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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

TOHONO O'ODHAM NATION,

Intervening Defendant.

Case No. CV10-1993-PHX DGC

Case No. CV10-2017-PHX DGC (consolidated action)

Case No. CV10-2138-PHX DGC (consolidated action)

CITY OF GLENDALE'S MOTION FOR SUMMARY JUDGMENT

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MOTION

Plaintiff City of Glendale ("Glendale" or the "City") moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

MEMORANDUM OF POINTS & AUTHORITIES

Introduction

Glendale brings this action to prevent the creation of an Indian reservation—and the construction of a massive Las Vegas-style casino complex—on land located squarely within the City's borders, without the consent of either Glendale or the State of Arizona.

In 2003, the Tohono O'odham Nation ("the Nation") used a shell corporation to quietly purchase 135 acres of land within western Glendale, more than 100 miles from the Nation's main reservation and governmental headquarters. The Nation held the parcel in secret for six years, watching as residential development blossomed and a new high school sprang up across the street. Then, in 2009, the Nation unveiled its plans: To the shock of Glendale officials—who had no idea the Nation even owned the property, and whose city has no gaming facilities—the Nation announced that it would use the site to open a $600 million, 1.2 million square foot gaming center, complete with a 150,000 square foot casino, more than 1,000 slot machines, dozens of gaming tables, and parking for 4,000 cars. The Nation asserted that the City was powerless to stop its plan. That same day, the basis for that bold assertion became clear: The Nation filed an application asking the Secretary of the Interior (the "Secretary") to take the property into trust as an Indian reservation—a step that would permanently remove the land from state and local control—and to approve its use as a mega-casino.

Opposition quickly followed. Glendale's mayor and city council, Arizona's governor, members of the Arizona congressional delegation, the mayors of nearby cities, and a number of Arizona tribes all spoke out against the Nation's plan and asked the Secretary to reject it. They explained that the parcel did not meet statutory requirements for Indian trust property. And they pointed out that the Nation's move to create a reservation far from its traditional lands, purely to conduct gaming, was an abuse of the land into trust process. But their objections were to no avail. On July 23, 2010, the Secretary issued a decision letter (the "Decision") granting the application and determining to take "Parcel 2"—a 54-acre portion of the Nation's 135-acre parcel—into trust. The Nation has since reaffirmed that, if and when the parcel is taken into trust, it will build its casino.

The Secretary's Decision was unlawful and cannot stand. First, the land is not eligible for acquisition under the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) (the "Gila Bend Act" or "Act"), on which the Nation and the Secretary relied. The Act forbids the creation of Indian reservations on land located "within the corporate limits of any city or town," Act § 6(d), and the Nation's parcel sits within the corporate limits of Glendale. The Secretary's contrary conclusion was arbitrary, capricious, and contrary to law.

Second, as set forth in the motion and memorandum submitted by the Gila River Indian Community ("Gila Memorandum"), the trust acquisition is prohibited under Act § 6(c). Section 6(c) authorizes the Nation to purchase no more than 9,880 acres of land pursuant to the Act. But the Nation had already purchased some 16,000 acres of land

pursuant to the Act before it bought the parcel at issue in this case. For this reason, too, the Decision was arbitrary, capricious, and contrary to law.

Third, as also set forth in the Gila Memorandum, the Secretary did not follow his own rules and policies regarding land on which gaming will be conducted. Those rules and policies require the Department of the Interior (the "Department") to determine—before approving a trust application for any land that will be used for gaming—whether the land satisfies certain requirements of the Indian Gaming Regulatory Act. The Secretary failed to do that here. Glendale joins the arguments set forth in the Gila Memorandum with respect to this claim and the Section 6(c) claim discussed above.

Fourth, the Gila Bend Act, as applied, violates the Tenth Amendment to the U.S. Constitution. The Tenth Amendment forbids the federal government from "impair[ing] the States' integrity," Fry v. United States, 421 U.S. 542, 547 n.7 (1975), or taking from the States any of the "essential attributes inhering" in sovereign status, Alden v. Maine, 527 U.S. 706, 714 (1999), without their consent. But that is exactly what the federal government is attempting to do here. If the Secretary has his way, a substantial swath of land will be effectively removed from Arizona's sovereign control without the consent—indeed, over the continuing objection—of Arizona and its political subdivision, Glendale. The Constitution does not permit the federal government to go so far. For the same reasons, the Act, as applied, exceeds Congress' power under the Constitution's Indian Commerce Clause.

For all of these reasons, this Court should declare the Secretary's Decision unlawful and enjoin the Secretary from taking the land at issue into trust.

Standard of Review

This Court sets aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). Action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency," Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), or if the decision is not "based on a permissible construction of the statute." Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1198 (9th Cir. 2008) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-843 (1984)). Thus while the Court defers to the Department's "reasonable interpretations of its governing statutes," Golden Nw. Aluminum Inc. v. Bonneville Power Admin., 501 F.3d 1037, 1045 (9th Cir. 2007), it "must reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9. And it "must not rubber-stamp . . . administrative decisions . . . that frustrate the congressional policy underlying a statute." Arizona Cattle Growers' Ass'n v. Bureau of Land Mgmt., 273 F.3d 1229, 1236 (9th Cir. 2001).

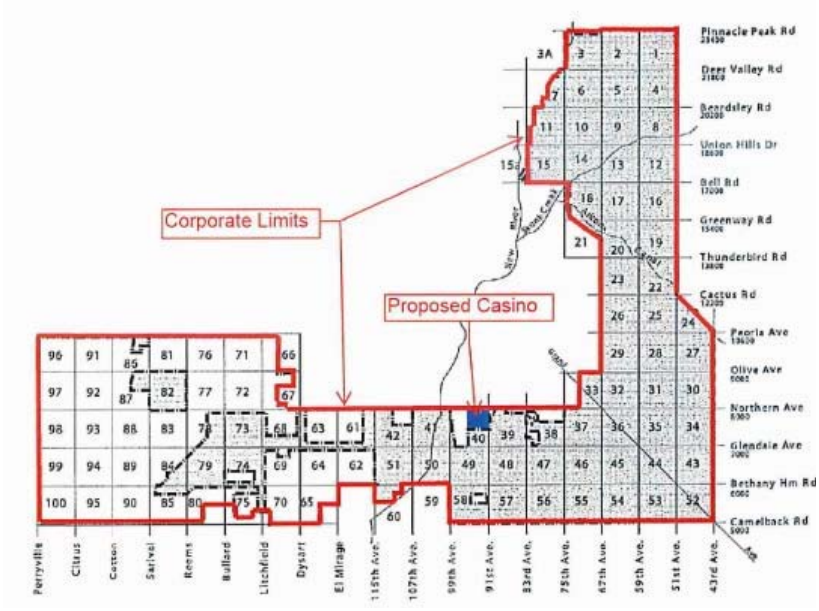
Argument

I. THE PARCEL IS INELIGIBLE TO BE TAKEN INTO TRUST BECAUSE IT LIES "WITHIN THE CORPORATE LIMITS" OF GLENDALE.

The Secretary's challenged action is unlawful because Parcel 2 does not meet the basic requirements of the Gila Bend Act. The Act makes clear that land cannot be taken into trust if it is "within the corporate limits of any city or town," Act § 6(d), and Parcel 2 sits within Glendale's corporate limits. The Secretary's action thus is contrary to law.

A. Facts

Parcel 2 is fully encircled by incorporated Glendale land, as shown below:



AR1101. Parcel 2 is part of the parcel of land shown in blue.[1] The strip of territory bordering it on the north—shown in red—is incorporated land that forms part of Glendale's exterior boundary. SOF ¶¶ 8-9. (This process of "strip annexation" is explained in detail in the Statement of Facts.) Indeed, there is no dispute that Parcel 2 is fully encircled by Glendale-incorporated land: The Government admits that Parcel 2 is "surrounded and enclosed by land that has been annexed into Glendale's jurisdictional limits," Gov't Answer to Glendale Compl. ¶ 18; and the Nation admits Parcel 2 is part of a " 'county island' of unincorporated territory surrounded by land that has been incorporated" by Glendale. Tohono O'odham Answer to Glendale Compl. ¶ 18.

As discussed at greater length in the Statement of Facts (¶¶ 8-10), Parcel 2 came to be within Glendale's exterior boundary in 1977, when the City annexed a large area west of the city center. That annexation enclosed Parcel 2 by incorporating strips of

land in varying widths along Northern Avenue out to 107th Avenue to the west. SOF ¶ 9. Most of the area enclosed within the city limits in 1977 has since been annexed by the City. SOF ¶ 10. And while Parcel 2 has not been annexed, Glendale has long included it in city planning and exercised over it the powers described in the Statement of Facts. SOF ¶¶ 11-14. The parcel is part of Glendale's Municipal Planning Area, is included in its General Plan, and has been included in the City's waste and wastewater planning. SOF ¶ 11. Glendale's General Plan guides zoning and subdivision of the parcel. SOF ¶ 12. Glendale also has exclusive authority to annex the land. SOF ¶ 13.

Glendale argued below that Parcel 2 is "within the corporate limits" of the City, under the plain meaning of that phrase, because the corporate limits surround Parcel 2 on all sides. The Secretary rejected that argument. AR8. He reasoned that the phrase "shows a clear intent to make a given piece of property eligible under the Act if it is on the unincorporated side of a city's boundary line." Id. The Secretary thus concluded that Parcel 2 is not within Glendale's "corporate limits"—though it is within the "city limits"—because it has not been incorporated into the city. Id.

B. The Secretary's Interpretation Contradicts The Act's Plain Meaning.

The Secretary's interpretation of Section 6(d), boiled down to its essence, was that the phrase "within the corporate limits" has the exact same meaning as "incorporated land": If land is incorporated then it is within the city's corporate limits, and if it is unincorporated then it is not within the corporate limits. But that analysis ignores the plain meaning of the statutory text and contradicts Congress' intent as

[1] The blue area represents the Nation's full 135-acre holding within Glendale. As explained in the Statement of Facts, "Parcel 2" is a 54-acre piece of that larger parcel.

expressed in the Act. Because "the intent of Congress is clear," Chevron, 467 U.S. at 842-843, the Secretary's contrary interpretation cannot stand.[2]

1. *Plain Meaning.* This Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2350 (2009). "If the plain language of [the Act] renders its meaning reasonably clear," the Court "will not investigate further unless its application leads to unreasonable or impracticable results." United States v. Fei Ye, 436 F.3d 1117, 1120 (9th Cir. 2006).

Here no additional "investigat[ion]" is necessary because the Act "has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). The Act provides that land cannot be taken into trust if it is "within the corporate limits of any city or town." Act § 6(d). "Within" means "[i]n the interior" or "on the inner side." The New Shorter Oxford English Dictionary (1993). "Limit," in turn, means a "boundary" or "frontier." Id.; see also Merriam-Webster Online Dictionary (defining "limit" as "the utmost extent"). "Within the corporate limits" thus means inside the outer boundary, or frontier, of the city.

That is a perfect description of Parcel 2. The strip of land bordering the north edge of Parcel 2 is incorporated land that forms Glendale's outer boundary—i.e., its limits. See City of Safford v. Town of Thatcher, 495 P.2d 150, 152 (Ariz. Ct. App. 1972) (land incorporated via strip annexation forms part of the city's "corporate limits"). Glendale's corporate limits surround Parcel 2. Parcel 2 therefore is "within the

[2] The Nation has relied in other filings on the canon requiring that ambiguities in certain statutes be construed in favor of the affected Indians. See Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985). The canon does not apply here because the text of the Gila Bend Act is clear and unambiguous in forbidding Parcel 2's acquisition.

corporate limits" of the City, Act § 6(d), under the plain meaning of those words. It cannot be taken into trust under the Gila Bend Act.

In support of the contrary conclusion, the Secretary eschewed plain meaning, finding instead that "the term 'corporate limits' is a term of art delineating the incorporated area of a city." AR8. But the cases on which the Secretary relies to define this supposed "term of art"—Speros v. Yu, 83 P.3d 1094 (Ariz. Ct. App. 2004), and Sanderson Lincoln Mercury, Inc. v. Ford Motor Co., 68 P.3d 428 (Ariz. Ct. App. 2003)—never even use the phrase "corporate limits," or, for that matter, either of those words individually. Instead, they merely explain the obvious point that areas that have not been formally incorporated into a city are "not part of the incorporated City." Sanderson, 68 P.3d at 432. By relying on a case that construes the phrase "incorporated city," and using it to analyze the distinct statutory phrase "within the corporate limits," the Secretary commits the cardinal sin of statutory interpretation: He fails to "give effect, if possible, to every clause and word of a statute." United States v. Gallenardo, 579 F.3d 1076, 1086 (9th Cir. 2009) (quoting Stratman v. Leisnoi, Inc., 545 F.3d 1161, 1168 (9th Cir. 2008)). His interpretation flatly ignores the words "within" and "limits." But those words have meaning. If Congress had wanted to forbid trust treatment only for land that is "part of an incorporated city," it knew how to do so. See, e.g., 25 U.S.C. § 1724(i)(2) (allowing Indian tribe to use government-provided funds to purchase "acreage within . . . unincorporated areas of the State of Maine").

The Secretary's reliance on Speros and Sanderson is also misplaced for a second reason: To the extent the cases are relevant, they squarely support Glendale's position. In Speros, the court explained that "county islands"—a term sometimes used to describe

pockets of unincorporated land like Parcel 2—are "entirely within the exterior boundary of the city." 83 P.3d at 1100. Precisely. Parcel 2 is entirely within the exterior boundary—i.e., within the "limits"—of Glendale, even though it is not incorporated into Glendale. It accordingly is not eligible to be taken into trust under the Gila Bend Act.

Finally, there is yet a third reason why the Secretary's "term of art" analysis is erroneous: It ignores the rest of the relevant statutory phrase. The phrase at issue bars trust treatment of land "within the corporate limits of any city or town." Act § 6(d) (emphasis added). The inclusion of "town" explains why Congress chose the modifier "corporate": It serves as a collective adjective referring to the two types of municipal corporate entities, cities and towns, named in the statute. Thus it is not a term of art, but a more elegant way to say "city and town limits." And contrary to the Secretary's suggestion (AR8), Congress could not have substituted "city limits" without producing a nonsense phrase: "within the city limits of any city or town." Seen in that light, the Secretary's concession that the Act would have forbidden trust acquisition of Parcel 2 had it used the words "city limits," see AR8, is fatal to his analysis. The supposed term of art that the Secretary thought required a 180-degree reversal in meaning was no term of art at all, but another way of saying the same thing—"city limits"—that he conceded would defeat the Nation's application.

2. *Congressional Intent*. This plain-meaning analysis is only reinforced by consideration of "the specific context in which that language is used, and the broader context of the statute as a whole." Robinson, 519 U.S. at 341. The "corporate limits" language appears in the following statutory passage:

> Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or

> within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village.

Act § 6(d). The passage contemplates that any new reservation under the Act will be (i) in a county, not a city; and (ii) composed of only a few sprawling parcels of land.[3] Put another way, it protects cities and towns by mandating a reservation comprised of large rural tracts. That congressional intent is flouted by a reservation that features comparatively small pockets of land situated squarely within the confines of a city.

This understanding of Section 6(d) comports with "the broader context of the statute as a whole." Robinson, 519 U.S. at 341. After all, Congress enacted the Gila Bend Act so that the Nation could "replace[ ]" its previous 9,880 acres of rural reservation land, Act § 2; Congress used the words "replace" or "replacement" four times in the Act itself (including the title). And Congress made clear that it envisioned this "replacement" land as a single cohesive reservation for the Nation's people, to replace the single cohesive reservation the nation was giving up. To take just one example: While the Act authorizes the Secretary to waive Section 6(d)'s "three-area" requirement and authorize the purchase of more tracts "if he determines that additional areas are appropriate," the House report explained that "[t]he Committee intends that the term 'appropriate' include circumstances in which the tribe might purchase private lands that, while not entirely contiguous, are sufficiently close to be reasonably managed as a single economic unit." House Report at 11. That description cannot be

[3] The Act envisions the Nation purchasing, and seeking trust treatment for, three parcels of land totaling 9,880 acres. Act § 6(d). Thus, absent a waiver of the three-parcel requirement, the tracts on average would be quite large—making it highly unlikely that Congress envisioned trust treatment for tracts located in urban areas.

squared with a reservation that includes some rural land and some other land located many miles away, smack in the middle of a city. The "within the corporate limits" provision, and the surrounding text, are designed to forbid exactly the sort of disjointed, geographically disparate, partially urban reservation the Secretary has now approved.

C. The Secretary's Interpretation Is At Odds With Arizona Law.

Arizona law likewise supports the common-sense conclusion that land located within a city's outer boundary is "within the corporate limits."[4] Indeed, that is the holding of Flagstaff Vending Co. v. City of Flagstaff, 578 P.2d 985 (Ariz. 1978) (en banc), the leading case on the issue.

In Flagstaff Vending, a company operating on the campus of Northern Arizona University argued that it was not subject to Flagstaff city taxes even though the university sits fully within Flagstaff's city limits. Id. at 987. That was so, the company argued, because the city excluded from taxation all sales made beyond its "corporate limits." Id. The company argued that it was entitled to the "corporate limits" exemption because the university campus was a "state enclave, an island" that was "not subject to the police powers of the City." Appellant's Br. 7, 11,[5] see also Flagstaff Vending, 578 P.2d 985.

The Arizona Supreme Court rejected that argument—and in so doing, it squarely equated a city's "exterior boundary" with its "corporate limits":

> Flagstaff has specifically excluded sales consummated beyond the corporate limits from the tax basis of any retailer. . . . An

[4] "The meaning of a federal statute or rule is generally not determined by state law unless the statute or rule so directs." Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 455 (6th Cir. 2008). At every stage of this case, however, the parties have analyzed Arizona law on the "corporate limits" issue, and the Secretary considered the point in the decision on review. See AR8.

[5] The Flagstaff Vending briefs are available upon request.

> examination of Flagstaff Ordinance No. 436, which describes the corporate limits, demonstrates that the exterior boundary of Flagstaff completely surrounds Northern Arizona University. This geographical fact satisfies the "within" requirement of the ordinances. This conclusion comports with the ordinary meaning of "within"—"on the innerside . . . inside the bounds of a region." Webster's Third New International Dictionary, 2627 (1965). We therefore reject appellant's theory of Northern Arizona University being a geographical entity not "within" the City of Flagstaff[.]

Flagstaff Vending, 578 P.2d at 987 (emphases added). The Supreme Court thus adopted an understanding of "within . . . corporate limits" that comports precisely with the understanding Glendale advocates here: The phrase taken as a whole is geographical, and applies to any territory that sits inside the exterior boundary of the city.

The Secretary brushed aside Flagstaff Vending, stating that it has been "limited by the holdings of Speros and Sanderson," that the land where the university sat "had previously been annexed by the City," and that the land at issue in Flagstaff "received fire protection from the City." AR8. The first of these contentions is incorrect. See supra at 11. The second is irrelevant even if true, because the Flagstaff Vending court certainly never mentioned that fact as a ground for decision and appears not to have known it. See 578 P.2d at 990-991 (Cameron, J., concurring). From all that appears, the court assumed that "the University campus is an autonomous geographical area," Appellant's Br. 7, and rejected the vendor's argument anyway on the ground that the city's "corporate limits" and "exterior boundary" were one and the same. And the third contention—that Flagstaff is somehow distinguishable because the university campus received city fire services and Parcel 2 does not—is entirely illogical. The Secretary did not even attempt to explain how the receipt of fire services could be relevant to the fundamentally geographic question whether particular land lies "within" a city's

corporate limits. Moreover, even if incidents of city service and control were relevant to the inquiry, the Secretary's analysis ignored the fact that Glendale exercises land-use control over Parcel 2—a measure of authority far greater than the provision of city fire service, which typically can be purchased by any adjacent community for a fee.

Nor is Flagstaff Vending the only Arizona authority supporting Glendale's position. Other cases also recognize that a city's outer boundaries are the same as its "corporate limits" or "city limits"—even where those outer boundaries are the product of strip annexation. See, e.g., City of Safford, 495 P.2d at 152 (recognizing that strip annexation "extend[s] the corporate limits" of a city); Petitioners for Deannexation v. City of Goodyear, 773 P.2d 1026, 1027 (Ariz. Ct. App. 1989) (referring to the deannexation of land that had been strip-annexed as "deannexation of a portion of Goodyear's city limits"). And several statutes use the phrase "corporate limits" to refer to the city's perimeter—a meaning notably at odds with the jurisdictional definition the Secretary applied. See Ariz. Rev. Stat. Ann. § 9-461.11(A) (municipality may, in certain circumstances, exercise jurisdiction "both to territory within its corporate limits and to that which extends a distance of three contiguous miles in all directions of its corporate limits"); id. § 9-462.07(A) (same); but see Ariz. Rev. Stat. Ann. § 9-500.23. These authorities recognize what the Secretary denies: the term "limits" has meaning—and in the present context, it unambiguously means a city's outer boundaries.

* * *

Land may be "within" a municipality's "corporate limits" even though it has not been incorporated by the municipality. That is the case here. Parcel 2 accordingly does not "meet[ ] the requirements" of the Gila Bend Act. Act § 6(d). The Court should

declare unlawful the Secretary's Decision that Parcel 2 qualifies for acquisition under the Act and enjoin the Secretary from taking Parcel 2 into trust.

II. THE GILA BEND ACT, AS APPLIED, VIOLATES THE TENTH AMENDMENT.

The Secretary's decision is also unlawful for a second reason: The Gila Bend Act, as applied here, violates the Tenth Amendment by diminishing the state's sovereign control over its land without the state's consent. Likewise, the Act as applied exceeds Congress' authority under the Indian Commerce Clause.

A. The Tenth Amendment Prohibits Federal Infringement Of A State's "Essential Attributes," Including Sovereign Control Over Its Land.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. It is one of "numerous constitutional provisions" affirming that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' " Printz v. United States, 521 U.S. 898, 918-919, 924 n.13 (1997) (quoting James Madison, The Federalist No. 39, Independent Journal, Jan. 16, 1788).

While the particulars of Tenth Amendment jurisprudence have shifted with the decades, the Supreme Court has never wavered from its "conviction that the Constitution precludes 'the National Government [from] devour[ing] the essentials of state sovereignty.' " Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) (quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)). Put another way, the Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity," Fry,

421 U.S. 542 at 547 n.7—at least not without the state's consent.[6] Thus Congress cannot undercut a state's "ability to function effectively in a federal system," id., "curtail in any substantial manner the exercise of its powers," Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926), or take from the state any of "the dignity and essential attributes inhering" in sovereign status. Alden v. Maine, 527 U.S. 706, 714 (1999).

High on the list of these untouchable "essential attributes"—as one might expect—is a state's "plenary powers over its own territory." Northern Sec. Co. v. United States, 193 U.S. 197, 347 (1904) (quotation marks & citations omitted). Acknowledging that sovereignty contemplates, by its nature, that the sovereign will exercise control over its own lands, the Supreme Court has held that "Congress has no power to "reserve or convey . . . lands that ha[ve] already been bestowed upon a State." Idaho v. United States, 533 U.S. 262, 280 n.9 (2001); see also id. at 284 (Rehnquist, C.J., dissenting) ("[I]t ignores the uniquely sovereign character of [admission to the Union] . . . to suggest that subsequent events somehow can diminish what has already been bestowed"). Likewise, the Court has held that it "would raise grave constitutional concerns" if the United States "purported to 'cloud' [a state's] title to its sovereign lands" by recognizing a native group's land claim long after the state's admission to the Union. Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1445 (2009). And it has

[6] The state's consent could change matters; the Supreme Court has explained that state consent in some circumstances renders permissible federal action that otherwise would unlawfully invade state sovereignty. See Printz, 521 U.S. at 910-912 ("the critical point" in earlier cases approving commandeering was that Congress could not have "impose[d] these responsibilities without the consent of the States.") (emphasis in original); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 143-144 (1939) (rejecting Tenth Amendment claim because "there [wa]s no objection" to the federal action "by the states"). But see New York v. United States, 505 U.S. 144, 181 (1992).

suggested that congressional action that causes a state to suffer a "loss of political jurisdiction" over its lands—including by the expansion of tribal prerogatives—unlawfully "interfere[s] with the sovereignty of the state." State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 & n.58 (1941); accord United States v. Lara, 541 U.S. 193, 205 (2004) (expansion of a tribe's criminal jurisdiction presented no question of "potential constitutional limits" on congressional power only because it "involve[d] no interference with the power or authority of any State").

The state's power to control the use of its land is also among the "essential attributes inhering" in sovereign status. Alden, 527 U.S. at 714. "[L]and-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community." Petersburg Cellular P'ship v. Board of Supervisors, 205 F.3d 688, 703 (4th Cir. 2000) (citation omitted). Indeed, to block a locality from controlling land use is "nothing short of . . . end[ing] its existence in one of its most vital aspects." Id. That is a result of the Framers' design: Under the Constitution "nearly the whole charge of interior regulation is committed" to the states. Lane County v. Oregon, 74 U.S. 71, 76 (1868). And precisely because "[r]egulation of land use [is] a function traditionally performed by local governments," Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994), it raises "significant constitutional questions" when Congress "significant[ly] impinge[s] . . . the States' traditional and primary power over land and water use." Solid Waste Agency v. U.S. Army Corps of Engineers, 531 U.S. 159, 174 (2001).

B. The Secretary's Decision Violates The Tenth Amendment.

The Secretary's decision to take Parcel 2 into trust pursuant to the Gila Bend Act violates the Tenth Amendment because it strips these core elements of sovereignty from Arizona and its municipal subdivision, Glendale, without the state's consent.

1. *Political Jurisdiction.* The Act provides that land taken into trust "shall be deemed to be a Federal Indian Reservation for all purposes." Act § 6(d). And "federally-recognized reservations . . . are, in many ways, separate jurisdictions from the state in which they are located." Tworek v. United States, 46 Fed. Cl. 82, 87 (2000). "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that tribal sovereignty 'is dependent on, and subordinate to, only the Federal Government, not the States.' " California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (citations omitted). "[T]he doctrine of tribal sovereignty . . . historically gave state law 'no role to play' within a tribe's territorial boundaries." Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-124 (1993) (quoting McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 168 (1973)). Thus " '[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' " Bryan v. Itasca Cnty., 426 U.S. 373, 376 n.2 (1976) (quoting McClanahan, 411 U.S. at 170). Likewise, "state and local governments lack the power to tax reservation Indians or their land" absent congressional authorization. Quinault Indian Nation v. Grays Harbor Cnty., 310 F.3d 645, 648 (9th Cir. 2002).

All of these principles will apply to Parcel 2 if it is taken into trust: Arizona and Glendale will be stripped of virtually all power to govern the land—an "essential

attribute[ ] inhering" in sovereign status. Alden, 527 U.S. at 714. Arizona law generally will not apply to members of the Nation within Parcel 2. Bryan, 426 U.S. at 376 n.2. Arizona and Glendale will lose authority to tax property in Parcel 2. Quinault, 310 F.3d at 648. Glendale will lose the power to annex the parcel. See Carefree Improvement Ass'n v. City of Scottsdale, 649 P.2d 985, 986 (Ariz. Ct. App. 1982). And Glendale will be stripped of its authority to "influence" the parcel with respect to "other activities subject to regulation under the police power." Id. at 992.

2. *Control Over Land Use.* Moreover—and importantly for this case—tribal sovereignty principles "specifically prohibit[] state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning . . . or the exercise of general civil jurisdiction over the members of the tribe." Crow Tribe of Indians v. State of Mont., 650 F.2d 1104, 1110 (9th Cir. 1981) (citations omitted); accord Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 433 (1989) (Indians have the power "to regulate land use" on reservations). The Ninth Circuit thus has rejected attempts to apply local laws, including zoning ordinances and building codes, to reservation lands absent congressional authorization. See, e.g., Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390-94 (9th Cir. 1987); United States v. Humboldt Cnty., 615 F.2d 1260, 1261-62 (9th Cir. 1980).

That elimination of the zoning and land-use authority would have a severe impact on Arizona's sovereign power, as delegated to Glendale by state law. Under current law, zoning and subdivision of Parcel 2 must be guided by Glendale's zoning rules and land-use plan, and, as a practical matter, Maricopa County cannot make any use of the land that undermines that plan. SOF ¶¶ 8-15; see Gov't Answer to Glendale

Compl. ¶ 18 (admitting that Parcel 2 is "planned and protected by Glendale"). The City has planned Parcel 2 in its General Plan, accounted for the area in its waste and wastewater plans, and developed the land around Parcel 2 in reliance on its comprehensive land-use approach. AR 513-36; see supra at 5-6. The City does not want—and would never have approved—a massive casino in the midst of this largely residential area that hosts, among other things, a high school. SOF ¶ 18. If Parcel 2 becomes an Indian reservation, the City no longer will have a choice in the matter. Its land-use authority will be eliminated.

In short, while "[s]tate sovereignty does not end at a reservation's border," Nevada v. Hicks, 533 U.S. 353, 361 (2001), there can be no denying that a core attribute of that sovereignty—the right to exercise jurisdiction over land—would be eviscerated by the Secretary's action, while another—the right to control land use—would cease to exist.[7] The Tenth Amendment forbids that result. Indeed, the Secretary's action does precisely what the Supreme Court has cautioned against: It causes the state a "loss of political jurisdiction" over its lands, Atkinson, 313 U.S. at 534 n.58, and it "significant[ly] impinge[s] . . . the States' traditional and primary power over land and water use." Solid Waste Agency, 531 U.S. at 174. These are among the essential underpinnings of statehood. The challenged action accordingly "impairs [Arizona's] integrity," Fry, 421 U.S. at 547 n.7, and "curtail[s] in a[ ] substantial manner the exercise of [Arizona's] powers." Metcalf & Eddy, 269 U.S. at 523. It cannot stand.

[7] The loss of political jurisdiction would affect a relatively small land area. But that is irrelevant; Tenth Amendment interests are not amenable to balancing tests. New York, 505 U.S. at 177-178. In any event, no principle separates this case from cases in which the Government has sought to take thousands of acres into trust. E.g., New York v. Salazar, 701 F. Supp. 2d 224 (N.D.N.Y. 2010) (more than 13,000 acres).

III. THE GILA BEND ACT, AS APPLIED, EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE.

The argument articulated above has been rejected by several courts (none in this circuit) in recent years. E.g., Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007), rev'd on other grounds sub nom. Carcieri v. Salazar, 129 S. Ct. 1058 (2009); City of Roseville v. Norton, 219 F. Supp. 2d 130 (D.D.C. 2002), aff'd, 348 F.3d 1020 (D.C. Cir. 2003). But the rationale adopted by these courts—that (i) the Indian Commerce Clause gives Congress "plenary power," (ii) Congress therefore can strip land from state control, and (iii) since the Clause authorizes Congress' action, the Tenth Amendment cannot forbid it—relies on misunderstandings of both constitutional provisions. The Indian Commerce Clause does not authorize what the Secretary seeks to do here.

A. The Few Courts That Have Analyzed The Issue Have Misapplied The Indian Commerce Clause And The Tenth Amendment.

The Supreme Court said in New York v. United States, 505 U.S. 144, 156 (1992), that the Tenth Amendment and Article I "are mirror images": "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if [it] is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Seizing on that statement, a few courts have dismissed challenges similar to Glendale's on the basis that the Constitution generally authorizes Congress to regulate Indians:

> The powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . ." Because Congress has plenary authority to

> regulate Indian affairs, [the challenged statute authorizing Indian land trust acquisitions] does not offend the Tenth Amendment.

Carcieri, 497 F.3d at 39-40 (citations omitted) (quoting New York, 505 U.S. at 156).

This analysis is fatally flawed twice over. First, it suggests that because the Tenth Amendment and Article I are "mirror images," a court can ignore the Amendment—and the Constitution's other state-sovereignty guarantees[8]—and look only to Article I to decide if congressional action is authorized. But that approach is squarely foreclosed by the Supreme Court's subsequent decision in Printz. There the Court rejected the notion that the Commerce Clause, in tandem with the Necessary and Proper Clause, authorizes Congress to commandeer state officials into enforcing federal handgun restrictions. See 521 U.S. at 923-924. It so concluded because the Tenth Amendment cabined Congress' "Necessary and Proper" powers. Explained the Court: "When a 'La[w] . . . for carrying into Execution the Commerce Clause' violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier"—including the Tenth Amendment—"it is not a 'La[w] * * * proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.' " Id. (quoting Alexander Hamilton, The Federalist No. 33, Independent Journal, Jan. 2, 1788) (first emphasis added).

Thus the Tenth Amendment is no irrelevancy; it and related provisions inform the scope of Congress' affirmative power. And where, as here, Congress asserts the power

[8] Printz explained that "[o]ur system of dual sovereignty is reflected in numerous constitutional provisions" in addition to the Tenth Amendment. 521 U.S. at 923 n.13. It cited, among others, "the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3" and "the Guarantee Clause, Art. IV, § 4." Id. at 919.

to strip away a state's control over its land without its consent, that assertion "violates the principle of state sovereignty." Id. at 924; see supra at 16-19. Indeed, while the Supreme Court has not had occasion to offer a square holding on the issue, it has suggested that this is precisely the approach it will take. In Atkinson, it stated that where federal requisition of state land causes the state "loss of political jurisdiction over the lands taken" without state consent, that unlawfully "interfere[s] with the sovereignty of the state." 313 U.S. at 534-535 & n.58. Just so here. Likewise, in Lara, the Court concluded that Congress "possess[es] the constitutional power to lift the restrictions on . . . tribes' criminal jurisdiction over nonmember Indians." 541 U.S. at 200. It explained that it was "not now faced with a question dealing with potential constitutional limits" on Congress' Indian Commerce Clause authority to alter tribal status because the case "involves no interference with the power or authority of any State." Id. at 205 (emphasis added).[9] This case, by contrast, involves just such "interference." Under the approach laid out in Printz, Congress' assertion of power must be rejected.

Carcieri and like cases ignored this sovereignty inquiry altogether in analyzing Congress' power—a fundamental error. But they also erred in a second way: They concluded (with scant analysis) that the power to take land into trust for Indians, and comcomitantly to diminish state jurisdiction, must exist under the Indian Commerce Clause because Congress has "plenary power to legislate in the field of Indian affairs." Carcieri, 497 F.3d at 39 (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)). That analysis misses the mark. To say Congress has "plenary" Indian

[9] One academic referred to this as a "warning shot at Congress" regarding Tenth Amendment limits on the Indian Commerce Clause power. A. Skibine, Tribal Sovereign Interests Beyond the Reservation Borders, 12 Lewis & Clark L. Rev. 1003, 1039 (2008).

regulatory authority is merely to say that it is the only body that can legislate on the topic—in other words, that the state legislatures have no role. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) (under the Indian Commerce Clause states "have been divested of virtually all authority over Indian commerce and Indian tribes"). It certainly is not to say the Congress can do anything it wants in reliance on the Indian Commerce Clause. Indeed, the Supreme Court has squarely rejected that proposition. In Seminole Tribe, it held that "the Indian Commerce Clause does not grant Congress th[e] power" to abrogate states' Eleventh Amendment sovereign immunity. 517 U.S. at 47. And in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), it explained that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." Id. at 84 (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)). See also United States v. Kagama, 118 U.S. 375, 378 (1886) (calling the assertion that the Indian Commerce Clause authorized a federal criminal statute "a very strained construction" of the Constitution). Thus the fact that Congress has "plenary power to legislate in the field of Indian affairs," Carcieri, 497 F.3d at 39, says nothing at all about the question presented: whether Congress has the authority to oust a state from most incidents of sovereignty with respect to its land by converting that land into an Indian reservation without the state's consent.

B. The Indian Commerce Clause Does Not Authorize Congress To Oust State Jurisdiction Over State Territory Without The State's Consent.

Properly applying this jurisprudence, it is apparent that the Indian Commerce Clause does not authorize what the Secretary seeks to do under the Gila Bend Act's auspices. The Secretary's proposed trust acquisition, and negation of state authority on the land, does not "regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I,

sec. 8 (emphasis added)— not if the word "Commerce" is to retain any actual meaning. See United States v. Lopez, 514 U.S. 549, 561 (1995). Nor can it be justified under the Necessary and Proper Clause as a means necessary to execute the Indian Commerce power. As already discussed, the proposed trust acquisition "interfere[s] with the sovereignty of the state" by causing the state the "loss of political jurisdiction over the lands taken" without state consent. Atkinson, 313 U.S. at 534-535 & n.58. And it fails to "require[ ] accommodation of state interests"—the minimum required safeguard in situations where Congress attempts to use its "Necessary and Proper" powers in a way that invades state prerogatives. See United States v. Comstock, 130 S. Ct. 1949, 1962 (2010). As a result, it "violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier." Printz, 521 U.S. at 924. It accordingly cannot be "a 'La[w] . . . proper for carrying into Execution the Commerce Clause.' " Id. at 524 (quoting U.S. Const. art. I, sec. 23) (emphasis in Printz).

The Supreme Court precedent reflects just these concerns. The Court, of course, has recognized that Congress' Indian Commerce Clause power is "broad." Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 837 (1982). But it repeatedly has stopped short of endorsing congressional authority under the Clause to strip states of "political jurisdiction" or otherwise to "interfere with the sovereignty of the state." Atkinson, 313 U.S. at 534 & n.58; Lara, 541 U.S. at 205. And for good reason. Under the state-sovereignty analysis mandated by Printz, such an assertion of authority exceeds Congress' Article I power. That is just what happened here.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of the City of Glendale on all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system for filing and service to counsel of record in these consolidated proceedings.

s/Jennie Larsen