No. 05-1160

In the Supreme Court of the United States

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah Municipal corporation, PETITIONERS

v.

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING; GAYLE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL A. McCALEB, in his capacity as Assistant Secretary of the Interior Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS

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

BRIEF FOR RESPONDENT SHIVWITS BAND OF PAIUTE INDIANS IN OPPOSITION

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Respondent, Shivwits Band of Paiute Indians ("the Tribe"), submits this Brief in Opposition to the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. The Tribe submits that the Court should deny the Petition because there is no compelling reason to review the lower court's ruling that Section 465 is constitutional.

STATEMENT

Petitioners ask the Court to review whether Section 465 is an unconstitutional delegation of Congress' authority to regulate commerce with Indian Tribes. Congress has historically given the Executive Branch broad authority over the management of Indian affairs. *E.g.*, 25 U.S.C. §§ 2, 9, 13. Section 465 is part of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461, *et seq.*, an Act which was designed to bring an end to an allotment policy that resulted in the loss of millions of acres of Indian land. Section 465 was designed to give the Secretary of the Interior the authority to restore to Indian ownership some of what was lost.

The court of appeals held that the Secretary of the Interior had the constitutional authority to acquire the parcels at issue in trust for the Tribe pursuant to Section 465. Appendix of Petition for Writ of Certiorari (hereinafter "Pet. App.") 9-14. After the property was taken in trust, the Tribe sought and obtained the Secretary's approval of the Tribe's lease to Kunz and

Co.[1] for the purpose of constructing billboards on the trust parcels pursuant to 25 U.S.C. § 415.[2] Pet. App. 48, 60. The court of appeals also held that Petitioners had no jurisdiction to regulate these federally sanctioned activities. Pet. App. 28-33. Petitioners do not seek review of the court of appeals' holding on this latter issue. Rather, Petitioners only seek review of the court's holding that Section 465 is constitutional.

In 1993, Kunz proposed that the Tribe purchase the parcels and offered to finance the purchase in return for a lease back to Kunz. Pet. App. 3, 95. The Tribe saw the proposal as an economic development opportunity, a way to "increase its meager revenue stream." Pet. App. 3. Thereafter, on July 7, 1994, an official of the Bureau of Indian Affairs (BIA) contacted the City Manager of the City of St. George and orally advised him that the Tribe intended to purchase two parcels of land and asked if the City "would provide a letter of support for this endeavor." Pet. App. 4; Appellants' App. at 128A, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274). The City declined to provide such a letter because the City "was

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[1] Plaintiff Kunz and Co., d/b/a Kunz Outdoor Advertising (Kunz), is a California corporation engaged in the business of leasing outdoor advertising space on billboards. It owns and/or leases ground space, erects and maintains billboards thereon, and leases space on the face of the billboards to businesses and entities engaging in outdoor advertising.

[2] The full text of 25 U.S.C. § 415 (1994) appears in the Appendix to this Response (hereinafter "Resp. App."), at Appendix A. The version of 25 U.S.C. § 415 that appears in Appendix A is that which was in effect at the time the parcels of land at issue here were taken into trust.

afraid the land would be used for the purpose of erecting outdoor advertising signs and the City was opposed to [such] signs." *Id.* On August 1, 1994, the BIA sent a letter to the City again stating that the Tribe was "in the process of purchasing two small parcels of land located in an undeveloped area of" the City. *Id.*; Fed. Aplee. Supp. App. at 1, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274).[3] The letter identified the two parcels in detail by location and tax identification numbers. Pet. App. 4. The letter again sought City support of the Tribe's endeavor. *Id.* The City did not respond to the BIA's letter. *Id.*; Appellants' App. at 131, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274).

On August 9, 1994, the Tribe purchased the parcels from the respective private owners. Pet. App. 5. The next day, on August 10, 1994, the Tribe tendered a special warranty deed to the BIA, along with an application and supporting documents to the BIA requesting that the off-reservation trust acquisition be formally approved by that agency. *Id.* Over one year later, on August 31, 1995, the BIA approved the Tribe's request for approval of the trust acquisition and formally accepted the properties into trust. *Id.*

[3] The two parcels in question are located approximately 19 miles from the Tribe's Reservation. *Shivwits Band Fee-to-Trust Land Transfer and Outdoor Advertising Leases Final Environmental Assessment* B-W PN 808, 1-3 (March 2003); Appellant's App. at 185, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274. The Reservation is located approximately 12 miles northwest of the City of St. George, Utah. *Id.*

The Tribe's lease of the two trust parcels to Kunz was approved by the Secretary on September 11, 1995. Pet. App. 97. By letter dated October 25, 1995, shortly after Kunz began construction of five advertising billboards on the Tribe's Trust property, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened Kunz with criminal prosecution if it did not cease construction of the signs immediately. Pet. App. 6. The Tribe and Kunz then sought and obtained a preliminary injunction in the district court. Pet. App. 7, n3.

In Petitioners' statement of the case, they assert that, "[t]he State of Utah and the City of St. George became aware of Kunz's plan [to lease the Tribe's trust properties for the purpose of outdoor advertising] once construction of the billboards began." Pet. 4. However, this directly contradicts the record. As shown above, the City was clearly on notice of the proposed trust acquisition and the contemplated use of the property over a year before the BIA actually accepted the deed and took the land in trust. Pet. App. 4, 96-97.[4] Moreover, the record reflects that the City of St. George at least suspected that billboards might be constructed on the land for over a year before actual construction began. Pet. App. 4. Yet, for reasons unknown, the City of St. George chose to wait until

[4] The regulations in effect at the time did not require the BIA to notify either the State or the City that the BIA intended to take land in trust. Pet. App. 19; 25 C.F.R. § 151.1-.14 (1994). Resp. App. E. The BIA nevertheless gave the City of St. George notice of the proposed transaction over one year before the land was actually taken in trust. The regulations now require that the State and local governments be notified of any proposed trust acquisition. 25 C.F.R. §§ 151.10-.11 (2006). Resp. App. B, C.

after the trust acquisition was complete, the leases were approved, and the signs were in construction before taking any action. The City of St. George neither objected to the process nor sought the State's assistance prior to the United States' formal acquisition in trust in August 1995.

SUMMARY OF THE ARGUMENT

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." This case does not present compelling reasons for review. Petitioner's resistance to the taking of land into trust is to be expected in light of the fact that state and local governments are largely preempted from exercising regulatory authority over federally authorized activities in "Indian Country." The resulting "intergovernmental frictions," Pet. 3, are a natural consequence of overlapping sovereignty. The mere fact that there may be a lot at stake for state and local governments because Congress has granted the Executive broad authority to take land into trust for Indians does not make Section 465 an *unconstitutional* delegation of power.

Petitioners contend that Congress has unconstitutionally delegated to the Executive branch "unrestricted power to take lands – any lands – into trust 'for Indians.'" Pet. 3. This alarmist reading of Section 465 has been rejected by all of the courts that have considered the issue. Moreover, even assuming *arguendo* that Section 465 were found to be unconstitutional, the Court is without the power to

afford meaningful relief to Petitioners in this case because the Indian Lands exception to the Quiet Title Act, 28 U.S.C. §2409(a) (QTA), bars Petitioners' claims because they seek to invalidate the United States' trust title to the lands at issue. Nor would review be meaningful in this case because the regulations in effect at the time the Tribe's land was taken in trust have since been superseded.[5] Finally, this case is simply not appropriate for Supreme Court review because the Tenth Circuit's holding is not inconsistent with any decision of this Court, nor does this case implicate compelling principles that would have a widespread and general impact on the public as a whole.

ARGUMENT

I. THIS CASE PRESENTS NO FUNDAMENTAL CONSTITUTIONAL OR STATUTORY QUESTION THE SETTLEMENT OF WHICH IS LIKELY TO HAVE WIDESPREAD AND GENERAL IMPACT

The Court has stated that:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of

[5] 60 Fed. Reg. 32879, 32875-32878 (June 23, 1995), *as corrected at* 60 Fed. Reg. 48894 (Sept. 21, 1995), *as corrected at* 62 Fed. Reg. 1057 (Jan. 8, 1997) (codified at 25 C.F.R. § 115.11 (2006)). Resp. App. C.

opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) (per Taft, C.J.). The present case does not pose such a question because every court to consider the issue has correctly found that Section 465 is constitutional, and is not a "standardless grant of complete discretion," as Petitioners claim. Pet. i. Moreover, the unique facts of this case make review inappropriate because in the time period since the particular properties in dispute were taken into trust for the Tribe, the Secretary of the Interior has issued new regulations affecting trust land acquisitions. The new regulations provide for judicial review of the Secretary's decision to acquire the land before it is actually taken in trust, thus removing any previous concern over the lack of judicial review of the manner in which the Executive Branch exercises its delegated authority.[6] Consequently, this is an isolated case in which the procedures for taking land into trust were governed by regulations that no longer apply. Finally, since title to the properties has already vested in the United States government, Petitioners no longer have the means to challenge the taking of land into trust. If the Supreme Court wishes to review a challenge to Section 465, it would be more appropriate to do so in a case that challenges the taking of land into trust *before*

[6] *See* 61 Fed. Reg. 18082 (April 24, 1996) (establishing a 30-day waiting period after final administrative decisions by the Secretary to acquire land into trust under the IRA and other federal statutes so that interested parties will have sufficient notice before land is actually transferred to seek judicial or other review under the Administrative Procedure Act and applicable regulations.) (codified, as amended, at 25 C.F.R. § 151.12 (2006)). Resp. App. D.

title has vested, and which follows the acquisition procedures identified under the current federal regulations, as codified at 25 C.F.R. § 151.11 (2006).[7]

A. There is no conflict of authority between the circuit courts of appeal on whether Section 465 is an unconstitutional delegation of power; all of the courts to consider the matter are in accord that § 465 is not an unconstitutional delegation.

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. *Whitman v. Am. Trucking Ass'ns Inc.*, 531 U.S. 457, 472 (2001). The Court has consistently held that when Congress confers decisionmaking authority on agencies *Congress* must "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform." *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (second emphasis added). The Tenth, Eighth, and First Circuits have all directly considered the issue of whether Section 465 is an unconstitutional delegation of power. All have found that it is not, and that the statute does in fact lay down an intelligible principle to guide the Secretary's discretion. Likewise, the Ninth Circuit has opined that Section 465 is a constitutional delegation. *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 698 (9th Cir. 1997), *cert. denied*, 522 U.S. 1027 (1997) (stating that "the general delegation of power to the Executive to take land into trust for the Indians is a valid delegation because

[7] The full text of 25 C.F.R. § 151.11 (2006) appears in Resp. App. C.

Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used").[8] In fact, there is no contrary authority in any of the circuit courts of appeals. Not only is there no conflict among the circuit courts of appeals, *no* court has found Section 465 to be unconstitutional since the Secretary of the Interior revised the regulations to provide for judicial review of final agency action in 1996.[9] Because all of the circuit courts are in accord, this case does not warrant consideration by this Court.

The Tenth Circuit has twice specifically held that Section 465 does not violate the non-delegation doctrine, both in the case below, *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), and in *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). In *Roberts*, the Tenth Circuit Court of Appeals agreed with the district court's finding that Section 465 is a proper delegation of authority. 185 F.3d at 1137. The court concluded that the statute

[8] In *Siletz*, the court was specifically considering the constitutionality of a provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, which required the state governor's concurrence before land could be taken into trust by the Secretary of the Interior on behalf of Indian tribes for gaming. In upholding the constitutionality of § 2719, the Ninth Circuit Court of Appeals discussed the broader power of the Secretary of the Interior to take land into trust for Indians under 25 U.S.C. § 465 and found that the general delegation of power to the Executive to take land into trust for Indians is a valid delegation because Congress has given specific guidelines to limit Executive discretion.

[9] *See* Resp. App. D for the current regulations, 25 C.F.R. § 151.12 (2006).

itself provides standards for the Secretary's exercise of discretion. *Id.* Specifically, the statute provides that any land must be acquired for Indians, and funds appropriated for the acquisitions may not be used to provide land for Navajos outside their reservation boundaries. *Id.* (citations omitted). In addition, the court noted that the legislative history identifies goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by .... oppression and paternalism" of the prior allotment policy. *Id.* (citations omitted).[10]

The Tenth Circuit also held that Section 465 is constitutional in the case below. Pet. App. 10-13. The Tenth Circuit reaffirmed its previous holding from *Roberts*, 185 F.3d at 1137, finding that "the statute itself provides standards" for the Secretary's exercise of discretion and that the statute is therefore not an unconstitutional delegation. Pet. App. 11-12. The court

[10] Prior to 1887, title to most Indian land was held by the tribe and not its citizens. The General Allotment Act (GAA) of 1887 was a comprehensive congressional attempt to "civilize" Indians and assimilate them into mainstream American society by breaking up the tribal land base and parceling out plots, or "allotments," to individual Indians who were to be converted into yeoman farmers. David H. Getches et al., *Federal Indian Law* 141 (4th ed. 1998). While the goal of terminating tribalism and civilizing Indians may have seemed to Congress at the time to be a noble goal, the darker side of this policy was that millions of acres of surplus tribal lands were opened up for settlement by non-Indian homesteaders. The resulting loss of land was devastating for tribes. *See* note 17, *infra*. The Indian Reorganization Act of 1934 was intended to bring an end to the failed allotment policies and the concomitant loss of Indian lands and to facilitate tribes' acquisition of additional acreage and repurchase of former tribal domains. Felix Cohen, *Handbook of Federal Indian Law* 86 (2005 ed.).

noted that the legislative history identifies Congress' underlying goals in passing Section 465, providing further guidance to the Secretary in the exercise of his or her discretion. *Id.*

Petitioners assert that the Tenth Circuit's opinion "ignores the nationwide scope and impact of the power [Section 465] confers on local BIA bureaucrats." Pet. 21. To show this "impact," Petitioners cite to a statistic from 1999, in which the Department of the Interior estimated that it *receives* 7,000 trust and acquisition applications annually. *Id.* (citations omitted) (emphasis added). However, Petitioners fail to cite the number of these applications that were approved or disapproved. More specifically, Petitioners do not mention the number, if any, of these applications approved over the objections of state or local government. This statistic is simply not relevant to the question of whether Section 465 is constitutional.

Moreover, the Tenth Circuit is clearly not alone in finding that Section 465 does not grant local BIA bureaucrats "unbounded authority … to stockpile lands 'for Indians,'" as suggested by Petitioners. Pet. 21. Three other circuits have found that Section 465 is a constitutional delegation of power.

In *Carcieri v. Norton*, the First Circuit rejected the argument that Congress had failed to articulate sufficient standards to guide the Secretary's trust determinations. 398 F.3d 22, 26 (1st Cir. 2005). Instead, the court found that the requirement in Section 465 that the acquisition be "for the purpose of providing land for Indians" was an "intelligible principle" to sufficiently guide the Secretary's

discretion. *Id.* at 26-30. The court thus agreed with the conclusion of the district court and found, for the same reasons articulated in *Roberts*, 185 F.3d 1125, that Section 465 is not an unconstitutional delegation of legislative power. *Id.* at 30.

Next, in *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790 (8th Cir. 2005) (*South Dakota II*), the Eighth Circuit Court of Appeals upheld the district court's finding that Section 465 was constitutional after reviewing the question *de novo*. The issue was before the court for the second time, following years of litigation and a remand from this Court.[11] The court of appeals rejected the State's arguments that Section 465 does not provide sufficient boundaries governing the Secretary's decision to acquire land in trust for Indians and fails to provide an "intelligible principle." *South Dakota II*, 423 F.3d at 795. Instead, the court found that the Supreme Court

[11] In the first case, *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 881-85 (8th Cir. 1995), *vacated by* 519 U.S. 919 (1996), a panel of the Eighth Circuit, in a 2-1 decision, concluded that Section 465 violated the non-delegation doctrine. The court reasoned that the Department of the Interior had interpreted its own power too broadly by treating the statute as delegating unreviewable discretionary authority to the Secretary. *Id.* In response to *South Dakota I*, the Department of the Interior promulgated a new regulation that provided for judicial review, 25 C.F.R. § 151.12(b), and then petitioned for writ of certiorari, asking that the United States Supreme Court vacate *South Dakota I* and remand the case to the Department of the Interior. *Id.* The Supreme Court granted the writ and vacated the judgment, directing that the matter be remanded "to the Secretary of the Interior for reconsideration of his administrative decision," in light of the new regulation allowing for judicial review. *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 919-20 (1996).

has given Congress wide latitude in meeting the intelligible principle requirement and recognized that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). The court found that it was not bound by its earlier conclusion in *South Dakota I*, 69 F.3d 878, because the Supreme Court vacated that decision. *South Dakota II*, 423 F.3d at 796. The court then reexamined the broader context of the IRA and determined that 25 U.S.C. § 465 does in fact provide guidance sufficient to withstand a constitutional challenge based on non-delegation grounds. *Id.*

As the court noted in *South Dakota II*, the Supreme Court has struck down statutes on delegation grounds on only *two* occasions, and not since 1935. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Moreover, the statutes at issue in those cases arose under unique circumstances and delegated to the President exceptionally broad control over the national economy. *South Dakota II*, 423 F.3d at 795. Since 1935, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.*, quoting *Whitman*, 531 U.S. at 474-75. The court in *South Dakota II* concluded that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust." 423 F.3d at 797. Section 465 was therefore held not to be an unconstitutional delegation of power.

Most recently, in *Tomac v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), the Court of Appeals for the D.C. Circuit found that Congress' delegation to the Secretary of the authority to acquire real property in trust for the benefit of the Pokagon Band of Potawatomi Indians under Section 6 of the Indian Restoration Act, Section 1300j-5, was not an unlawful delegation of power. Section 6 of the Indian Restoration Act is similar to Section 465 in that it allows the Secretary to acquire real property for the Tribe and hold such land in trust for the benefit of the Tribe. Section 1300j-5. The court in *Tomac* found that when this section is read in light of its clear purpose, the history of the Tribe, and the Restoration Act as a whole, it is clear that Congress set forth appropriate boundaries to guide the Secretary in trust land acquisitions. 433 F.3d at 866. This case, albeit dealing with a different statute specific to the taking of lands in trust for the Pokagon Band, lends further support that Section 465 is not an unlawful delegation of power.

Moreover, federal district courts that have considered the constitutionality of Section 465 and similar statutes allowing for trust land acquisitions have consistently found the delegation of authority to be constitutional. *See Citizens Exposing Truth About Casinos v. Norton*, No. 02-1754, 2004 U.S. Dist. LEXIS 27498, (D.D.C. Apr. 23, 2004); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 154-56 (D.D.C. 2002), *aff'd* 348 F.3d 1020 (D.C. Cir. 2003) (the Auburn Indian Restoration Act, 25 U.S.C. §§ 1300*l*-1, 1300*l*-2(a), allowing for the taking of land into trust for the United Auburn Indian Community, does not constitute an unconstitutional delegation of Congressional authority);

City of Lincoln City v. United States Dep't of Interior, 229 F. Supp. 2d 1109, 1128 (D. Or. 2001).

In fact, the only case to hold Section 465 unconstitutional under the delegation doctrine, *South Dakota I*, was vacated and remanded by this Court, and therefore has no precedential value. *See* Note 15, *supra.* The law of the case in *South Dakota* after remand is that Section 465 is indeed constitutional. *South Dakota II*, 423 F.3d at 797-799.

In addition to the ample authority establishing that Section 465 is constitutional, this Court has stated that courts must accord acts of Congress the presumption of constitutionality. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). Therefore, absent some basis for finding otherwise, which Petitioners have not articulated, Section 465 should be presumed to be a constitutional delegation of legislative power. In sum, this case simply does not pose a significant constitutional question such that Supreme Court review would be appropriate.

B. This case is not appropriate for review because it is an isolated case that will not have importance to the public as a whole.

Petitioners claim that Section 465 can be easily "exploited to avoid legitimate state laws and land use or development restrictions." Pet. 21. This is not the case under the current regulations, which require that, where there is an off-reservation acquisition of land, as the distance between the tribe's reservation and the land to be acquired increases, "the Secretary shall give greater scrutiny to the tribe's justification of

anticipated benefits from the acquisition." 25 C.F.R. § 151.11(a) (2006). Resp. App. C. In cases where the land to be acquired is far from the tribe's reservation, the Secretary must also give greater weight to the concerns raised by state and local governments with respect to the "acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d) (2006). Resp. App. C. Under the regulations in effect at the time the properties here were taken in trust, the Secretary was not required to make such an analysis, but rather was only required to consider "jurisdictional problems and potential conflicts of land use which may arise" as one factor in evaluating a request for acquisition. 25 C.F.R. § 151.10 (1994). Resp. App. E. As a result of the significant changes in the regulations, new trust applications now have more hurdles to clear to be accepted. It is a matter of public record that since 1995, when the lands at issue in this case were taken in trust, no other trust land applications submitted by the Paiute Tribe of Utah or any of its Bands have been approved, perhaps because of the additional opportunities for state and local governments to object.[12] This fact itself indicates that the State's concern that there will be a proliferation of Indian trust land acquisitions is unwarranted.

Respondents recognize that these new regulations clearly could not cure an unlawful delegation of power if the statute itself fails to provide an intelligible principle. *Whitman*, 531 U.S. at 472-73.

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[12] Joint Memorandum in Opposition to State Defendants' Motion for Summary Judgment at 20, *Shivwits Band of Paiute Indians v. Utah* (Civil No. 2:95CV 1025C).

However, as every court to consider the issue has found, 25 U.S.C. § 465, particularly when viewed within the broader context of the IRA, provides sufficient guidance to withstand a constitutional challenge on delegation grounds. The effect of the new regulations on the trust acquisition process merely adds further support for the position that this case does not present an important question warranting Supreme Court review.

C. The Court Should Deny Review Because the Court is Without Jurisdiction to Grant Meaningful Relief.

The State's claim that Section 465 is unconstitutional is aimed at seeking a reexamination of the federal decision to take land into trust. Because the United States has already acquired the Shivwits land in trust, any claims aimed at affecting title are barred by the Indian lands exception to the Quiet Title Act, 28 U.S.C. §2409(a). *Block v. North Dakota*, 461 U.S. 273 (1983).

It is well-settled that the QTA provides the exclusive means by which adverse claimants can challenge the United States' title to real property. *Id.* at 286. The Indian Lands Exception to the QTA clearly prohibits any action that would defeat title to Indian lands acquired in trust under Section 465. *Id.* at 277.

Petitioners have not appealed the Tenth Circuit's ruling that the Quiet Title Act precluded the court from reviewing and remedying any shortcomings in taking the land at issue into trust. Therefore, even if this Court wanted to review the issue whether Section

465 is unconstitutional, there would be no way to afford meaningful relief to Petitioners because title to the land would still be vested in the United States.

D. The court of appeals' decision is not inconsistent with this Court's decision in Whitman v. Am. Trucking Ass'n.

The Tenth Circuit rejected Petitioners' interpretation of *Whitman* in the opinion below, finding that Petitioners' assertion "that the 'intelligible principle' must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*." Pet. App. 13. The court further concluded that the *Whitman* Court reviewed and applied its past precedent concerning the non-delegation doctrine. *Id.* This precedent makes clear that broad phrases of purpose in an act are not "utterly without meaning" when viewed in the light of "the purpose of the Act, *its factual background* and *the statutory context* in which [the phrases of purpose] appear." *Am. Power & Light Co. v. Securities & Exch. Comm'n*, 329 U.S. 90, 104 (1946) (emphasis added). Thus, far from indicating that the intelligible principle must be found only on the face of the Act itself and not in the Act's legislative history, the cases indicate that it is important to determine if the delegation of authority is constitutional within the broader context of the Act and the factual background underlying its passage.

Moreover, *Whitman* itself made clear that the statute does not have to provide a "determinate criterion" for the exercise of the delegated power, as long as a policy is articulated. 531 U.S. at 475. Petitioners overlook this point when they state, "To be

sure, if Congress had enacted standards in Section [465] or elsewhere, they could be fleshed out by reference to [the factors identified in *Am. Power & Light Co.*]". Pet. 16. However, Congress does not have to enact "standards" so long as it articulates an "*intelligible principle*" for the exercise of the delegated power. *Whitman*, 531 U.S. at 475 (emphasis added). Congress has conveyed such a principle in Section 465, particularly when the statute is viewed in the context of the overall IRA.

The standard articulated in Section 465 directs the Secretary to exercise his or her authority "for the purpose of providing land for Indians." This is no broader than other phrases in which the Court has found an intelligible principle. For instance, in *Nat'l Broad. Co. v. United States*, the Court upheld as a valid delegation an act stating that an agency should promulgate regulations encouraging the use of radio in the "public interest, convenience, or necessity," noting that the meaning of "public interest" was limited in light of the larger aim of the Act. 319 U.S. 190, 215-217 (1943). Similarly, in *Whitman* the Court upheld a delegation to the Environmental Protection Agency to set ambient air quality standards "at the level that is requisite … to protect the public health with an adequate margin of safety." 531 U.S. at 475-76. Petitioners note these standards, but attempt to distinguish them from setting land aside in trust on the grounds that in those cases greater specificity by Congress would be "insignificant or impossible." Pet. 14.

Petitioners assume without any supporting authority that the Secretary of the Interior's decisions

in setting aside lands in trust for Indians do not involve the same type of "complicated factors for judgment" that were contemplated in *Nat'l Broad. Co.*, 319 U.S. at 216. Pet. 14. However, Section 465 is part of the larger IRA, an Act intended to end the devastating policy of allotment which resulted in the loss of millions of acres of Indian land, and undertake new efforts to "encourage economic development, self-determination, cultural pluralism, and the revival of tribalism" for Indian tribes. Felix Cohen, *Handbook of Federal Indian Law* 86 (2005 ed.). Under the IRA, the Executive was to take an active role in enabling tribes to improve their economic status. *Id.* The IRA was also designed to bring an official end to the failed assimilation policies that had deprived Indians of their land and culture.[13] *Id.* at 78-87. Certainly against this backdrop, and in light of the unique trust obligations that the federal government owes to Indian tribes, the Secretary does indeed have to make complicated decisions about how to best assist Tribes in their economic development, such that a broad grant of authority from Congress is equally appropriate as it was with respect to the statutes at issue in cases like *Whitman* and *Nat'l Broad. Co.*

[13] Of the approximately 156 million acres of Indian land in 1881, less than 78 million remained by 1900. *Cohen, supra*, at 78-79. By 1934, the year the IRA was passed, Indian land holdings had been reduced to 48 million acres. *Id.* Petitioners raise the concern that, "At the end of 1997, more than 56 million acres in 36 states were already held in trust by the Secretary." Pet. 21 (citations omitted). However, this hardly seems significant in light of the more than one hundred million acres of land lost by Indians during the Allotment Era.

Significantly, both the Tenth Circuit in the opinion below and the Eighth Circuit in *South Dakota II* relied upon *Whitman* to *support* their holdings that Section 465 is constitutional. Likewise, the First Circuit cited to *Whitman* in *Carcieri v. Norton*. 398 F.3d at 32-34. None of these cases read *Whitman* to support the notion that Section 465 is an unconstitutional, standardless delegation.

In sum, Section 465 does not grant the Secretary unbounded discretion, as Petitioners claim. Instead, when read in light of the purpose of the IRA to restore to Indians a portion of the lands lost during the failed Allotment Era, the Act's factual background, and the broader statutory context, it is clear that Section 465 provides an intelligible principle to guide the Secretary of the Interior in the exercise of his or her discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 12th day of May, 2006.

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