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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, Plaintiff, v. THE UNITED STATES OF AMERICA, *et al.*, Defendants, and TOHONO O'ODHAM NATION, Intervening Defendant.	Case No. 10-cv-01993-PHX DGC Case No. 10-cv-02017-PHX DGC (consolidated action) Case No. 10-cv-02138-PHX DGC (consolidated action)

THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

Defendants United States of America; the United States Department of the Interior, Kenneth L. Salazar, in his official capacity as Secretary of the Interior; and Larry Echo Hawk, in his official capacity as Assistant Secretary of the Interior, collectively, the United States, for the reasons set forth in the accompanying memorandum of facts and law, hereby oppose Plaintiffs' motions for summary judgment and, pursuant to Federal Rule of Civil Procedure 56, file this cross-motion for summary judgment.

Plaintiffs bring exclusively legal arguments, none of which have merit. First, claims under Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the Tenth Amendment, U.S. Const. amend. X, should be dismissed because no Plaintiff has demonstrated standing. Second, the Secretary of the Interior properly interpreted and applied the Gila Bend Indian Reservation Lands Replacement Act ("Lands Replacement Act"), Pub. L. No. 99-503, 100 Stat. 1798 (1986), in determining that a 54-acre parcel of land met the Land Replacement Act's eligibility requirements. Third, even if a Plaintiff had demonstrated standing under IGRA, the Secretary is not required to make a determination on whether land is eligible for gaming under IGRA when taking land into trust. And, fourth, the Lands Replacement Act is a valid exercise of Congress's broad and exclusive authority to legislate in Indian affairs under the Indian Commerce Clause and therefore does not violate the Tenth Amendment.

For the reasons set forth in the accompanying memorandum of facts and law, Plaintiffs' motions for summary judgment should be denied, and summary judgment granted in favor of the United States.

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Respectfully submitted this 30th day of December, 2010,

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MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, AND IN SUPPORT OF THE UNITED STATES' CROSS-MOTION

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The United States hereby opposes Plaintiffs' motions for summary judgment and, pursuant to Federal Rule of Civil Procedure 56, files this cross-motion for summary judgment.

INTRODUCTION

The Gila Bend Indian Reservation Lands Replacement Act constitutes one of Congress's many actions implementing its broad Constitutional authority to legislate in Indian affairs. Congress enacted the statute to remediate past harms to the Tohono O'odham Nation by providing it with new reservation lands and monies to be used to further the Nation's economic self-sufficiency. Pursuant to the Act, the Nation has requested that the Secretary of the Interior accept trust title to a 54-acre parcel of property that the Nation owns in Maricopa County, Arizona. The Secretary has determined that the parcel meets the Act's requirements and will be taken into trust, but has delayed acceptance of title given the present litigation. Plaintiffs the City of Glendale, the Gila River Indian Community, a handful of State Legislators, and several private individuals all oppose the acquisition. Though most fail to articulate how they are specifically harmed by the United States' acceptance of title, their opposition presumably derives from the Nation's plans to open a hotel and resort on the property, which will include a casino. Gaming, however, was not a factor that the Secretary considered in agreeing to take the land into trust. Nor was it required to be. Instead, the Act sets forth limited criteria that, if met, require the Secretary to accept trust title. With respect to the Nation's 54-acre parcel, the Secretary properly interpreted the Act and determined that the parcel met those criteria. Plaintiffs' motions for summary judgment should therefore be denied, and summary judgment should be granted in favor of the United States.

STATUTORY AND REGULATORY BACKGROUND

I. Land-Into-Trust Statutes Generally.

If authorized by an act of Congress, the Secretary of the Interior may hold title to land in trust for the benefit of an Indian Tribe. *See* 25 C.F.R. §§ 151.3, 151.9. Generally, trust acquisition statutes fall into one of two categories. "Discretionary" acquisitions are

those for which Congress has delegated to the Secretary authority to determine whether the acquisition is appropriate under the circumstances. *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1261 (10th Cir. 2001). The most common discretionary acquisition statute is the Indian Reorganization Act of 1934. *See* 25 U.S.C. § 465. Department of the Interior regulations set forth factors the Secretary is to consider in exercising his discretion to acquire land into trust. *See* 25 C.F.R. § 151.10 (on-reservation acquisitions); *id.* § 151.11 (off-reservation acquisitions). "Mandatory" acquisitions, on the other hand, are those for which Congress has directed the acquisition of land into trust, often identifying a specific parcel or certain eligibility requirements for the land. *See Sac & Fox Nation*, 240 F.3d at 1261–62; AR004462–63.[1] When the acquisition statute is mandatory, most of the regulatory factors applicable to discretionary acquisitions do not apply. *See* 25 C.F.R. §§ 151.10, 151.11. Most notably, the notice and comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d), requiring that the Department notify state and local governments of the land-into-trust application, are not applicable, and compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f), is not required. Further, the Secretary is not required to consider the criteria listed in 25 C.F.R. §§ 151.10(a)–(h) and 151.11(a)–(c). The Secretary, however, still must publish notice of the decision to acquire land in trust (*id.* § 151.12(b)), conduct a contaminant survey on the lands pursuant to internal Departmental guidelines, and complete a title examination (*id.* § 151.13).

II. The Gila Bend Indian Reservation Lands Replacement Act.

Congress passed the Gila Bend Indian Reservation Lands Replacement Act ("Lands Replacement Act" or "Act") in 1986. *See* Pub. L. 99-503, 100 Stat. 1798 (1986); *see* AR004355–58. The history behind the Lands Replacement Act, however, began

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[1] The Department of the Interior's Administrative Record was lodged with the Court on October 19, 2010, and supplemented on November 12, 2010. *See* Doc. Nos. 42, 70. The United States cites to the Administrative Record using the page identifiers stamped on the lower right-hand corner of each document: 'AR00xxxx."

much earlier. In 1960, the U.S. Army Corps of Engineers completed construction of the Painted Rock Dam along the Gila River near Gila Bend, Arizona. *See* H.R. Rep. No. 99-851, at 4 (1986); AR004385–97. Flooding from subsequent dam operations destroyed the economic viability of what was then the Tohono O'odham Nation's reservation.[2] H.R. Rep. No. 99-851, at 4–5. Congress first attempted to remedy that harm by identifying agriculture lands near the reservation that would be suitable for a land exchange. *Id.* at 6 (referencing Pub. L. No. 97-293, § 308, 96 Stat. 1274 (1982)). After no such lands could be found, and recognizing its "responsibility to exercise its plenary power over Indian affairs to find an alternative land based [sic] for the O'odham people," Congress turned to the Lands Replacement Act. *See id.* 7–8. Congress intended the Act to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming . . . , and promote the economic self-sufficiency of the O'odham Indian people." Pub. L. No. 99-503, § 2(4).

The Act required that the Nation assign the previously-impacted portions of its reservation to the United States and, thereafter, that the United States pay $30,000,000 to the Nation. Pub. L. No. 99-503, § 4(a). The Act allows the Nation to spend the funds for "land and water rights acquisition, economic and community development, and relocation costs," and related planning and administration costs. *Id.* § 6(a). The Act also includes a mandatory land-into-trust acquisition provision. *See* AR000006–7. The Nation may purchase up to 9,880 acres of land to be taken into trust by the United States. Pub. L. No. 99-503, § 6(c), 6(d). "The Secretary . . . shall hold in trust for the benefit of the [Nation]" any of the 9,880 acres that meet certain requirements. *Id.* § 6(d). Congress provided that:

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[2] The Tohono O'odham Nation was formerly known as the Papago Tribe of Arizona. *See* Pub. L. No. 99-503, § 3(2).

> 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.

Id.

III. The Indian Gaming Regulatory Act.

Congress enacted the Indian Gaming Regulatory Act (IGRA) "to provide a statutory basis for the operation of gaming by Indian tribes . . . ." 25 U.S.C. § 2702(1). The statute creates the National Indian Gaming Commission, which is charged, among other duties, with enforcement of the statute as it regulates gaming. *See id.* §§ 2704(a), 2705, 2706. IGRA categorizes gaming into three classes. *See id.* §§ 2703(6)–(8), 2710. "Class III" gaming includes all forms of gaming that are not (1) social or traditional games engaged in as part of tribal ceremonies ("Class I" gaming); or (2) bingo or similar games ("Class II" gaming). *See id.* § 2703(6)–(8). Class III gaming generally includes banked card games, such as blackjack, and slot machines, *see id.* § 2703(8), and must be conducted pursuant to a compact between the Tribe and the state. *Id.* § 2710(d)(3), (8). Further, a Tribe may conduct gaming only on "Indian lands," *id.* § 2710(b)(1), (d)(3), which includes lands within the limits of any Indian reservation, lands held in trust by the United States for the benefit of the Tribe, or lands held by an Indian tribe subject to restrictions by the United States against alienation. *Id.* § 2703(4). With certain exceptions, IGRA also prohibits gaming on lands acquired after October 17, 1988. *Id.* § 2719.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2003, the Tohono O'odham Nation ("the Nation"), a federally recognized Indian Tribe, purchased 135 acres of land in Maricopa County, Arizona. *See* AR004366. The property is composed of five parcels in Phoenix's northwest suburbs and constituted a "county island" surrounded on all sides by the City of Glendale. *See*

AR003178–94; AR004637–38 (map). In late-January 2009, the Nation requested that the Department of the Interior take the land into trust for the Nation's benefit under the Lands Replacement Act. *See* AR004360–81(memo accompanying application); AR004845–48 (Tribal resolution). The Nation intends to use the land to develop a hotel and resort, including a gaming facility, *see* AR004360–61, though it has withdrawn its request for an opinion from the Department on whether the lands are eligible for gaming under IGRA, AR002163–64. In July 2009, the Nation filed suit against the City of Glendale in response to the City's claims that portions of the Nation's property had previously been annexed by the City. AR002144–53; AR000533–34 (maps). In light of that litigation, the Nation notified the Department that it would like a decision on its application with respect to a 54-acre parcel of the property ("Parcel 2"), which was not the subject of the Nation's suit against the City. AR002100–01.

Parcel 2 sits on the western-most end of the Nation's 135-acre property. *See* AR002091 (map). The parcel is just south of Northern Avenue, and west of 91st Avenue. AR002091; AR004637–38. It is undisputed that Parcel 2 has not been incorporated into the City of Glendale via annexation. *See* Pls.' Unified Statement of Facts ¶ 8 (Doc. No. 87). In January 2010, the Nation underscored its desire to have the land taken into trust after the Arizona Legislature began debating legislation that would have further complicated the Nation's desired trust acquisition. AR001626–37.

On July 23, 2010, the Assistant Secretary for Indian Affairs, acting under his delegated authority, issued a determination that Parcel 2 would be taken into trust. AR00003–10. The decision came after review of, among other materials, the Nation's application and recommendation from the Bureau of Indian Affairs Western Regional Office, *see* AR004290–907, as well as comments submitted by the City of Glendale and the Gila River Indian Community (GRIC). *See* AR000004. The Assistant Secretary determined that Parcel 2 was within Maricopa County, outside the City of Glendale's corporate limits, only the Nation's second acquisition under the Lands Replacement Act,

and that the prior acquisition had only been 3,200 acres.[3] AR000006–9. The Act therefore mandated the acquisition of Parcel 2.

Pursuant to regulation, 25 C.F.R. § 151.12(b), a notice of the Assistant Secretary's decision was published in the Federal Register on August 26, 2010. 75 Fed. Reg. 52,550, 52550–51 (Aug. 26, 2010). On September 16, 2010, GRIC filed suit challenging the Assistant Secretary's decision. The City of Glendale followed with a separate lawsuit five days later. Several GRIC Tribal members ("Terry Plaintiffs") filed a complaint identical to GRIC's on October 6. The Court consolidated these three actions via two separate orders. *See* Doc. Nos. 22, 29. The Tohono O'odham Nation was granted intervention on October 12. *See* Doc. No. 30. And each Plaintiff group eventually filed an amended complaint. *See* GRIC Am. Compl. (Doc. No. 74); Glendale Am. Compl. (Doc. No. 57); Terry Am. Compl. (Doc. No. 58). The Court and Defendants were then faced with a successive onslaught of motions to intervene from numerous State of Arizona legislators purporting to act in their official capacities. The Court granted permissive intervention to a select group of these legislators ("State Legislators") on November 19. Doc. No. 77; *see* State Leg. Compl. (Doc. No. 89). The Governor of Arizona has since filed an amicus brief. Doc. No. 91. Collectively, Plaintiffs argue the Assistant Secretary's decision violated the Lands Replacement Act, the Indian Gaming Regulatory Act and related State law, and the Tenth Amendment and Indian Commerce Clause. Though Parcel 2 can now be acquired by the United States, the Department of the Interior has delayed that acquisition in light of the present litigation. On December 3,

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[3] The Assistant Secretary's decision letter cites to "OIG Tab 1" and "OIG Tab 2." OIG Tab 2 is the Nation's land-to-trust application and begins with the January 28, 2009, letter from Chairman Norris to the Bureau of Indian Affairs (BIA) Western Regional Director at AR004341. OIG Tab 1 is comprised of other documents sent from the BIA Western Region to the Washington, DC, Office of Indian Gaming, and begins at AR004291. Citations to "TON Exhibits" refer to the numbered exhibits that accompanied the Nation's application and begin immediately following the January 28 letter at AR004345, with the nine exhibits following in numerical order.

2010, Plaintiffs filed their respective motions for summary judgment. *See* State Leg. Mem. (Doc. 84); Terry Mem. (Doc. No. 85); Glendale Mem. (Doc. 86);[4] GRIC Mem. (Doc. 88).

STANDARD OF REVIEW

Plaintiffs bring their claims under the Administrative Procedure Act (APA). The APA imposes a narrow and highly deferential standard of review, authorizing a court to set aside agency action only where "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance to law." 5 U.S.C. § 706(2)(A); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Here, Plaintiffs focus on the latter portion of this standard, arguing that the Assistant Secretary acted contrary to law. Cases brought under the APA are properly adjudicated on cross-motions for summary judgment under Federal Rule of Civil Procedure 56. *See Save the Peaks Coal. v. U.S. Forest Serv.*, No. 09-cv-8163, 2010 WL 4961417, at *6 (D. Ariz. Dec. 1, 2010) (citing *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994)). If an agency has acted arbitrarily or not in accordance with the law the proper remedy is for the court to remand the decision to the agency for further consideration. *See Camp v. Pitts*, 411 U.S. 138, 143 (1973).

ARGUMENT

Plaintiffs bring exclusively legal arguments, none of which have merit. First, claims under IGRA and the Tenth Amendment should be dismissed because no Plaintiff has demonstrated standing. Second, the Assistant Secretary properly interpreted and applied the Lands Replacement Act in determining that Parcel 2 met the Act's eligibility requirements. Third, even if a Plaintiff had demonstrated standing under IGRA, the Secretary is not required to make a determination on whether land is eligible for gaming under IGRA when taking land into trust. And, fourth, the Lands Replacement Act is a

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[4] It is unclear from Glendale's motion for summary judgment whether the individual plaintiffs identified in the City's Amended Complaint join the City in the motion. *See* Glendale Mem. at 1 (Doc. No. 86); Glendale Am. Compl. ¶¶ 9, 10.

valid exercise of Congress's broad and exclusive authority to legislate in Indian affairs under the Indian Commerce Clause and therefore does not violate the Tenth Amendment.

I. Plaintiffs Lack Standing for Claims Under the Indian Gaming Regulatory Act and Tenth Amendment.

Numerous of Plaintiffs' arguments can be immediately disposed of because no Plaintiff has demonstrated standing. "Standing is an essential and unchanging part of the case-or-controversy requirement of Article III" of the U.S. Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To demonstrate standing, a plaintiff must show: (1) a concrete, particularized, and actual or imminent injury-in-fact; (2) that the injury is fairly traceable to the defendant's actions; and (3) that the injury is likely to be redressed by a favorable ruling. *Id.* at 560–61. A case may go forward so long as "at least one plaintiff has standing." *Harris v. Bd. of Supervisors, Los Angeles County*, 366 F.3d 754, 761 (2004). But standing must be established for each claim and "each form of relief." *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). At the summary judgment stage, a plaintiff must establish standing through affidavit or other specific facts. *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)). In addition to Article III's requirements, the judiciary has placed several prudential limits on standing. These include the requirements that: (1) plaintiffs' alleged grievances "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'"; (2) courts avoid reviewing "generalized grievances" that are publicly shared; and (3) plaintiffs assert their own legal rights and interests, as opposed to those of third parties. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (citations omitted). Here, Plaintiffs have failed to demonstrate standing for their claims under IGRA and the Tenth Amendment.[5]

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[5] Because the City of Glendale likely has both Constitutional and prudential standing for its claims under the Lands Replacement Act, the United States does not address the other Plaintiffs' standing for those claims. The United States notes, however, that GRIC, the

A. Plaintiffs Do Not Have Standing for Claims Under the Indian Gaming Regulatory Act.

Plaintiffs have failed to demonstrate standing for their claims that the Department acted contrary to IGRA. GRIC, the Terry Plaintiffs, and the State Legislators have not even attempted to substantiate a particularized injury from the trust acquisition of Parcel 2, let alone one related to gaming on the property. The individual plaintiffs that join in Glendale's Amended Complaint limit their gaming-related assertions to "concern[s]" over abstract commercial competition and unspecified "consequences." *See* Hirsch Decl. ¶¶ 10–11 (Doc. No. 87-10); Socaciu Decl. ¶ 8 (Doc. No. 87-2). Similarly, Glendale abstractly alleges injury from the planned casino because the property is "close" to other land uses and the City "anticipates" impacts on property values and investments. *See* Beasley Decl. ¶ 23 (Doc. No. 87-1). Such unspecified, abstract harms are insufficient for standing under Article III. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1150–51 (2009).

Even assuming the alleged injuries demonstrate concrete and particularized harm, Plaintiffs' allegations fail Article III's causation prong. The Assistant Secretary's decision explicitly withheld any determination on whether gaming could occur on Parcel 2. *See* AR000003–10. "Injuries related to the possible building of a casino are . . . not fairly traceable to an agency action that affirmatively declined to determine whether or not a casino could be built on the Property." *Stop The Casino 101 Coal. v. Salazar*, 384 F. App'x 546, 548 (9th Cir. 2010). Absent causation, Plaintiffs' IGRA arguments are nothing more than an "alleged violation of a right to have the Government act in accordance with law." *Lujan*, 504 U.S. at 575. Such generalized interests are not

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Terry Plaintiffs, and the State Legislators have failed to identify any injury and therefore lack Article III standing for their statutory interpretation claims. All Plaintiffs other than Glendale also do not fall within the Land Replacement Act's zone of interests.

judicially cognizable under Article III.[6] *See id.* at 573–76. Absent identification of some gaming-related injury, it also cannot be discerned if Plaintiffs' claims fall within IGRA's zone of interests. *Accord City of Vancouver v. Hogen*, No. 08-cv-5192, 2008 WL 4443806, at **3-5 (W.D. Wash. Sept. 24, 2008).

B. Plaintiffs Do Not Have Standing for Claims Under the Tenth Amendment.

The Court also lacks Article III jurisdiction over Plaintiffs' Tenth Amendment claims. The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997). There are two general categories of claims brought under the Tenth Amendment: (1) those in which a plaintiff argues that the United States has interfered with some aspect of state sovereignty; and (2) those in which a plaintiff argues Congress lacks the authority to legislate in the subject area. *See New York v. United States*, 505 U.S. 144, 156 (1992). GRIC and the Terry Plaintiffs do not bring claims under the Tenth Amendment. And the claims Glendale and the State Legislators assert clearly fall under the first category. *See* Glendale Am. Compl. ¶¶ 92–101; State Legislators Compl. ¶¶ 54–60. Though Glendale argues that the Lands Replacement Act is contrary to Congress's Article I powers, *see* Glendale Mem. at 20–24, the City does not allege that Congress lacks the authority to legislate in Indian affairs. Instead, the City argues that Article I and the Tenth Amendment do not allow Congress to act in a manner that infringes upon "attributes of state sovereignty." *See* Glendale Am. Compl. ¶¶ 105–107.

With respect to alleged infringement upon state sovereignty, it is "settled law . . . that only states have standing to bring Tenth Amendment claims." *Stop the Casino*, 384

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[6] The State Legislators also bring a claim that taking Parcel 2 into trust will violate Arizona's Tribal-State Compact. *See* State Leg. Compl. ¶¶ 52–56; State Leg. Mem. at 8–9. The United States, however, is not a party to gaming compacts under IGRA. *See* 25 U.S.C. § 2710(d)(1)(C), (d)(3)(A).

F. App'x at 548 (citing *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009)); *see Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 135–36, 143–44 (1939) (finding only state has standing to bring claims alleging that federal utility resale rates were regulating state affairs). Thus, the private individuals that join in Glendale's Amended Complaint do not have standing. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1181 (E.D. Cal. 2003) (quoting *Tenn. Elec. Power Co.*, 306 U.S. at 143–44); *see also City of Roseville v. Norton*, 219 F. Supp. 2d 130, 147–48 (D.D.C. 2002) (noting in context of claims similar to those here that a Seventh Circuit decision allowing private party standing cannot be squared with *Tennessee Electric Power*). Similarly, Glendale, as a municipality, lacks standing because it is not "the state[] or [its] officers." *Id.* at 148 (quoting *Tenn. Elec. Power Co.*, 306 U.S. at 144).

The fact that the Governor of Arizona has filed an amicus brief in support of Glendale's arguments does not cure the standing deficiencies. Status as amicus curiae does not make the State of Arizona or its officers parties to this litigation. *See Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Thus, Glendale's arguments under the Tenth Amendment violate the prudential standing principle that prevents a plaintiff from asserting the rights or interests of third parties. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975); *City of Roseville*, 219 F. Supp. 2d at 148. The City's alleged harm to state laws and jurisdiction, *see* Glendale Mem. at 17–19, are predicated on the State's, rather than the Glendale's, interests. The Court should hesitate to find standing where the State has demonstrated its knowledge of the suit and chosen not to intervene or file its own complaint. *See Artichoke Joe's*, 278 F. Supp. 2d at 1181.

The State Legislators also lack standing under the Tenth Amendment because they are not authorized to act as "officers" of the State of Arizona in litigation. Arizona law confers upon the Arizona Department of Law the authority to represent the State in federal court. *See* Ariz. Rev. Stat. § 41-193(A)(3). Article III of the Arizona Constitution prevents the legislature from exercising powers properly belonging to the executive. *See* Ariz. Const. art. 3; art. 5, § 9. Further, only the Attorney General is

authorized to hire outside counsel to represent the State. *See* Ariz. Rev. Stat. § 41-191(C). In allowing the State Legislators permissive intervention, the Court held that Arizona law granted them "standing to obtain relief on behalf of the legislature," even where the legislature has not specifically so authorized. *See* Nov. 19, 2010, Order at 3 (quoting *Bennett v. Napolitano*, 81 P.3d 311, 318 (Ariz. 2003)) (Doc. No. 77). But whether legislators have the authority to represent the legislature is a separate question from whether they have the authority to represent the State. Because the State Legislators lack the latter, they do not have standing to challenge the Assistant Secretary's decision under the Tenth Amendment.

II. The Assistant Secretary Properly Interpreted and Applied the Lands Replacement Act.

Parcel 2 is eligible for acquisition under the Lands Replacement Act. *See* Pub. L. No. 99-503, 100 Stat. 1798 (1986). The Act requires that the Secretary accept property into trust if it meets the requirements of § 6(d). Section 6(d) requires that the land be (1) within Pima, Pinal, or Maricopa Counties; (2) not more than the third acquisition into trust, one of which must be contiguous to San Lucy Village; (3) not within the corporate limits of any city or town; and (4) constitute, with the other acquisitions, not more than 9,880 acres. *Id.* Plaintiffs do not dispute that Parcel 2 is within Maricopa County or that it is less than the third area of land to be taken into trust under the Act. They argue only that the Assistant Secretary improperly interpreted the § 6(d) provision making land "within the corporate limits of any city or town" ineligible; misinterpreted § 6(c)'s acreage limitation; and ignored § 6(e)'s reference to a water management plan. Each argument, however, presents an interpretation contrary to the Act's plain meaning and Congressional intent.

A. Parcel 2 Is Not "Within the Corporate Limits of Any City or Town."

Under the Lands Replacement Act's plain meaning, Parcel 2 is not "within the corporate limits" of the City of Glendale. When interpreting a statute, a court must first look to the text's plain meaning. *Transwestern Pipeline Co. v. 17.19 Acres of Property*

Located in Maricopa County, No. 09-16850, __ F.3d __, 2010 WL 4968708, at *2 (9th Cir. Dec. 8, 2010). "'Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Id.* (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). And courts must look "to the entire statute to determine Congressional intent." *Gov't of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 633 (9th Cir. 1999) (quotation omitted). If the statute's wording is clear, the court's inquiry is at an end. *Id.*

Congress plainly stated that property does not meet § 6(d)'s acquisition requirements if it is "within the corporate limits of any city or town." Pub. L. No. 99-503 § 6(d). In interpreting that provision, the Court need look no further than the common dictionary definitions of "within," "corporate," and "limit." *See Transwestern*, 2010 WL 4968708, at *2, n.3 (recognizing a court's ability to consult dictionary definitions); *United States v. McNeil*, 362 F.3d 570, 572 (9th Cir. 2004). "Within" is defined as "in inner or interior part of." *Black's Law Dictionary* 1602-03 (6th ed. 1990). "Corporate" means "[b]elonging to a corporation." *Id.* at 339. "Limit" is defined as "boundary, border, or outer line of thing" and "[e]xtent of power, right, or authority conferred." *Id.* at 926. Using those definitions, a parcel is not eligible for acquisition if it is on the interior part of the corporation's border and extent of authority. Here, that corporate border is the City's boundary. In fact, one of the few other instances in which Congress has used the phrase "within the corporate limits" was in creating the position of Chief Financial Officer within the District of Columbia's local government. *See* Pub. L. No. 109-356, 120 Stat. 2019, § 201 (Oct. 16, 2006). Congress used the phrase to define the office's authority with respect to special assessments for tax purposes. *See id.* (adding § 424(d) to the District of Columbia Home Rule Act). Congress surely did not intend to extend the office's powers to areas outside the District's boundary lines. Similarly, in the Lands Replacement Act, Congress "show[ed] 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." AR000008.

Reading the statute as a whole, Congress must have intended the "within the corporate limits" language to exclude only land that is actually incorporated into the city. Congress intended the statute to provide the Nation with "lands suitable for sustained economic use which is not principally farming . . . ." Pub. L. No. 99-503, § 2(4). Lands near developed areas and population centers facilitate that purpose. And, while the "within the corporate limits" provision was likely intended to provide some protection to municipalities, protection against proximity makes little sense. Nothing in the Act would prevent the Nation from having a tract taken into trust that is immediately adjacent to Glendale or any other municipality in Pima, Pinal, or Maricopa counties. Instead, the more plausible reading is one aimed at protecting a city's existing land base. Taxes and land-use planning would be preserved by excluding incorporated lands from trust acquisition. The City's efforts to annex other portions of the Nation's property, and claimed losses to potential tax base and the ability to guide land-use planning, Glendale Mem. at 17–19, illustrate the concern. Parcel 2, however, is not part of the City's land base. It is undisputedly outside the City of Glendale's corporate boundary lines. AR004367–68; AR003016 (letter from Maricopa County); AR004311–16 (portions of recommendation from Field Solicitor). And Glendale readily admits that Parcel 2 has not been incorporated into the City. *See* Glendale Mem. at 6, 7–8; Beasley Decl. ¶ 7. Glendale does not tax or directly regulate land use on Parcel 2. *See* Beasley Decl. ¶¶ 11, 14 (stating that Maricopa County "maintain general authority over unincorporated areas" and that the City's taxing authority extends only to incorporated lands).

In arguing that Parcel 2 is nonetheless ineligible, Glendale stretches "within the corporate limits" to mean "inside the outer boundary." *See* Glendale Mem. at 7 (emphasis added). Such an interpretation is contrary to the statute's very words, particularly since it requires inserting "outermost" into Glendale's own common definition of "limit," not to mention the argument's failure to recognize the differences in City authority over unincorporated lands. Indeed, the very point of a boundary is to exclude one thing from another—here, incorporated from unincorporated lands.

Glendale's deconstruction of "limit" effectively reads away Congress's inclusion of "corporate," rendering the chosen modifier meaningless. *See id.* at 9.

And there is no support for Glendale's contention that Congress envisioned only large, rural tracts for acquisition. *See id.* at 10–11. First, Congress did not place an acreage limit on any given acquisition. The statute would not prevent the Nation from having one 9,878 acre parcel taken in trust along with two separate one acre parcels. Second, Glendale provides no textual support for its proposition that Congress intended the Nation to acquire a "single cohesive reservation." *See id.* at 10. While the tracts within each of the three acquisition-eligible areas must be contiguous, Pub. L. No. 99-503, § 6(d) ("not more than three separate areas consisting of contiguous tracts"), there is no requirement that the three areas themselves be contiguous or even near each other. And Congress only required that one of the three acquisition-eligible areas be contiguous to the Nation's San Lucy Village. *See* § 6(d). Glendale's reversion to legislative history describing the intent behind the waiver provision in § 6(d), (Glendale Mem. at 10–11), contradicts the City's argument that the meaning of "within the corporate limits" is plain. *See Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1207 (9th Cir. 2010) (noting that examination of legislative history is unnecessary if the statute's meaning is unambiguous). Regardless, reference to the reasoning behind § 6(d)'s waiver provision has no link whatsoever to the reasoning behind the statute's authorization for three areas to be taken into trust.

Even if the meaning of "within the corporate limits" is not plain, the Assistant Secretary's interpretation is more than reasonable.[7] Courts defer to the administrative

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[7] Contrary to Glendale's reading of the decision letter, Glendale Mem. at 6, 9, nowhere did the Assistant Secretary address whether Parcel 2 would be within Glendale's "city limits" as opposed to "corporate limits." *See* AR000008. Similarly, the Assistant Secretary did not rely upon Arizona state law to define "corporate limits." The sentence to which Glendale cites, Glendale Mem. at 8, is the Assistant Secretary's summary of the Field Solicitor's opinion on the matter. *See* AR000007–8. In fact, the Assistant Secretary noted—as the Field Solicitor found (AR004311–17)—that Arizona law does

agency's construction of an ambiguous statutory word or phrase, so long as the interpretation is permissible under the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–845 (1984). Courts have applied *Chevron* deference to the Department of the Interior's administration of land-into-trust acquisition statutes. *See Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204, 1220–21 (D. Kan. 2006), *vacated on other grounds sub nom. Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008); *accord Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1127 (E.D. Cal. 2002) (applying *Chevron* deference to letter that was "final, albeit informal, adjudication on the merits").

The Assistant Secretary's construction of "within the corporate limits" in a manner that allows acquisition of Parcel 2 is a permissible and reasonable construction of the phrase within the statutory scheme. *See Chevron*, 467 U.S. at 866. The Land Replacement Act sought to remedy past harms to the Nation through land replacement and economic development. *See* H.R. Rep. No. 99-851, at 7. Congress intended the Act, in part, to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming . . . ." Pub. L. No. 99-503, § 2(4). The House of Representatives noted that "[s]ignificant opportunities for employment or economic development in the town of Gila Bend (population 1600), simply do not exist." H.R. Rep. No. 99-851, at 7. The legislative history demonstrates Congress's intent to make land eligible under the "within the corporate limits" provision so long as it is "outside the corporate limits of any city or town." *Id.* at 11. The Assistant Secretary's interpretation is a reasonable reading of the phrase and must therefore be upheld.

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not clearly support a conclusion one way or the other. AR000008. Regardless, Glendale concedes that federal statutes are not interpreted using state law. *See* Glendale Mem. at 11 n.4. It is the United States' understanding that the Tohono O'odham Nation will respond to Glendale's interpretation of "corporate limits," as a term of art and as used in Arizona law.

B. The Lands Replacement Act Does Not Limit the Number of Acres the Nation Can Acquire Using the Statute's Funds.

Plaintiffs are also incorrect that the Lands Replacement Act limits the total acreage the Nation can acquire using the Act's funds, and that the Act requires the Department of the Interior to account for the use of those funds. *See* GRIC Mem. at 11–13. The argument ignores half of Congress's intent in passing the statute, and creates a requirement that is incompatible with the remainder of § 6.

While §6 certainly limits the acreage the Nation may have taken into trust, *see* § 6(c) and 6(d), it places no limitation on acreage the Nation may purchase and hold in fee. Congress intended the Lands Replacement Act to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming . . . , and promote the economic self-sufficiency" of the Nation. Pub. L. No. 99-503, § 2(4) (emphasis added). Thus, the Act authorizes: "(1) payment of $30,000,000.00 to the tribe to be used for land and water rights acquisition and economic development[;] and (2) the Secretary of the Interior to hold in trust up to 9,880 acres of replacement lands which may be purchased by the tribe . . . ." H.R. Rep. No. 99-851, at 8 (emphasis added). Sections 6(c) and 6(d) are manifestations of Congress's intent for lands to be taken into trust. The limitation in § 6(c) aligns with the number of acres the Nation assigned to the United States through § 4(a). And Congress's separation of § 6(c) from § 6(d) simply results in the latter's waiver provision not applying to acreage. Section 6(a), on the other hand—which Plaintiffs entirely ignore—implements Congress's intent for economic development: the Nation may use the $30 million in funds for multiple purposes, including "land and water rights acquisition." § 6(a). Land need not be held in trust for the Nation to make the land economically viable through development.

Plaintiffs' interpretation is at war with the Act's express language. The Ninth Circuit "generally refuses to interpret a statute in a way that renders a provision superfluous." *Gov't of Guam*, 179 F.3d at 634 (citing *Burrey v. Pac. Gas & Elec. Co.*, 159 F.3d 388, 394 (9th Cir. 1998)). Yet that is entirely what Plaintiffs' interpretation

does. If § 6(c) was intended to limit the acres of land the Nation could purchase, then the broad land acquisition provision of § 6(a) would be duplicative and unnecessary. Further, in arguing that the Act requires the Secretary to account for the Nation's land purchasing, Plaintiffs ignore entirely § 6(b), which provides: "[t]he Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section . . . ." Instead, Congress intended "that the tribe have great flexibility in determining the use of funds provided under this Act." H.R. Rep. No. 99-851, at 10.

C. The Lands Replacement Act Does Not Require that the Secretary Develop a Water Management Plan Before Acquiring Land into Trust.

Plaintiffs' argument that the Department failed to determine whether a water management plan could be developed for Parcel 2 again ignores the Act's plain language. *See* GRIC Mem. at 13. The Act requires that the Secretary, with certain exceptions, "establish a water management plan for any land which is held in trust under subsection (c)." Pub. L. No. 99-503, § 6(e) (emphasis added). Parcel 2 is not yet held in trust. And Plaintiffs' reference to *Tohono O'odham Nation v. Phoenix Area Director*, 22 IBIA 220 (1992), is off-point. As Plaintiffs acknowledge, GRIC Mem. at 13, the case held that the Nation was required to eliminate or satisfy a lien on the subject property prior to the actual trust acquisition. *Tohono O'odham Nation*, 22 IBIA at 237. But the establishment of a water management plan is not a title issue. Indeed, with respect to title, the Department has already undertaken an initial assessment; the Department's Field Solicitor issued a preliminary title opinion on the property. *See* AR004319–22 at 4320. Department regulations require a final title determination—and any necessary removal of encumbrances—before title transfers to the United States. *See* 25 C.F.R. § 151.13. Plaintiffs assume the Secretary will disregard those title duties, as well as those that may require establishment of a water management plan once the land is held in trust. But the *Tohono O'odham Nation* opinion demonstrates the contrary. The Assistant Secretary's decision was fully in-line with the Lands Replacement Act.

III. The Indian Gaming Regulatory Act Did Not Require the Secretary to Determine Whether Parcel 2 is Eligible for Gaming.

Like their interpretation of the Lands Replacement Act, Plaintiffs' interpretation of IGRA is contrary to the statute. IGRA does not require the Secretary to make a determination on gaming eligibility before land can be taken into trust. Plaintiffs attempt to create an obligation for such a determination from the Department of the Interior's use of "Indian lands opinions." "Indian lands opinions" are advisory legal opinions issued, depending on the circumstances and where necessary, by the Department of the Interior's Office of the Solicitor or the National Indian Gaming Commission's (NIGC) Office of General Counsel. *See* Pls.' Ex. 3(D) (Mem. of Agreement between Dep't of the Interior and NIGC) (Doc. No. 87-7). The advisory opinions assess whether the land in question (1) is "Indian land" eligible for gaming, *see* 25 U.S.C. § 2703, and (2) if acquired after October 17, 1988, meets one of the exceptions to IGRA's general prohibition of gaming on newly-acquired lands. *See* 25 U.S.C. § 2719; *see* Pls.' Ex. 3(D); Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,372 (May 20, 2008) (noting that Indian lands opinions "are advisory in nature and thus do not bind the persons vested with the authority to make final agency decisions"). Plaintiffs attempt to create a mandatory obligation to issue an opinion has three flaws.

First, Plaintiffs cite to no statutory provision that requires—or even contemplates—such opinions. And for good reason; there is not one. IGRA does not require pre-gaming, authorizing determinations (from either the Secretary or the NIGC) that the subject land is eligible for gaming under § 2719. *Cf. N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009). Plaintiffs' reference, GRIC Mem. at 18–19, to the doctrine of *in pari materia*—which requires that statutes addressing the same subject matter be read as one, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006)—cannot be used to create legal obligations where one would not otherwise exist.

IGRA describes the role of the Secretary of the Interior with respect to Indian gaming. That role does not include an affirmative duty to issue Indian lands opinions.[8]

Second, the regulatory provision to which Plaintiffs cite, 25 C.F.R. § 292.3, does not require the Secretary to issue an opinion. The provision's title states: "How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?" § 292.3. The provision was added "in response to comments requesting guidance on the process for seeking opinions under section 2719." 73 Fed. Reg. 29,354, at 29,358. Thus, the regulation merely puts forth the procedure through which a Tribe can request an opinion, should it desire one.

Good cause may often exist for the Secretary or a Tribe to request an advisory Indian lands opinion. Department of the Interior regulations governing discretionary land-into-trust acquisitions require the Secretary to consider the land's intended purpose in exercising that discretion. *See* 25 C.F.R. §§ 151.10(c), 151.11(a). Thus, whether gaming is a viable land use may inform the Secretary's ultimate decision, not to mention the Tribe's desire to move forward with a given project. The *Bruning v. Department of the Interior*, 625 F.3d 501 (8th Cir. 2010), and *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007), cases to which Plaintiffs cite both involved discretionary acquisitions under the Indian Reorganization Act, 25 U.S.C. § 465. Those portions of the Department's regulations, however, are inapplicable to mandatory acquisition statutes like the Lands Replacement Act. *See* 25 C.F.R. §§ 151.11, 151.12 (requiring consideration of land's intended use only where acquisition is not mandated by statute). Here, the Nation withdrew its request for an opinion from the Department (AR002163–64), and nothing in the Lands Replacement Act requires the Secretary to issue an opinion or limits the Nation to any specific land use.

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[8] Upon information and belief, the Nation will respond to the State Legislators' arguments that gaming on Parcel 2 would violate the Tribal-State Compact on Class III gaming. The United States, notes, however that the Legislators' arguments with respect to the Secretary appear to mirror those of GRIC—that the Secretary failed to comply with Section 20 (25 U.S.C. § 2719) of IGRA. *See* Mem. at 9–13.

Third, the Department does not have an established policy to issue Indian lands opinions for mandatory acquisitions. For one, past practice is not the determinative pattern that Plaintiffs wish it to be. *See*, *e.g.*, *Stop the Casino 101 Coal. v. Salazar*, No. 08-cv-022846, 2009 WL 1066299, at *1–2 (N.D. Cal. 2009) (reciting that, in the context of a mandatory acquisition statute, the Secretary did not make a determination as to the land's eligibility for gaming). And the documents Plaintiffs use in an attempt to show the contrary are simply inapplicable. Plaintiffs' Exhibit 3(E) references the Indian Reorganization Act, a frequently used discretionary acquisition statute. *See* 25 U.S.C. § 465. The Memorandum of Agreement between the Department of the Interior's Office of the Solicitor and the NIGC's Office of General Counsel, rather than create a requirement for either agency, sets forth a process for issuing the legal opinions when one is requested. *See*, *e.g.*, Pls.' Ex. 3(D) (noting that both the Department and the NIGC "are in need, from time to time, of legal advice"). The Department's 2007 Checklist (Pls.' Ex. 4 (Doc. No. 87-8)) provides guidance to regional staff in compiling land-into-trust recommendation packages from review by the Assistant Secretary. That Checklist does not create a requirement for the Assistant Secretary to issue Indian lands opinions.

Regardless, for an agency to be required to explain a departure from precedent, the prior activity must be established as a binding requirement. *See Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1032 (D. Ariz. 2009) (noting agency changed positions with respect to finding that a water flow management plan violated the Endangered Species Act); *see also Motor Vehicles Mfrs. Ass'n, v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (finding failure to explain departure where agency rescinded existing regulation). Even if the Checklist addressed Department requirements for issuing Indian lands opinions—which it does not—it is not a binding "norm" from which the agency would need to explain a departure. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29–30 (D.C. Cir. 2008); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (summarizing that actions imposing no rights are obligations are not

binding norms). The Assistant Secretary did not violate IGRA in determining that Parcel 2 would be taken into trust.

IV. The Lands Replacement Act and Acquisition of Parcel 2 Do Not Violate the Tenth Amendment or the Indian Commerce Clause.

The City of Glendale is also incorrect that the Lands Replacement Act violates the Tenth Amendment "by diminishing the state's sovereign control over its land without the state's consent." Glendale Mem. at 14. The 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. The Tenth Amendment is "essentially a tautology," reserving to the states those rights and powers that have not been granted to the United States. *New York*, 505 U.S. at 156–57. Where Congress acts within the bounds of an otherwise-existing Constitutional power, the Tenth Amendment is not implicated. *Id.*

Glendale stretches Constitutional interpretation to support its state sovereignty theory. The City's selective quotations, Glendale Mem. at 14–16, of Supreme Court cases—some of which do not even involve the Tenth Amendment—miss the underlying limitation to its argument: "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). The Tenth Amendment is not a trump card. Thus, the only question with respect to the Tenth Amendment is whether the Constitution delegates to Congress the ability to take land into trust for Indian tribes and whether Congress acted within that power. The answer to both inquiries is "yes."

Article I authorizes Congress to legislate in Indian Affairs. The Constitutional authority for land-into-trust statutes rests in the Indian Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Congress acted under that

plenary power in enacting the Lands Replacement Act. *See* H.R. Rep. No. 99-851, at 7 (recognizing "responsibility to *exercise its plenary power over Indian affairs* to find an alternative land base[ ] for the O'odham people at Gila Ben[d]") (emphasis added). The City argues that the Constitution does not grant the United States the authority to take land into trust for the benefit of an Indian tribe without state consent. *See* Glendale Mem. at 20–24. Thus, despite its use of the descriptive, Glendale is not making an "as applied" challenge to the Lands Replacement Act. But the argument is contrary to every judicial opinion deciding the question. *See*, *e.g.*, *Carcieri v. Kempthorne*, 497 F.3d 15, 39–40 (1st Cir. 2007), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009); *Cent. N.Y. Fair Business Ass'n v. Salazar*, No. 608-CV-600, 2010 WL 786526, at *3–4 (N.D. N.Y. Mar. 1, 2010); *City of Roseville*, 219 F. Supp. 2d at 154.

The Indian Commerce Clause grants Congress the necessary power because it includes more than just the power to regulate Indians. The Clause places in the federal government the power to legislate the nation's relationship with Indians. This power "rest[s], in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that [the Supreme] Court has described as 'necessary concomitants of nationality.'" *United States v. Lara*, 541 U.S. 193, 201 (2004) (citations omitted). Within that power must be the ability for the Federal Government to find an alternative land base for a Tribe to replace that which is no longer economically viable. *See* H.R. Rep. No. 99-851, at 4. And state consent is not a requirement of either the Indian Commerce Clause or the Tenth Amendment. *See New York*, 505 US at 181–82 (noting that "departure from the constitutional plan cannot be ratified by the 'consent' of state officials"). Any such requirement would remove from the United States the power to legislate in Indian affairs and place it, ultimately, in the hands of each state.

The City's attempt to limit Congressional power under the Indian Commerce Clause to mirror that under the Interstate Commerce Clause, Glendale Mem. at 21–23, ignores the different purpose of each. The reasoning behind the Interstate Commerce

Clause "is not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum Corp.*, 490 U.S. at 192. Jurisprudence under the latter does not rely on the "rigid categories" that limit the United States' power under the former. *United States v. Clark*, 435 F.3d 1100, 1112-13 (9th Cir. 2006). While the Interstate Commerce Clause "is concerned with maintaining free trade among the States even in the absence of implementing federal legislation," the Indian Commerce Clause "is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.*, 490 U.S. at 192. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida County v. Oneida Nation*, 470 U.S. 226, 234 (1985) (emphasis added) (citations omitted).

Regardless, the "sovereignty" Glendale claims will be impacted is not that which the Constitutional system intended to preserve. Contrary to the City's myriad citations, Parcel 2's status as trust land will not cloud or remove the state's title to any land, *see Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009); *Idaho v. United States*, 533 U.S. 262, 272–73 (2001), will not result in federal regulation of state actions or actors, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985); *Fry v. United States*, 421 U.S. 542, 547–48 (1975), will not commandeer state officials to enforce federal regulatory schemes, *see New York*, 505 U.S. at 156; *Printz v. United States*, 521 U.S. 898, 923–24 (1997), and will not impact the state's immunity from suit under the Eleventh Amendment, *see Alden v. Maine*, 527 U.S. 706, 714 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64 (1996). Instead, Glendale is concerned that some state laws do not apply on Indian reservations. *See* Glendale Mem. at 17–19. That point of law, however, is simply the manifestation of Congress's Constitutional authority to regulate matters directly and the supremacy of Congress's action over contrary state regulation. It, like the Lands Replacement Act, is fully consistent with the Tenth Amendment. *See New York*, 505 U.S. at 178.

CONCLUSION

For the reasons stated above, Plaintiffs' motions for summary judgment should be denied, and summary judgment granted in favor of the United States.

Respectfully submitted this 30th day of December, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2010, I electronically filed the foregoing document with the clerk of the court using the CM/ECF system, which will send electronic notice of the filing to all counsel of record.

/s/ J. Nathanael Watson
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