*, —— U.S. ——, 133 S.Ct. 511, 519, 184 L.Ed.2d 417 (2012) ("[G]overnment-induced flooding can constitute a taking of property."). The Nation had a claim that the continual flooding of its lands due to the Painted Rock Dam exceeded the scope of the government's flowage easement, which allowed the government "occasionally" to "overflow, flood, and submerge" the Nation's lands, because the flooding rendered "all of the arable land of the reservation—5,962 acres—to be unsuitable for agriculture." The remaining 4,000 acres of the Nation's reservation were of "little or no economic value" due to "repeated flooding, silt deposition and salt cedar infestation." This taking by definition constituted a claim for the interference to the Nation's title to and possession of its land, and the flooding interfered with "other real property interest[s]," such as the Nation's use of the land.

Furthermore, the district court did not err in determining that the LRA was a "settlement" of the Nation's land claims. Congress enacted the LRA to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming...." The LRA required the Nation to assign to the federal government "all right, title and interest of the Tribe" in 9,880 acres of land the government flooded in the Gila Bend Indian Reservation, and to execute a

4. "General words are to be understood in a general sense."

5. *See* 25 C.F.R. § 292.2.

"waiver and release" of "any and all claims of water rights or injuries to land or water rights ... with respect to the lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Tribe of such a waiver" in exchange for $30 million in "settlement funds" that the Nation could use to purchase new tribal lands.

Additionally, the LRA expressly provides that "[a]ny land which the Secretary holds in trust [under the Act] shall be deemed to be a Federal Indian Reservation for *all* purposes." In sum, we hold that Parcel 2, which the United States is now holding in trust for the benefit of the Nation, meets the requirements of § 2719(b)(1)(B)(i) of IGRA.

B. *Judicial Estoppel and Waiver*

[15] Plaintiffs argue that the Nation is judicially estopped from asserting that it has a right to conduct Class III gaming on Parcel 2 under IGRA because of a position the Nation took in a supplemental brief submitted to an arbitrator during an unsuccessful arbitration proceeding relating to negotiations of a 1993 Gaming Compact between the Nation and Arizona. Plaintiffs also claim that the Nation waived its right to conduct Class III gaming on Parcel 2 under IGRA because the Nation was present when a "handout" was distributed at a 1993 meeting between Arizona legislative staff and tribal representatives; the handout stated the "settlement of a land claim" exception to IGRA's prohibition of gaming on tribal lands taken into trust after October 17, 1988 would not affect Arizona. We address each argument below, and conclude that the district court correctly rejected both of these arguments.

[16, 17] "[J]udicial estoppel 'is an equitable doctrine invoked by a court at its discretion' " "to protect the integrity of the judicial process." *New Hampshire v. Maine,* 532 U.S. 742, 749–50, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (internal quotation marks omitted). Thus, we review the district court's decision whether to invoke judicial estoppel for an abuse of discretion. See *Hendricks & Lewis PLLC v. Clinton,* 766 F.3d 991, 995 (9th Cir.2014). We conclude that the district court did not abuse its discretion in holding that the doctrine of judicial estoppel does not bar the Nation from asserting that it has a right to conduct Class III gaming on Parcel 2. Here's why.

Federal courts consider the following factors described by the Supreme Court in *New Hampshire* when deciding whether to invoke the doctrine of judicial estoppel:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose unfair detriment on the opposing party if not estopped.

Id. at 1001 (quoting *New Hampshire,* 532 U.S. at 750–51, 121 S.Ct. 1808).

Prior to executing the 1993 Gaming Compact, the Nation and Arizona were parties to a nonbinding arbitration proceeding under IGRA, where the Nation and Arizona each submitted a "last best offer" compact to an arbitrator, who was to choose one of the two proposals without amendment. In response to a provision in Arizona's proposed compact which would have barred Class III gaming on lands

acquired in trust after IGRA's effective date, the Nation submitted a supplemental brief which explained that Arizona's provision:

> would result in the Nation forfeiting the rights provided to tribes in IGRA to request that in certain circumstances after-acquired trust land be available for class III gaming activities. The existing federal law requires the Governor's concurrence. This is adequate protection to the State and local interests. The State simply seeks an ancillary benefit in this provision.

Here, the district court correctly recognized and applied the three *New Hampshire* factors, and thus did not abuse its discretion in deciding not to apply the doctrine of judicial estoppel. In regard to the first *New Hampshire* factor, these sentences in the Nation's 1992 brief are not "clearly inconsistent" with Nation's argument in this case that land it acquired in trust under the LRA qualifies as a "settlement of a land claim" pursuant to § 2719(b)(1)(B)(i) of IGRA. The passage quoted above simply does not state that the Nation would not ever pursue gaming under § 2719(b)(1)(B)(i) of IGRA in the future. The passage states that acceptance of Arizona's provision would result in "after-acquired trust land" not being available for Class III gaming in undefined "certain circumstances." Thus, purchase of land after 1988 would be one "certain circumstance." But acquisition of land as "part of . . . a settlement of a land claim" was not mentioned as forfeited from use for Class III gaming. The second *New Hampshire* factor, whether the Nation succeeded in persuading the arbitrator to accept its argument, also weighs in favor of the Nation. Although the arbitrator ultimately selected the Nation's compact, the arbitrator expressed no view on whether and how the § 2719 IGRA after-acquired land exceptions would apply. In any case, Arizona refused to consent to the arbitrator's selection, and the arbitration concluded without the Nation obtaining any relief, as the parties then returned to negotiations. The third *New Hampshire* factor, whether the Nation's statements in the arbitration created an "unfair advantage or impose[d] an unfair detriment on [the Plaintiffs]," favors the Nation as well. Since the arbitration failed to produce a binding compact, the Secretary of the Interior sent the Nation and Arizona back to negotiations, where Arizona was free to pursue any compact terms it desired.

[18] Additionally, the Nation did not waive its right to conduct Class III gaming on its Glendale-area property under IGRA simply because the Nation was present when a handout was distributed at a 1993 meeting between Arizona legislative staff and representatives of various Arizona Indian tribes.

[19, 20] "A waiver is an intentional relinquishment or abandonment of a known right or privilege. It can preclude the assertion of legal rights. An implied waiver of rights will be found where there is 'clear, decisive and unequivocal' conduct which indicates a purpose to waive the legal rights involved." *United States v. Amwest Sur. Ins. Co.,* 54 F.3d 601, 602–03 (9th Cir.1995) (internal citations and quotation marks omitted).

Here, during negotiations for the 1993 Compact, tribal representatives of various Arizona Indian tribes, including the Nation, met with Arizona legislative staffers. At the meeting, a handout was distributed which read:

> Another exception to the prohibition of gaming on after acquired lands is when the lands are taken into trust as part of a settlement of land claim. This will not effect [sic] Arizona because aboriginal land claims in Arizona have already been

settled pursuant to the Indian Claims Commission Act of 1946.

There is nothing in the record that shows that representatives of the Nation either drafted or distributed the handout or were primary speakers at this meeting. Plaintiffs instead support their waiver claim by arguing that the Nation was present at the meeting and did not voice disagreement with the handout. Because mere silence is not "clear, decisive and unequivocal conduct," *Amwest Sur. Ins. Co.*, 54 F.3d at 603 (quoting *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir.1970)), we agree with the district court that we "cannot conclude that the Nation's silence during the 1993 meeting constituted a knowing waiver, in perpetuity, of its right to claim the exception in § 2719(b)(1)(B)(i)."

But even were we to assume there was a duty to object to the legislative staffers' view that no Arizona land could be affected by the "settlement of a land claim" exception, and that view was voiced during the negotiations for the 1993 compact, that view did not make it into the Compact as written and executed. Hence, it is without contractual force because of the integration clause of the Compact, which provides that the Compact "contains the entire agreement of the parties with respect to matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding."

IV

[21] The Plaintiffs argue that the language of the Compact implicitly prohibits Class III gaming on the Glendale-area property purchased by the Nation and held in trust by the government, and Plaintiffs seek to introduce extrinsic evidence to prove this claim. The Nation responds that the district court correctly granted it summary judgment on this issue, because "IGRA authorizes gaming on the Settlement Property, and the Compact's plain terms authorize the Nation to game where IGRA permits."

The Compact contains a choice-of-law clause, but it does not clearly identify what law applies to interpret the terms of the Compact. The clause provides: "This Compact shall be governed by and construed in accordance with the applicable laws of the United States, and the Nation and the State." To decide whether Plaintiffs' proffered extrinsic evidence was admissible, the district court first engaged in a choice-of-law analysis, pursuant to the Restatement (Second) of Conflicts of Law, to determine what body of law governed the interpretation of the Compact: federal common law or Arizona state law.[6] As discussed below, although the district court erred in concluding that Arizona state law governs the interpretation of the Compact, this error is harmless because the same outcome results under both federal common law and Arizona contract law. This is because the Plaintiffs rely on extrinsic evidence to vary or contradict the written terms of the Compact, which is not permissible under either federal common law or Arizona contract law.

[22] We recently reaffirmed that "[g]eneral principles of federal contract law govern ... Compacts[ ] which were entered pursuant to IGRA." *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1163 (9th Cir.2015) (quoting *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066 (9th Cir.2010)). Federal common law follows the traditional approach for the parol evidence rule: "[A]

6. The district court noted that "[a]lthough the governing law provision of the Compact also mentions the Nation's law, the Nation has no developed law on the parol evidence rule."

contract[ ] must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the [contract]." *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir.2005).

[23] Arizona's parol evidence rule is more liberal: "[T]he judge first considers the offered evidence, and if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by the proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134, 1140 (1993). In applying Arizona's parol evidence rule, however, the Ninth Circuit has noted that "the *Taylor* court specifically limited its liberal use of parol evidence to contract interpretation and *rejected its use to vary or contradict a final agreement.*" *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1317–18 (9th Cir.1997) (emphasis added) (citing *Taylor*, 854 P.2d at 1139–40).

Here, to begin, the Compact that the parties executed contains an integration clause which provides that the "Compact contains the entire agreement of the parties with respect to the matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding." While not dispositive, this broad integration clause that was agreed to by sophisticated, represented parties after years of tedious negotiations strongly counsels in favor of rejecting Plaintiffs' proffered extrinsic evidence to interpret the terms of the duly-executed written agreement. Section 3(a) of the Compact, entitled "Authorized Class III Gaming Activities," explicitly authorizes the Nation to conduct Class III gaming, subject to the terms and conditions of the Compact. Plaintiffs seek to introduce extrinsic evidence to prove that during negotiations of the Compact, the parties understood that the Compact would bar the Nation from opening a casino in the Phoenix metropolitan area. But § 3(j) of the Compact, entitled "Location of Gaming Facility," contains no such limitation, and provides that "[a]ll Gaming Facilities shall be located on the Indian Lands of the Tribe," and "Gaming Activity on lands acquired after the enactment of the [IGRA] on October 17, 1988 *shall be authorized* only in accordance with 25 U.S.C. § 2719." The only other language in the Compact which could be read to limit the location of the Nation's gaming facilities is § 3(c)(3), which provides:

> If the Tribe is the Tohono O'odham Nation, and if the Tribe operates four (4) Gaming Facilities, then at least one of the four (4) Gaming Facilities shall: a) be at least 50 miles from the existing Gaming Facilities of the Tribe in the Tucson metropolitan area as of the Effective Date.

This language clearly does not prohibit the Nation from gaming in the Phoenix metropolitan area on its Indian Lands.[7]

In short, the duly-executed Compact negotiated at length by sophisticated parties expressly authorizes the Nation to conduct gaming on its "Indian Lands," subject to the requirements of IGRA § 2719. This language is unambiguous and not reasonably susceptible to Plaintiffs' interpretation that the Compact implicitly bars the Nation from gaming in the Phoenix metropolitan area. The Plaintiffs' extrinsic evidence to the contrary attempts to vary or contradict the terms of a final agreement,

7. Application of the interpretive tool *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of the other") also supports this reading of the Compact. The language described above is the only express limitation in the executed Compact on the geographic location of the Nation's gaming facilities.

and therefore must be rejected. Since we hold that Parcel 2 complies with the requirements of IGRA § 2719, and the Compact expressly allows the Nation to conduct Class III gaming there, the district court correctly entered summary judgment in favor of the Nation on Plaintiffs' breach of Compact claim.

V

[24] Relatedly, Plaintiffs also argue that the Nation's plan to conduct Class III gaming on Parcel 2 violates the implied covenant of good faith and fair dealing in the Compact.

[25, 26] "It is true that there is an implied covenant in every contract that each party will do nothing to deprive the other of the benefits arising from the contract." *Sessions, Inc. v. Morton*, 491 F.2d 854, 857 (9th Cir.1974). "This 'covenant of fair dealing' imposes the duty on each party to do everything that the contract presupposes will be done in order to accomplish the purpose of the contract. However, this implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties." *Id.* (internal quotation marks omitted).

Here, the terms of the Compact do not prohibit the Nation from building a Class III casino in the Phoenix area; to the contrary, the Compact expressly authorizes Class III gaming on "Indian lands," subject to the requirements of 25 U.S.C. § 2719(b)(1)(B)(i). Thus, since Parcel 2 in Glendale is now held in trust as part of the Nation's "Indian Lands," see *Nation*, 804 F.3d at 1301, and Parcel 2 meets the requirements of IGRA, the Compact authorizes the Nation to conduct gaming there. Based on the terms of the Compact, it is not reasonable for Plaintiffs to expect that the Compact prohibits the Nation from the conduct of gaming on Parcel 2. The Nation's choice to conduct Class III gaming in accordance with the express terms of the Compact does not deviate from the agreed common purpose of the Compact, and therefore does not breach the implied covenant of good faith and fair dealing.

VI

[27] Plaintiffs' last argument is that the district court erred in ruling that tribal sovereign immunity bars Plaintiffs' claims against the Nation for promissory estoppel, fraudulent inducement, and material misrepresentation. This argument is without merit.

[28] "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Here, the Compact expressly states that it does not waive the Nation's tribal sovereign immunity. Plaintiffs claim instead that § 2710(d)(7)(A)(ii) of IGRA abrogates the Nation's tribal sovereign immunity for their non-Compact claims. Not so. That section provides that "[t]he United States district courts shall have jurisdiction over ... any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal–State compact*...." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Congress thus abrogated the Nation's tribal sovereign immunity for claims alleging only violations of the Compact. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028 n. 9 (9th Cir.2010) (recognizing "the canon of construction obligating [the court] to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests").

[29, 30] The district court correctly found that Plaintiffs' claims for fraud in the inducement, material misrepresenta-

tion, and promissory estoppel do not constitute claims for a violation of the Compact. "A promissory estoppel claim is not the same as a contract claim. Promissory estoppel ... is not a theory of contract liability." *Double AA Builders v. Grand State Constr.*, 210 Ariz. 503, 114 P.3d 835, 843 (Ct.App.2005). And fraudulent inducement and material misrepresentation are tort claims, not breach of contract claims. *See Morris v. Achen Constr. Co.*, 155 Ariz. 512, 747 P.2d 1211, 1213 (1987) ("The duty not to commit fraud is obviously not created by a contractual relationship and exists ... even when there is no contractual relationship between the parties at all."). As such, these claims do not fall within IGRA's limited abrogation of tribal sovereign immunity.[8] 25 U.S.C. § 2710(d)(7)(A)(ii). Therefore, the district court correctly concluded that it lacked subject matter jurisdiction over Plaintiffs' non-Compact claims.

CONCLUSION

For the foregoing reasons, the orders of the district court in favor of the Nation are **AFFIRMED.**

8. Plaintiffs cite a footnote in the U.S. Supreme Court's recent *Bay Mills* decision for the proposition that the doctrine of tribal sovereign immunity should not bar tort claims against an Indian Tribe at all. But in the cited footnote, the Court was discussing the principle of *stare decisis*, and expressly reserved decision on whether a case involving an unwitting "tort victim" "would present a 'special justification' for abandoning precedent," because that case was "not before [the Court]." *Michigan v. Bay Mills Indian Cmty.*, —— U.S. ——, 134 S.Ct. 2024, 2036 n. 8, 188 L.Ed.2d 1071 (2014) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)). We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law. *See Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir.2008) (affirming dismissal of plaintiff's negligence claims against the Fort Mojave Indian Tribe under doctrine of tribal sovereign immunity, where the plaintiff was seriously injured by an intoxicated driver who had been drinking at a casino operated by the Tribe).

Furthermore, as the Supreme Court also noted in *Bay Mills*, "it is fundamentally Congress's job, not [the federal courts], to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills Indian Cmty.*, 134 S.Ct. at 2037.

UNITED STATES of America, Plaintiff–Appellant/Cross–Appellee,

v.

George BADGER; Lajuana Badger; SB Trust; David Badger, as Trustee for the SB Trust; Ardco Leasing & Investment, LLC; American Resources and Development Company, Inc.; Springfield Finance and Mortgage Company, LLC, Defendants–Appellees/Cross–Appellants.

Nos. 14–4110, 14–4119.

United States Court of Appeals, Tenth Circuit.

March 25, 2016.

Background: Government brought action against judgment debtor, corporation, limited liability companies (LLC), and trust, seeking declaration that the entities were debtor's alter egos so that their assets could be pursued to satisfy consent judgment, under which debtor agreed to disgorgement of $5.8 million of profits from his securities fraud scheme. The United States District Court for the District of

III. It is Not as Easy As it Looks.

A. The Indian Gaming Regulatory Act ("IGRA") provides the requirements for gaming in 25 U.S.C. § 2710(d), which includes:

i. On Indian lands received before 1988;

ii. Authorized by a Tribal ordinance approved by the National Indian Gaming Commission ("NIGC");

iii. Located in a State that permits such gaming; and

iv. Conducted in conformance with a Tribal-State Compact which is in effect.

B. On Indian Land.

i. What is Indian Land?

- Trust land
- Restricted land
- Pueblos
- Allotted land
- Fee land
- Reservations-on and off

ii. The Indian Reorganization Act of 1934, 25 U.S.C. § 465, is the primary authorization for the Secretary to acquire trust land. There are also other Tribal specific acts, i.e., Gila Bend Indian Reservation Lands Replacement Act, Pub. No. 99-503, 100 Stat. 1798 (1986).

iii. IGRA defines Indian land but does not authorize the Secretary to acquire land in trust.

iv. Indian land is defined in 25 U.S.C. § 2703(4).

a. Within a reservation;

b. Trust or restricted fee land; and

c. Over which the tribe exercises governmental power.

v. The procedures for acquiring land in trust are found in 25 C.F.R. Part 151. Secretary Zinke has announced consultation to revise regulation.

C. The Carcieri Problem. *Carcieri v. Salazar*, 555 U.S. 379, (Feb. 24, 2009) held the Secretary could only acquire land in trust for Indians who were "under federal jurisdiction" in 1934. Markham C. Erickson, *Carcieri v. Salazar*: The Supreme Court's Definition of "Now" Creates Uncertainty for Indian Tribes, *The Federal Lawyer* (July 2009).

The Supreme Court held that the Quiet Title Act does not bar challenges to trust land decisions by the BIA under the Administrative Procedures Act. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

The Ninth Circuit decided in 2014 that the BIA lacked authority to take land in trust for the Big Lagoon Rancheria in 1994 because the Big Lagoon did not pass the *Carcieri* test and then withdrew that part of its decision after receiving a storm of criticism, including from the U.S. D.O.J. *Big Lagoon Rancheria v. California*, 741 F.3d, 1032 (9th Cir. 2014), *amended en banc*, 789 F.3d 947 (9th Cir. 2015).

A *Carcieri* challenge is often brought in a challenge to new casino proposals. *Confederated Tribes of Grande Ronde v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014), *appeal docketed*, No. 14-5326 (D.C. Cir. 2014).

D. After-Acquired Land (After October 17, 1988).

i. IGRA, 25 U.S.C. § 2719, prohibits gaming on lands acquired in trust after October 17, 1988 unless a listed exception is satisfied:

   a. Within or contiguous to a reservation as it existed in 1988;

   b. Special rules for land in Oklahoma;

   c. Two-part finding by the Secretary. The Secretary determines that gaming on after-acquired land would be in the best interest of the tribe and not detrimental to the surrounding community and the Governor of the State concurs;

   d. Part of the settlement of a land claim;

   e. Part of an initial reservation for a tribe recognized under the federal acknowledgment process; and

   f. The restored lands of a restored tribe.

ii. The Secretary has adopted a rule to implement the exceptions applicable to land acquired after October 17, 1988. 25 C.F.R. Part 292.

iii. The Assistant Secretary of Interior for Indian Affairs follows a Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and IGRA Section 20 Determinations (March 2005).

iv. The Assistant Secretary has approved several and denied other applications. Trump may approve some applications.

E. The National Environmental Policy Act ("NEPA") may require an Environmental Impact Statement if the application requires federal action.

IV. Do the Lawyers Always Win?

Michigan v. Bay Mills Indian Community, _____ U.S._____, 134 S. Ct. 2024 (2014).

Glendale Casino

Gila River Indian Community v. United States, 697 F. 3d 886 (9th Cir. 2012) (affirmed decision of Secretary of Interior to acquire land in trust on a county island in Glendale, AZ), *rev'd en banc,* 729 F.3d 1139 (2013) (remanded to Secretary of Interior under Gila Bend Indian Reservation Lands Replacement Act to decide "county island" issue).

Arizona v. Tohono O'odham Nation, No. 13-16517, 2016 WL 1211834 (9th Cir. March 29, 2016) (Compact does not bar gaming on land claim settlement lands).

Tohono O'odham Nation v. Ducey, No. 15-1135 (D. Az. July 18, 2017)
(Settlement of State counterclaim for declaration that Compact is void for misrepresentation).

North Fork Rancheria

Standup for California v. U.S. Dept. of Interior, 919 F. Supp.2d 51 (D.D.C. 2013) (challenge to Secretary of Interior acquiring off-reservation casino site).

Picayune Rancheria of Chukchansi Indians v. Brown, No. 34-2012-80001326 (Madera Co. Sup. Ct. judgment June 6, 2013) (appeal pending).

Stand Up for California v. California, No. 662850 (Madera Co. Sup. Ct. 2014).

Enterprise Rancheria

Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Jewel, No. 12-03021 (D.E.D. CA filed Dec. 14, 2012).

Other

Butte Cnty. v. Chaudhuri, No. 16-5240, ___ F.3d ____, 2018 WL 1769130 (D.C.Cir. April 13, 2018).

Secretary Zinke acquires land in Oklahoma for casino for Shawnee Tribe, 83 Fed. Reg. 3300-01 (March 28, 2018).

Forest County Potawatomi Community of Wisconsin v. Jewell, No. 15-00105 (D.D.C. filed Jan. 21, 2015) (challenge to Assistant Secretary disapproval of Compact because it is anticompetitive).

Nebraska ex rel. Bruning v. United States, 625 F.3d 501 (8th Cir. 2010) (APA appeal. Decision of NIGC regarding land purchased by tribe in 1999 remanded to NIGC for further proceedings to determine if land qualifies for gaming).

Iowa Tribe of Kansas and Nebraska v. Salazar, 607 F.3d 122 (10th Cir. 2010) (The Quiet Title Act bars an action to challenge the acquisition of land in trust by the Secretary).

25 U.S. Code § 5108 - Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

- **US Code**
- **Notes**

prev | next

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.)[1] 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.
(June 18, 1934, ch. 576, § 5, 48 Stat. 985; Pub. L. 100–581, title II, § 214, Nov. 1, 1988, 102 Stat. 2941.)

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[1] See References in Text note below.