IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

C.A. No. 03-2647

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

Plaintiffs-Appellants

v.

GALE A. NORTON in her capacity as Secretary of the Department of the Interior and FRANKLIN KEEL in his capacity as Eastern Area Director of the Bureau of Indian Affairs within the Department of the Interior

Defendants-Appellees

On Appeal From a Judgment of the United States District Court for the District of Rhode Island

STATE APPELLANTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

In the very heart of its ancestral territory, the Narragansett Indian Tribe is subject to the "civil and criminal laws and jurisdiction of the State of Rhode Island." That is because Congress, the State, the Town and the Tribe all expressly agreed to this jurisdictional allocation in the 1978 Rhode Island Indian Claims Settlement Act. Equally clear is that the Settlement Act, by necessary implication, preserved for all time this jurisdictional framework between the State and the Narragansetts throughout Rhode Island. There is nothing in section 465 of the Indian Reorganization Act of 1934 that defeats the later-enacted Settlement Act's preservation of State law and jurisdiction statewide. Indeed, section 465 trust, restricted by the application of state law and jurisdiction, is the operative jurisdictional paradigm directly across the street from the Parcel on the Settlement Lands.

While the State's laws and jurisdiction are expressly preserved on the Settlement Lands, through section 1708 of the Settlement Act, their application everywhere else is necessarily implied by sections 1705 and 1712. Those sections create a two-pronged, all encompassing extinguishment of potential Indian claims in Rhode Island by 1) extinguishing aboriginal title throughout the State and 2) by precluding claims by any tribe based upon "any

interest in" or "right involving" land in Rhode Island. 25 U.S.C §§ 1705(a)(2); 1712(a)(2) and 1705(a)(3); 1712(a)(3). It defies law, logic and history to somehow read the Settlement Act as more protective of State sovereignty inside the Tribe's heartland than outside.

There are two ways to preserve the integrity of the Settlement Act. First, the Settlement Act should be read to impliedly repeal the IRA's jurisdiction stripping federal trust provision, section 465.[1] Second, relevant to the limited scope of this supplemental briefing, the IRA's trust provision can be read harmoniously with the Settlement Act to allow both federal trust, while at the same time preserving the applicability of the State's civil and criminal laws and jurisdiction on any land so converted. Again, this is the very jurisdictional framework that exists on the Settlement Lands, right across the street from the subject Parcel.[2]

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[1] Moreover, the State Appellants also argue vociferously elsewhere that the 1934 IRA does not apply to the Tribe at all, that would moot the Settlement Act issue.

[2] On the Settlement Lands, the State's civil and criminal laws apply with limited exceptions for hunting and fishing, 25 U.S.C. § 1706(a)(3), and property-based taxation. 25 U.S.C. § 1715(a). If the Secretary were to take the Parcel into restricted trust, the jurisdictional regime would be very similar. On land so converted, the State's civil and criminal laws and jurisdiction would apply. As on the Settlement Lands, the Parcel would not be subject to property-based taxation. 25 U.S.C. § 465; *See also Sherrill v. Oneida Indian Nation,* 544 U.S. __, 125 S.Ct. 1478 (2005) (federal Indian trust property not subject to state and

In this way, the federal government would retain its IRA-based trust ability, the Tribe would be free from property taxation on trust land and the wall-to-wall application of the State's laws and jurisdiction would remain intact as Congress intended in the Settlement Act.[3]

II. ARGUMENT

A. The Settlement Act Necessarily Prohibits An Ouster of State Jurisdiction

1. *Extinguishing Aboriginal Title Prevents the Reinvigoration of Indian Land-Based Sovereignty*

If the Secretary can somehow take land into trust under the IRA in Rhode Island, the Settlement Act's wall-to-wall extinguishment of aboriginal title requires her to take it *subject to* the State's civil and criminal laws and jurisdiction.

In two provisions, the Settlement Act extinguishes all aboriginal title throughout the State. 25 U.S.C. § 1705(a)(2); 1712(a)(2). Aboriginal title is more

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local property taxes). Finally, State laws on hunting and fishing would apply, but without the limited exceptions to those laws applicable in the tribal heartland.

[3] Moreover, a restricted trust would preserve the Settlement Act's ban on Indian country in Rhode Island by precluding federal superintendence over the restricted trust land.

than a mere "possessory interest" in land.[4] A tribe's ability to perfect aboriginal title to property gives it both physical possession *and* the ability to exercise primary jurisdiction (subject to the federal government).[5] In essence, aboriginal title brings with it the ability to oust state laws and jurisdiction over land. Conversely, the extinguishment of aboriginal title expressly eliminates tribal *territorial* sovereignty.

The cases demonstrate that tribal sovereignty is derived from two intertwined sources: tribal land and tribal membership. *John v. Baker,* 982 P.2d 738, 754 (Alaska 1999) *citing United States v. Mazurie,* 419 U.S. 544, 557 (1975) (confirming that federal cases indicate that the nature of tribal sovereignty stems from both tribal membership and tribal lands); *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151 (1980) ("The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty . . .."). Said another way, there is membership-based and land-

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[4] As discussed in the State's Opening Brief (34-36), in its Reply (37-39) and in its Petition for Rehearing En Banc (4, 20-23).

[5] *See e.g., Bates v. Clark,* 95 U.S. 204, 207-08 (1877) (when aboriginal title is extinguished, land ceases to be Indian country); *Alaska v. Native Village of Venetie,* 522 U.S. 520, 526 (1998) (reversing a Ninth Circuit holding that an Alaska Native Village was "Indian country" but citing with approval the concurrence of one Ninth Circuit judge viewing ANCSA's broad extinguishment of aboriginal title as leaving Native Alaskans as sovereigns "without territorial reach").

based tribal sovereignty. Since land is one source of Indian sovereignty, then the extinguishment of Indian (aboriginal) title to that land forecloses Indian territorial sovereignty there.

A recent decision of the United States Supreme Court, *Sherrill v. Oneida Indian Nation,* 544 U.S. ___, 125 S. Ct. 1478 (2005), fully supports the analysis of the scope of aboriginal title. In *Sherrill,* the Oneida attempted to effect an ouster of New York's sovereignty over land by purchasing fee title to two parcels within what had once been the Oneida's historic reservation. Relying on prior recognition of the Oneida's aboriginal title to that historic reservation, the United States and the Oneida argued – just as the State Appellants do here – that the unification of fee title and aboriginal title permitted the exercise of tribal sovereignty over the parcels. 125 S. Ct. at 1489.

Crucially, the Oneida were not using aboriginal title as a means of gaining physical possession of land owned by others. Indeed, the Oneida already owned the parcels in fee. Instead, the *sole* reason for the assertion of aboriginal title was to extend tribal sovereign dominion over the parcels by removing them from state jurisdiction (and its concomitant taxing power). If aboriginal title were nothing more than a possessory interest in land, the Supreme Court would have simply ended the case by holding that aboriginal

title, even if reinvigorated, cannot effect an ouster of state laws. Instead, the Court agreed with the Oneida's core position (and that of the State Appellants) that the perfection of aboriginal title over land ousts state and local jurisdiction there. The Oneida lost only because the doctrine of laches barred the reinvigoration of aboriginal title. *Sherrill* thus confirms the central tenet of the State's argument: that the exercise of territorial sovereignty, to the exclusion of state laws, is an inherent attribute of aboriginal title. 125 S. Ct. at 1489-91.

The Supreme Court also agreed with the State Appellants that the effect of an unrestricted trust conversion under the IRA is to " . . . reestablish [tribal] sovereign authority over territory . . .." 125 S. Ct. at 1494. Such a trust conversion – with its attendant ouster of State jurisdiction – is completely inconsistent with the Settlement Act's extinguishment of aboriginal title. [6]

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[6] This argument – that the extinguishment of aboriginal title is inconsistent with unrestricted trust – is nothing new to the Secretary. Indeed, in 1993, Thomas L. Sansonetti, counsel of record on the brief and at oral argument, authored a memorandum discussing the Alaska Native Claims Settlement Act ("ANCSA"), which Congress has identified as a model for Rhode Island's Settlement Act. *See* House Report (Interior and Insular Affairs), H.R. Rep. No. 95-1453, at **1951, 1953 (1978) (Identifying ANCSA as a model for the Rhode Island Settlement Act and noting that Settlement Act's extinguishment of aboriginal title is consistent with ANCSA as "the relevant precedent for extinguishment in a settlement context"). In that memorandum, Sansonetti opined that, in light of ANCSA's extinguishment of aboriginal title (along with

The Secretary takes the opposite position than she took in *Sherrill*. Here, she dismisses aboriginal title as a mere "possessory interest in land," the extinguishment of which "had no effect on tribal sovereignty." Fed. Br. at 29-30. In support of that proposition, she asserts that "no court has ever held that by ceding aboriginal title to its lands a Tribe extinguishes any retained sovereignty it possesses with respect to those or other lands in which it later acquires an ownership interest." Fed. Br. at 29. On the contrary, *Sherrill* says precisely that. By ceding aboriginal title over land by virtue of the passage of time, the Oneida lost their sovereignty over those lands. Since there was no act of Congress affirmatively extinguishing the Oneida's aboriginal title, however, an agency of the federal government could restore their land-based sovereignty through the 465 process (assuming that the Oneida are an IRA eligible tribe). In Rhode Island, on the other hand, because Congress expressly

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other ANCSA provisions in common with the Settlement Act) it would be an abuse of discretion for the Secretary to take land into trust in Alaska. Office of the Solicitor, January 19, 1993, Memorandum at 123 n.296 (". . . in light of Congress' clearly expressed intent in ANCSA, it would be an abuse of discretion for the Secretary to take lands in trust for Venetie and Arctic Village. To now conclude that the villages, by acquiring land in fee, could essentially accomplish on their own what the Secretary cannot, is a proposition we cannot accept."). The relevant pages of the Solicitor's Memorandum are attached as Exhibit A. A complete discussion of the similarities between ANCSA and the Settlement Act appears in Appellants' Opening Brief at 40-46.

extinguished aboriginal title and, with it, any future claim of Indian territorial sovereignty, no agency of the United States can reinvigorate Indian sovereignty over land.[7]

Consistent with the Settlement Act's complete extinguishment of Indian territorial sovereignty in Rhode Island, the Secretary can only take land into trust under the IRA if the resulting trust is restricted to preserve the State's civil and criminal laws and jurisdiction. Permitting an unrestricted trust would reinvigorate the very tribal territorial sovereignty that was categorically extinguished in Rhode Island by Congress in the Settlement Act.

2. *Barring Claims Based on Any Interest in or Right Involving Land Precludes Unrestricted Trust*

Converting land to unrestricted trust under the IRA is also completely incompatible with the second, broader extinguishment prong of the Settlement Act – the extinguishment of any claims by any tribe, including the Narragansetts, or any "successor in interest" against the State or the Town based upon "*any* interest in" or "right involving" land in Rhode Island. 25 U.S.C. § 1705(a)(3); 1712(a)(3).

[7] In other words, in *Sherrill*, there was only one act of Congress in play. Here, in addition to the 1934 IRA, the 1978 Settlement Act prevents the assertion of territorial sovereignty by expressly extinguishing aboriginal title.

If, as the Secretary contends, extinguishing aboriginal title somehow merely terminates a right to "occupy" land (Fed. Br. at 29), then as a matter of law and logic, this second prong must further extinguish any "interest in" and "right involving" land beyond mere occupancy. Otherwise, it would mean nothing at all.[8] Under this prong, the Tribe (and the Secretary as its "successor in [fee title] interest") is precluded from making a claim that its laws, rather than State laws, apply on tribal land anywhere in the State. Such an assertion is a claim of right (sovereignty) involving land in Rhode Island. As such, the right of any tribe (or the Secretary on its behalf) to assert land-based sovereignty in Rhode Island is specifically barred.

Taking land into trust *subject to* the State's civil and criminal laws and jurisdiction, on the other hand, does not run afoul of the Settlement Act's bar against claims based upon interests in or rights involving land. Under the restricted trust scenario, the United States merely becomes the fee title owner of the Parcel, leaving the State's jurisdiction in place. In this way, neither the United States' nor the Tribe's claims of territorial sovereignty arise and there is

[8] It is a fundamental rule of statutory construction that statutes should be read to give effect to every word and phrase. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 30 (1st Cir. 2000). Applying that rule to the Settlement Act, this second extinguishment prong must be read as

no affront to the Settlement Act's bar against competing "interest in" or "right involving" land in Rhode Island.

3. Restricted Trust Harmonizes the IRA with the Settlement Act

Where two federal statutes are alleged to be in conflict, this Court "look[s} to whether they touch upon the same subject, and, if so, whether we can give effect to both statutes.[9] Here, the Settlement Act and section 465 of the IRA touch upon the same subject – Indian lands. As an alternative to the State's argument that the Settlement Act impliedly repeals section 465 of the IRA, this Court could also give effect to both statutes; but only if the Parcel's conversion were restricted to preserve the State's civil and criminal laws and jurisdiction.

The later enacted Settlement Act sets forth a comprehensive jurisdictional allocation among the Tribe, the State and the United States that expressly places the State's jurisdiction on the Tribe's Settlement Land – jurisdiction that survives the Settlement Lands conversion to federal trust – and by necessary implication precludes the Tribe or the federal government from eviscerating State law and jurisdiction everywhere else. It does so by

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extinguishing "interests" and "rights" beyond the extinguishments of aboriginal title.

extinguishing aboriginal title, foreclosing any other Indian claims based on any interest in or right involving land in Rhode Island and by prohibiting the Secretary taking up any further land-based duties or liabilities with respect to the Tribe.

Section 465 of the IRA, on the other hand, is completely silent on the issue of jurisdiction. It says only that the Secretary may purchase lands for Indians. Title to lands so acquired "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from state and local taxation." 25 U.S.C. § 465.[10]

Allowing the Secretary to take the Parcel into trust but preserving the State's civil and criminal laws and jurisdiction thereon leaves the goal of section 465 – to provide land for Indians – unimpaired. The Parcel would be held in trust for the Tribe and, as a result of federal ownership, the Parcel would be exempt from state and local taxation. Preservation of the State's laws and jurisdiction would in no way interfere with the goal of section 465 and, importantly, would honor the Settlement Act's guarantee that the State's civil

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[9] *United Parcel Service, Inc. v. Flores Galarza*, 318 F.3d 323, 333-34 (1st Cir. 2003); *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 703 (1st Cir. 1994) (same).

and criminal laws and jurisdiction apply to all land within its borders. For the same reason, preserving the State's civil and criminal laws and jurisdiction would prevent the Parcel from becoming Indian country because the applicability of the State's civil and criminal laws and jurisdiction would defeat the necessary "federal superintendence" that results from an unrestricted trust conversion.[11]

In short, it is possible to read the IRA and the Settlement Act in harmony to permit the Secretary to take land into trust for the Tribe but only so long as that any such trust is restricted to preserve the State's civil and criminal laws and jurisdiction.

B. The 1976 Lawsuits Settled the State's Jurisdiction Over the Parcel

As discussed in the State's Opening (54- 56), Reply Brief (42-43) and, most importantly, its Petition for Rehearing En Banc (20-23), the settlement of

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[10] The exemption from property tax is incident to federal ownership, not tribal sovereignty.

[11] It is worth noting that federal superintendence, the hallmark of unrestricted trust, is completely antithetical to the prohibition in section 1707(c) against the United States acquiring further land-based duties and responsibilities. Requiring the United States to become the "dominant political institution" over every parcel that the Tribe converts to trust – with all the administration and management responsibilities that run with it – cannot be squared with the discharge given by Congress in section 1707. If trust is to be allowed at all, restricted trust comes closest to honoring congressional intent to limit further federal entanglement with Indian land in Rhode Island.

the 1976 Lawsuits precludes the Secretary, on behalf of the Tribe, from effecting an ouster of the State's civil and criminal laws and jurisdiction from the Parcel. It does so because, as a matter of law, the Tribe and the United States were a legal unity with respect to these Lawsuits; and, it does so because the settlement involved the extinguishment of claims of aboriginal right which the Supreme Court recently confirmed includes "Indian sovereign control over land." *Sherrill,* 125 S. Ct at 1489.

As the Panel Opinion correctly notes, the 1976 Lawsuits were brought pursuant to the Nonintercourse Act. *Carcieri v. Norton,* 398 F.3d 22, 26 (1st Cir. 2005). What the Panel failed to recognize, however, was the legal relationship between the Tribe and the United States with respect to those claims. As set forth in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 379 (1st Cir. 1975), the United States is deemed to be the guardian and the Tribe its ward with respect to claims raised by the Tribe in its 1976 Lawsuits.[12] The Settlement entered into by the ward now binds the guardian. The two are a

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[12] Precisely the same legal unity finding was made by Judge Pettine in the 1976 Lawsuits themselves. *Narragansett Indian Tribe v. Southern R.I. Land Dev. Corp.,* 418 F.Supp. 798, 803 (D.R.I. 1976) ("It is beyond debate that the United States, if it chooses to do so, could bring an action under the [Nonintercourse] Act as trustee for the Tribe.")

legal unity for the purpose of binding the Secretary to the terms of the Tribe's settlement of those Lawsuits.

The Panel also rejected the State's unity of claims theory by saying: "the fee to trust acquisition by the Secretary, and the consequences thereof are different issues than the claims of aboriginal right which were litigated in the 1976 lawsuits and resolved by the JMOU and the Settlement Act." 398 F.3d at 39. As *Sherrill* makes plain, the Tribe's claim to territorial sovereignty in Rhode Island were the same in 1976 as they are today. The only difference is the *method* by which those claims are being advanced.

In *Sherrill,* the issue was whether sovereign control over land, to the exclusion of state law could be reinvigorated. There was no dispute over what the perfection of aboriginal title would mean should that reinvogoration occur. The Court concluded that restoring "Indian sovereign control over land" would "have disruptive practical consequences" because there would be a "checkerboard of alternating state and *tribal jurisdiction*." 125 S. Ct. at 1493. Such "sovereign control" over land would include freeing tribal land "from local zoning or other regulatory controls." *Id.* After *Sherrill,* it is beyond peradventure that a restoration of aboriginal title includes Indian sovereignty – to the exclusion of state law – over the subject land. In other words, the

Indian sovereignty over land that would result from "the fee to trust acquisition by the Secretary, and the consequences thereof," present the *same* issues as "the claims of aboriginal right which were litigated in the 1976 lawsuits and resolved by the JMOU and the Settlement Act." As such, any trust acquisition must preserve the bargained-for allocation of jurisdiction among the parties and preserve the State's civil and criminal laws and jurisdiction within its borders.

*   *   *

Each of the jurisdiction-preserving provisions of the Settlement Act – the extinguishment of aboriginal title, the bar against claims involving rights to and interests in land or the prohibition against further federal entanglement – lead to the inexorable conclusion that the Secretary cannot indirectly strip the State's jurisdiction over the Parcel through trust. That conclusion is only buttressed by the terms of settlement among the Tribe, Congress, the State and the Town. If these are not sufficient reasons to preclude trust outright, at a minimum, each of these reasons mandate that any trust preserve the State's civil and criminal laws and jurisdiction. Otherwise, the 1934 IRA and the 1978 Settlement Act are in irreconcilable conflict.

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DATED: June 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that caused to be forwarded a copy of the within Supplemental Brief via e-mail and regular mail, postage prepaid on the 15th day of June, 2005, to Elizabeth Ann Peterson Appellate Section Environment & Natural Resources Division, Room 8930 Department of Justice, PO Box 23795 L'Enfant Station, Washington, D.C. 20026; and to Anthony C. DiGioia, Esq., Assistant United States Attorney, 800 Fleet Center, Providence, RI, 02903.

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