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Carcieri v. Kempthorne: Whether the Secretary of the Interior May Acquire for the Narragansett Indian Tribe Trust Land Which is Not Subject to Rhode Island's Civil and Criminal Jurisdiction

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June 3, 2008

Abstract. *Carcieri v. Kempthorne* (No. 07-526) represents the latest in a series of jurisdictional contests over tribal lands in Rhode Island. In this case, the Supreme Court will consider the Secretary of the Interior's (SOI) authority to take into trust for the benefit of the Narragansett Indian Tribe (Tribe) and, therefore, generally free of state civil and criminal jurisdiction, a parcel of land outside of the Tribe's current reservation. The present reservation consists of lands, which the Rhode Island Indian Claims Settlement Act of 1974 (RIICSA) designated as "settlement lands," subjected to Rhode Island civil and criminal jurisdiction.

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**Prepared for Members and
Committees of Congress**

Carcieri v. Kempthorne: Whether the Secretary of the Interior May Acquire for the Narragansett Indian Tribe Trust Land Which is Not Subject to Rhode Island's Civil and Criminal Jurisdiction

Summary

Carcieri v. Kempthorne (No. 07-526) represents the latest in a series of jurisdictional contests over tribal lands in Rhode Island. In this case, the Supreme Court will consider the Secretary of the Interior's (SOI) authority to take into trust for the benefit of the Narragansett Indian Tribe (Tribe) and, therefore, generally free of state civil and criminal jurisdiction, a parcel of land outside of the Tribe's current reservation. The present reservation consists of lands, which the Rhode Island Indian Claims Settlement Act of 1974 (RIICSA) designated as "settlement lands," subjected to Rhode Island civil and criminal jurisdiction.

RIICSA does not explicitly address the possibility that lands other than the "settlement lands" could be placed in trust; nor does it specify what jurisdictional arrangement should apply should that occur. The two issues before the Supreme Court are: (1) whether the authority under which the SOI has agreed to acquire the land, 25 U.S.C. § 465, a provision of the Indian Reorganization Act of 1934, covers trust acquisitions by a tribe not recognized by the Department of the Interior in 1934 and (2) whether the trust acquisition violated the terms of RIICSA. A sharply divided U. S. Court of Appeals for the First Circuit, sitting en banc, ruled in favor of the trust acquisition with the majority relying predominantly on statutory construction. Dissents, however, criticized this method of resolving the case as mechanical and emphasized the fact that permitting the trust acquisition and the consequent elimination of Rhode Island jurisdiction over the land would directly conflict with the overriding purpose of RIICSA and the State's bargained-for-objective in agreeing to the settlement—ending all Indian claims to sovereign authority in Rhode Island.

This report will be updated based on judicial or legislative developments.

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Carcieri v. Kempthorne: Whether the Secretary of the Interior May Acquire for the Narragansett Indian Tribe Trust Land Which is Not Subject to Rhode Island's Civil and Criminal Jurisdiction

Background

*Carcieri v. Kempthorne*¹ represents the latest in a series of cases² in which the State of Rhode Island and the Narragansett Indian Tribe (Tribe) have contested jurisdiction over tribal lands. In this case, the Supreme Court has agreed to consider the Secretary of the Interior's (SOI) authority to take into trust a parcel of land for the benefit of the Tribe. The parcel involved is outside of the Tribe's current reservation and, should it be acquired by the SOI in trust for the Tribe, it would be generally free of state civil and criminal jurisdiction. The Tribe's current reservation consists of lands designated as "settlement lands" under the Rhode Island Indian Claims Settlement Act of 1974 (RIICSA or Settlement Act).³ Under the terms of RIICSA, these "settlement lands" are subject to Rhode Island civil and criminal jurisdiction and, therefore, not available for gaming under the Indian Gaming Regulatory Act (IGRA).⁴

Carcieri v. Kempthorne involves the interaction of two federal statutes: (1) RIICSA, which settled land claims of the Narragansett Indian Tribe (Tribe), and (2)

¹ 497 F. 3d 15 (1st Cir. 2007), *cert. granted*, 76 U.S.L.W. 3454 (U.S. February 25, 2008) (No. 07-526).

² *State of Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (holding that because the Rhode Island Indian Claims Settlement Act (RIICSA) left the Tribe with some governmental authority over tribal lands designated as "settlement lands" and subsequently taken into trust, gaming under the Indian Gaming Regulatory Act (IGRA) was available to the Tribe even though RIICSA subjected the Tribe's "settlement lands" to Rhode Island civil and criminal jurisdiction); and *Narragansett Indian Tribe v. Rhode Island*, 449 F. 3d 16 (1st Cir. 2006) (upholding Rhode Island's execution of a search warrant on settlement land to enforce state cigarette tax laws).

³ P.L. 95-395, 92 Stat. 83, 25 U.S.C. §§ 1701-1716.

⁴ P.L. 100-497, 101 Stat. 2467, 25 U.S.C. §§ 2701 - 2721. In *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F. 3d 1335 (1st Cir. 1998), the court upheld a 1996 amendment to RIICSA, known as the Chafee Amendment. It made IGRA inapplicable to the "settlement lands." P.L. 104-208, Div. A, Tit. I., § 10(d) [Tit. III, § 330], 110 Stat. 3009-227, 25 U.S.C. 1708(b).

25 U.S.C. § 465, a provision of the Indian Reorganization Act of 1934 (IRA).⁵ RIICSA embodies the terms of the Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims (JMOU)⁶ executed on February 28, 1978, by the Tribe, the State of Rhode Island (State), and private landowners; it ratifies the settlement ending a lawsuit brought by the Narragansett Indian Tribe (Tribe) claiming land in Charlestown, Rhode Island.⁷ The Tribe had claimed that land transfers covering hundreds of pieces of property and dating to 1880 violated the Indian Trade and Intercourse Act, 25 U.S.C. § 177, which, requires federal approval for any land conveyance by an Indian tribe.⁸ The Settlement Act included tribal relinquishment of land claims; federal ratification of earlier land transactions; establishment by the State of an Indian-owned, non-business corporation, the “Narragansett Tribe of Indians”; a settlement fund with which private lands were to be purchased and transferred to the corporation; the transfer of 900 acres of state land to the corporation for the Tribe; designation of the transferred lands as “settlement lands”; and a jurisdictional provision providing for state jurisdiction on the “settlement lands.”⁹ The Settlement Act was the necessary federal ratification of the JMOU. Under the federal legislation,¹⁰ Rhode Island was to set up a corporation to hold the land initially, for the Tribe’s benefit, with the possibility that subsequently the Tribe would gain recognition as an Indian tribe through the Department of the Interior’s (DOI) federal acknowledgment process.¹¹ The Settlement Act contained language extinguishing all Indian claims to land in Rhode Island once the State had enacted legislation creating the Indian corporation and conveying to that corporation settlement lands.¹² The language extinguishing claims is broad but it does not explicitly address subsequent trust acquisitions.¹³

⁵ 25 U.S.C. §§ 461 et seq.

⁶ H.R. Rep. 95-395, Appendix, at 25; 1978 U.S. Code Cong. & Ad. News 1962.

⁷ *Narragansett Tribe of Indians v. Southern Rhode Island Land Development. Corp.*, 418 F. Supp. 798 (D.R.I. 1976), and *Narragansett Indian Tribe v. Murphy*, 426 F. Supp. 132 (D.R.I. 1976).

⁸ *Narragansett Tribe of Indians v. Southern Rhode Island Land Development. Corp.*, 418 F. Supp. 798 (D.R.I. 1976), and *Narragansett Indian Tribe v. Murphy*, 426 F. Supp. 132 (D.R.I. 1976).

⁹ H.R. Rep. 95-395, 95th Cong., 2d Sess. 5-7 (1978); 1978 U.S. Code Cong. & Ad. News 1948, 1949-1950.

¹⁰ 25 U.S.C. § 1706(a).

¹¹ 25 C.F.R., Part 83, “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.”

¹² 25 U.S.C. § § 1705, 1706, and 1712.

¹³ RIICSA, 25 U.S.C. § 1712(a)(1), ratified all previous transfers from any Indian tribe of any land in Rhode Island outside of Charlestown. Aboriginal title, to the extent that any it was involved in such transfer, was also extinguished. 25 U.S.C. § 1712(a)(2). Specifically: “all claims against ... any State or subdivision thereof ... by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date (continued...)”

Under the IRA, 25 U.S.C. § 465, the SOI is authorized to take land into trust “for the purpose of providing land for Indians.” Once the trust acquisition has been completed and title to the land passes to the United States in trust for the benefit of an Indian tribe, in the absence of contrary federal law, the land becomes Indian country, subject to the Indian country criminal law jurisdiction of the United States and to the civil jurisdiction of the governing tribe.¹⁴

One of the issues in the litigation is the IRA definitions of “Indians” and “tribe.” These terms are defined in such a way as to raise a question as to whether a tribe, such as the Narragansett Indian Tribe, which was not federally recognized in 1934, may avail itself of the land-into-trust provision. Under section 465, the SOI is authorized to take land into trust “for the purpose of providing land for Indians.” “Indians” is defined to “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.”¹⁵ The same provision states that “tribe” is to “be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”¹⁶

RIICSA does not explicitly clarify the matter. It did not set up a reservation for the Tribe; it did, however, designate certain lands, as “settlement lands,”¹⁷ which ultimately became the Tribe’s reservation, and specified that the State would have virtually full jurisdiction over them.¹⁸ RIICSA did not provide federal recognition

¹³ (...continued)
of the transfer.” 25 U.S.C. § 1712(a)(3).

¹⁴ “Indian country” is defined in 18 U.S.C. § 1151. The Supreme Court has held that Indian country has two essential characteristics: (1) the federal government must have set aside the land for Indians and (2) the land must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998). Federal Indian country criminal jurisdictional statutes include (1) 18 U.S.C. § 1152, which applies federal enclave criminal law within Indian country except with respect to “offenses committed by one Indian against the person or property of another Indian [or] to any Indian committing any offense in Indian country who has been punished by the local law of the tribe” and (2) various federal statutes specific to Indian country. Among the latter are statutes punishing: major crimes (18 U.S.C. § 1153); liquor offenses (18 U.S.C. § 1161); and gambling offenses (18 U.S.C. § 1166). Tribes generally have civil jurisdiction over their lands and their members. See, *Montana v. United States*, 450 U.S. 544 (1981). Under 25 C.F.R. § 1.4, state and local laws and regulations, including zoning laws, are declared to be inapplicable to trust property belonging to an Indian tribe unless the Secretary of the Interior (SOI) determines to adopt such laws in a specific geographic area as determined “to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property.” 25 C.F.R. § 1.4(b).

¹⁵ 25 U.S.C. § 479 (emphasis added).

¹⁶ 25 U.S.C. § 479.

¹⁷ 25 U.S.C. §§ 1702(d), (e) and (f).

¹⁸ “Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.” 25 U.S.C. § (continued...)

for the Tribe, i.e., establish it as an Indian Tribe entitled to federal services for Indians. It did, however, envision the possibility that tribal status would be acknowledged administratively by the SOI.¹⁹ Nonetheless, it contains no explicit provision as to the ability of the Tribe, following recognition by the SOI, to acquire further trust land in Rhode Island. Essentially, it makes no express reference to section 465 or to the Secretary's authority to take land into trust. The case, thus, involves interpretation of both section 465 and RIICSA.

After the Tribe received federal recognition in 1983,²⁰ it successfully sought to have the settlement lands transferred from the corporation to the Tribe,²¹ and taken into trust pursuant to 25 U.S.C. § 465, and proclaimed an Indian reservation under 25 U.S.C. § 467.²² Subsequently, the Tribe applied to have the parcel at issue in this litigation taken into trust. It is a 31-acre tract which had been deeded to the Tribe to be placed in trust to provide housing for tribal members. The BIA agreed to take the land into trust on March 6, 1998, in determination, which was upheld by the DOI's Board of Indian Appeals on June 29, 2000,²³ and which is the subject of the current litigation.

¹⁸ (...continued)

1708(a). RIICSA also contains a provision providing limited authority for the tribal corporation "to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State..." 25 U.S.C. § 2516(a)(3). There have been two amendments to RIICSA, P.L. 96-601, § 5(a), 94 Stat. 3498, 25 U.S.C. § 1715, enacted in 1980, exempted the settlement lands from federal, state and local taxation when held by the Tribal corporation. P.L. 104-208, Div. A, Tit. I, § 101(d) [Tit. III, § 330], 110 Stat. 3009-227, enacted in 1996. The latter precludes gaming under the Indian Gaming Regulatory Act (IGRA) on the settlement lands. It followed the ruling, in *State of Rhode Island v. Narragansett Indian Tribe*, 129 F. 3d 685 (1994), *cert. denied*, 513 U.S. 919. In that case, the court ruled that the Tribe could conduct gaming on the settlement lands. Although RIICSA accorded civil and criminal jurisdiction to the State, the Tribe exercised sufficient governmental authority over the settlement lands to satisfy the requirement under IGRA that gaming be on trust lands "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B).

¹⁹ Section 1708(c) of Title 25, U.S.C., reads, in pertinent part: "... if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary...." See also, Joint Memorandum of Understanding (JMOU), § 16, H.R. Rep. 95-1453, 95th Cong. 2d Sess. 27 (1978); 1978 U.S.C.C.A.N. 1948, 1964.

²⁰ 48 Fed Reg. 6177.

²¹ R.I. Gen. Laws §§ 37-18-12 through 37-18-14 (1985).

²² Apparently, this occurred on September 12, 1988, see, *Town of Charlestown, Rhode Island v. Eastern Area Director*, Bureau of Indian Affairs, (IBIA 89-53A), 18 IBIA 67; 1989 I.D. LEXIS 29 (December 5, 1989).

²³ *Charlestown v. Eastern Area Director, Bureau of Indian Affairs*, (IBIA 98-88-A and 98-89-A), 35 IBIA 93 (2000).

District Court Decision

In *Carcieri v. Norton*,²⁴ the district court upheld the SOI's decision to take the 31-acre tract into trust. The court ruled that SOI had authority under the IRA to take the land into trust for the Tribe. It read the reference in the IRA to "members of any recognized Indian tribe *now* under Federal jurisdiction"²⁵ as covering the Narragansett Indian Tribe by finding the Tribe to have been under federal jurisdiction in 1934 even though it was not formally recognized until 1983. The court reasoned that because the Tribe's existence from 1614 was not in doubt, whether or not it was recognized, it was a tribe and, thus, under federal supervision.²⁶

At the district court level, the State raised three arguments based on the RIICSA: (1) the trust acquisition is contrary to the purposes of RIICSA because it results in expansion of tribal jurisdiction and contraction of state authority; (2) RIICSA specifically precludes any additional trust acquisition; and (3) since the parcel at issue was within the area claimed in the litigation settled by RIICSA, trust acquisition of the particular parcel is precluded by the extinguishment of aboriginal title in RIICSA and in the Tribe's renunciation of aboriginal claims in the underlying JMOU. In finding against the State, the district court ruled that RIICSA provided no explicit guidance on treatment of trust land applications by the Tribe after federal recognition were to be treated. It found that RIICSA's jurisdictional provisions are confined to the settlement land and that RIICSA's extinguishment of the Tribe's aboriginal claims covered only claims with respect to previous transfers of lands. The court took a narrow view of RIICSA's purpose: clearing titles encumbered by the lawsuit that it settled and in no way addressing the prospect of future land acquisitions by the Tribe. According to the court, the fact that trust acquisition may result in diminished state sovereignty over the parcel does not form a basis for construing RIICSA to prevent the trust acquisition but the basis for an argument for Congress to amend RIICSA.²⁷

Appellate Court Rulings

There are three decisions of the U.S. Court of Appeals for the First Circuit, two of which have been withdrawn but are worth attention for their reasoning. A three-judge panel, in an opinion subsequently withdrawn, ruled in favor of the trust

²⁴ 290 F. Supp. 2d 167 (D.R.I. 2003).

²⁵ 25 U.S.C. § 479 (emphasis supplied).

²⁶ The court cited *Final Determination for Federal Acknowledgment of the Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177, 6178 (February 10, 1983), as authority for attributing to the Tribe "'a documented history dating from 1614.'" *Carcieri v. Norton*, 290 F. Supp. 2d 167, 181.

²⁷ The court stated: "[a]lthough [RIICSA provisions] reveal an intent to resolve *all* claims, whether for possession or damages, that are premised upon the Narragansetts' assertions of aboriginal right, the provisions do not reveal an intent to otherwise restrict the tribe's legal rights and privileges, including those benefits which became available to the tribe upon attaining federal acknowledgment." *Id.* at 183.

acquisition but did not address the jurisdictional question.²⁸ The panel found that section 465 provided the SOI with authority to take land into trust for the Tribe in spite of the fact that the Tribe had not been federally recognized in 1934. It rejected Rhode Island’s arguments that, for section 465 to apply, a tribe must have been both recognized and subject to federal jurisdiction in 1934. The opinion focused on the interaction between section 465, which authorizes the SOI to take land into trust “for Indians,” and section 479, which defines “Indians” as “all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction.”²⁹ The court chose to defer to DOI’s “longstanding interpretation of the term ‘now’” as meaning “today” rather than “1934”³⁰ It viewed this interpretation as in accord with the Supreme Court’s interpretation of the statute in *United States v. John*³¹ and buttressed by the Federally Recognized Indian Tribe List Act³² and a 1994 amendment to the IRA.³³

On rehearing,³⁴ the panel reiterated its earlier rationale on the IRA issue and squarely addressed the jurisdictional issue. A majority of the panel, relying on a principle of statutory construction sometimes used to interpret Indian affairs legislation,³⁵ rejected Rhode Island’s arguments that, taken together, certain provisions of the Settlement Act precluded any tribe from exercising sovereignty over land in Rhode Island except to the extent specified in RIICSA. The majority of the panel read the Settlement Act as crystal clear in settling claims related to prior land transactions but ambiguous in failing to mention future land transfers. The

²⁸ *Carcieri v. Norton*, 398 F. 3d 22 (1st Cir. 2005).

²⁹ Emphasis added.

³⁰ *Id.* at 30.

³¹ 437 U.S. 634 (1978). In this case the Court ruled that the IRA applied to the Mississippi Choctaws, whose tribal existence had been extinguished in 1831 by treaty, because they met the other prong of the IRA test—having one-half Indian blood. In reaching this decision, however, the Court inserted in brackets [in 1934] as a substitution for “now” when it quoted from the definition of Indians in the IRA. *Id.* at 650. Rhode Island has characterized this as “the applicable statutory test necessary for a tribe, such as the Narragansetts, to be included in the IRA absent a later act of Congress.” *Cachieri v. Kempthorne* (07-526), Petition for Writ of Certiorari 15.

³² P.L. 103-454, 108 Stat. 4791 (1994), requiring SOI to maintain a list of federally recognized tribes “eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 479a-1(a).

³³ P.L. 103-263, 108 Stat. 707, 25 U.S.C. § 476(f). This statute forbids federal departments or agencies from issuing any regulation which “classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”

³⁴ *Carcieri v. Norton*, 423 F.3d. 45 (1st Cir. 2005) (rehearing en banc granted, opinion withdrawn; withdrawn for West reporter publication at request of the court) (available in Westlaw, Allfeds file, May 30, 2008).

³⁵ This principle requires that “statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.” *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

majority, relying on the canon of construction, resolved this ambiguity in favor of the Narragansetts: “Once the tribe received federal recognition in 1983 ... it gained the same benefits as other Indian tribes, including the right to apply to have land taken into trust pursuant to § 465.”³⁶

In a dissent, however, Circuit Judge Howard, took the view that the intent of the parties to the Settlement Act was that Rhode Island laws should apply throughout Rhode Island and that the language in the JMOU and in RIICSA could fairly be interpreted to that end.³⁷

On rehearing, en banc, a divided First Circuit ruled on both the IRA and jurisdictional issues. It found that the definition of Indian in 25 U.S.C. § 479, with its use of the phrase “now under federal jurisdiction,” is “sufficiently ambiguous” to implicate what is known as the *Chevron* test.³⁸ This involves a two-part examination of statutory language: (1) If Congress has directly spoken on the precise question at issue and its intent is clear and unambiguous, courts must defer to that interpretation of the law. (2) If the meaning or intent of a statute is silent or ambiguous, courts must give deference to the agency’s interpretation of the law if it is based on a permissible and reasonable construction.³⁹ The court found, by examining text, context, and legislative history, that the IRA is ambiguous on the question of whether trust acquisitions are available for tribes not recognized in 1934.⁴⁰ It, therefore, moved to the second prong of the *Chevron* test and found the Secretary’s interpretation to be reasonable and consistent with the statute.⁴¹

³⁶ 423 F. 3d. 45, at 62.

³⁷ According to the dissent:

It is not surprising that the Settlement Act does not refer explicitly to the preservation of State jurisdiction outside of the Settlement Lands. As sovereign, Rhode Island already had jurisdiction outside of the Settlement Lands, and the Settlement Act extinguished any potential competing ‘Indian’ claims to that land. The only land about which there might have been doubt was the Settlement Lands, and as to that land, State jurisdiction was expressly preserved.

In the circumstances of this case, holding that Rhode Island is divested of our jurisdiction by the Secretary taking into trust the adjacent parcel that was part of the original disputed land upsets the fairly expressed expectations of the parties. It also produces an unwarranted anomalous relationship between the Settlement lands and the after acquired parcel. 423 F. 3d 45, 72-73. (Howard, J. dissenting).

³⁸ The test was articulated by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

³⁹ *Id.* at 843.

⁴⁰ 497 F. 3d 15, 26 (“there is ambiguity as to whether to view the term ‘now’ as operating at the moment Congress enacted it or at the moment the Secretary invokes it.”). The court also raised the question of whether the word “now” was meant to restrict the applicability of IRA temporally to individual Indians who were under federal supervision in 1934, rather than tribes.

⁴¹ In this context, the court rejected Rhode Island’s arguments that the SOI had changed (continued...)

On the jurisdictional issue, the en banc majority ruled against the State's basic arguments principally by characterizing them as requiring a finding that RIICSA implicitly repealed the Secretary's authority to take land into trust for the Tribe. It cited Supreme Court authority requiring a high standard for repeals by implication.⁴² It found "nothing in the text of the Settlement Act that clearly indicates an intent to repeal the Secretary's trust acquisition powers under IRA, or that is fundamentally inconsistent with those powers."⁴³ The opinion also identified support for its position in the existence of other statutes settling Indian land claims which did have provisions clearly limiting SOI trust acquisition authority.⁴⁴ From this it reasoned, the Congress knew how to preclude future trust acquisitions and clearly did not choose to use this approach in RIICSA.

The court turned down as not within its power the State's request that, if the court were to uphold the trust acquisition, it should require the SOI to limit the Tribe's jurisdiction to that specified for the settlement lands, i.e., with Rhode Island retaining civil and criminal jurisdiction. The court acknowledged that such a directive would preserve what the State, in good faith, believed to have been the essential component of its bargain in agreeing to the JMOU and to RIICSA, i.e., maintaining State sovereignty. It suggested, however that the power to limit jurisdiction over the newly acquired land was the prerogative of Congress, not the courts or the SOI.

The two dissenting opinions raised arguments that are likely to be advanced by the State in its Supreme Court merits brief. Circuit Judge Howard would have found that (1) the parties to the JMOU and Congress, in enacting RIICSA, intended to resolve all Indian claims in Rhode Island past, present, and future; (2) RIICSA contains broad language which maybe fairly interpreted as impliedly and partially repealing SOI authority under the IRA to take land into trust for the Tribe; (3) the fact that other settlement acts included provisions limiting jurisdiction, should there be subsequent approvals of trust acquisitions, is irrelevant because RIICSA clearly contemplated that there would be no trust acquisition other than that of the settlement lands; and (4) to read RIICSA as if it did not preclude subsequent jurisdictional adjustments outside of the settlement lands would be "antithetical to Congress' intent" and "absurd."⁴⁵ Senior Circuit Judge Selya's dissent characterizes the majority's construction of the RIICSA as "wooden" and "too narrow," and the result,

⁴¹ (...continued)

position on the issue over the years, noting that no application for trust acquisition had been rejected because the applicant tribe had not been recognized in 1934. 497 F. 3d 15, 31.

⁴² The court cited *Morton v. Mancari*, 417 U.S. 535 (1974), and *Posadas v. National City Bank of New York*, 296 U.S. 497 (1936).

⁴³ 497 F. 3d. 15, 37.

⁴⁴ The Maine Indian Claims Settlement Act (MICSAs), for example, provides that "[e]xcept for the provisions of the [MICSAs], the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians ... in ... Maine." 25 U.S.C. § 1724(e).

⁴⁵ 497 F. 3d. 15, 49-50 (Howard, Circuit J., dissenting).

“absurd.”⁴⁶ Judge Selya argued that RIICSA must not be divorced from its historical context.⁴⁷

Potential Impact

The Court may choose to resolve this case as a matter of statutory construction. It may elect to apply canons favoring a liberal interpretation of statutes providing Indian benefits and rigorous standards for repeals by implication; on the other hand, it may examine RIICSA from the point of view of the bargain that the parties contemplated and, as if reforming a contract, interpret the statute to preserve the essentials of that agreement, i.e., limit tribal jurisdiction and preserve state sovereignty. However the Court rules, there are likely to be unexpected and unpredictable consequences for other tribes, other lands, and other issues.

A decision favoring SOI authority to take land into trust for newly recognized tribes would maintain the status quo. If the Court upholds the First Circuit on the IRA issue, the SOI would be able to continue to acquire land in trust for newly acknowledged or recognized tribes, absent an express statutory restriction specific to a particular tribe or land. The contrary decision, while not likely to jeopardize lands already held in trust,⁴⁸ would mean that newly acknowledged tribes would be unable to acquire any trust land without further legislation.⁴⁹

If the Court rules that RIICSA is not a bar to the trust acquisition, the Narragansett Indian Tribe would acquire land primarily subject to federal and tribal jurisdiction and presumably eligible for gaming under IGRA since RIICSA’s prohibition on gaming specifies “settlement lands.”⁵⁰ There would also be the

⁴⁶ 497 F. 3d 15, 51-5 (Selya, J., dissenting).

⁴⁷ “The Settlement Act, when taken together with the extinguishment of all Indian claims referable to lands in Rhode Island, the Tribe’s surrender of its right to an autonomous enclave, and the waiver of much of its sovereign immunity ... suggests with unmistakable clarity that the parties intended to fashion a broad arrangement that preserved the State’s civil, criminal, and regulatory jurisdiction over any and all lands within its borders.” *Id.* 51.

⁴⁸ Under Quiet Title Act, suits contesting title to Indian trust lands may not be entertained by the courts. 28 U.S.C. § 2409a.

⁴⁹ This would seemingly conflict with other statutes that assume that one of the consequences of tribal acknowledgment is the ability to acquire trust land. See, e.g., 25 U.S.C. § 2719(b)(1)(B)(iii). DOI regulations, in existence since 1980, which set forth the land acquisitions procedures and policies, do not preclude trust acquisitions for newly acknowledged tribes. See, e.g., 25 C.F.R., Part 151. Under 25 C.F.R. § 151.2(b), the SOI may take land into trust for “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.”

⁵⁰ 25 U.S.C. § 1708(b).

possibility that tribes subject to jurisdictional limitations in other settlement legislation would test their ability to extend their sovereignty.⁵¹

Whether the impact of a ruling against the Tribe on the RIICSA issue would have consequences beyond Rhode Island depends on the rationale of the decision. If the Court finds a textual basis for holding that RIICSA indicates that Congress intended to oust tribal jurisdiction in Rhode Island for all times by the breadth of the language extinguishing claims, ramifications outside of the facts of the case are not likely. If the decision rests on the extinguishment of aboriginal title in RIICSA, its effect might reach beyond the borders of Rhode Island and the Narragansett Tribe. Were the Court to find that by extinguishing tribal aboriginal title Congress foreclosed any subsequent trust acquisition or reassertion of jurisdiction, there might be a rash of challenges to the authority of other Indian tribes which have reacquired and placed into trust land to which their aboriginal title had been extinguished.

⁵¹ This seems to be one of the principal concerns of the states submitting an amicus brief in support of Rhode Island's petition for *certiorari*. *Carcieri v. Kempthorne* (No. 07-526), Brief of States of Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah, as *Amici Curiae* in Support of Petitioners. They argue that RIICSA contains provisions similar to those in several other settlement acts, but do not cite the specifics. *Id.* at 13.