Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642

IN THE

United States Court of Appeals for the Ninth Circuit

GILA RIVER INDIAN COMMUNITY, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. 2:10-cv-01993-DGC
District Judge David G. Campbell

BRIEF FOR PLAINTIFFS-APPELLANTS STATE OF ARIZONA, CITY OF GLENDALE, MICHAEL SOCACIU, AND GARY HIRSCH

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INTRODUCTION

This case presents the question whether federal law authorizes an Indian tribe to buy land within an Arizona city, convert that land into an Indian "reservation" located in the city itself, and use it to build a massive casino—all without the consent of, and against the wishes of, both the city and the State. The District Court held that federal law does authorize this stunning encroachment on state sovereign prerogative and local control. That decision was erroneous. It should be reversed, and the underlying agency approval vacated.

The controversy in this case dates to 2003, when the Tohono O'odham Nation ("the Nation") used a shell corporation to quietly purchase land within Glendale, Arizona, a city of some 225,000 people adjacent to Phoenix. The Nation

held its 135-acre parcel in secret for six years as development blossomed in the area and a new high school was erected across the street. Then, in 2009, to the shock of Glendale officials, the Nation announced that it owned the land, that it was asking the Secretary of the Interior ("Secretary") to take the land into trust as a reservation, and that once that process was complete it would use the parcel to open the state's largest casino—a $600 million behemoth with more than 1,000 slot machines and gaming tables. The Nation asserted that the city and State were powerless to stop its plan because the Secretary's anticipated land-into-trust determination would strip them of control over the land and its use.

Glendale's mayor and council, Arizona's governor, members of Congress, and even other tribes vehemently opposed the Nation's plan. They argued that it violated federal law, and they pointed out that it would destroy Glendale's land-use plans and end a fragile gaming truce among Arizona's tribes and the State. Their objections were to no avail. On July 23, 2010, the Secretary decided to take a 54-acre portion of the Nation's parcel—known as "Parcel 2"—into trust as a reservation (the "July 2010 Decision"). The Nation has since reaffirmed that, if and when that land-into-trust process is completed, it will build its casino.

The Secretary's July 2010 Decision was unlawful for several reasons. First, Parcel 2 is ineligible for trust acquisition under the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("Gila Bend

Act" or "Act"), on which the Nation and the Secretary relied, because the Nation has already exceeded the acreage it is authorized to buy with Gila Bend Act funds. Second, the land is ineligible because Parcel 2 sits within Glendale's corporate limits, and the Act specifically forbids creating Indian reservations on land "within the corporate limits of any city or town." Gila Bend Act § 6(d). And third, the Act, as applied here, exceeds Congress's Indian Commerce Clause power and violates the Tenth Amendment. The Secretary purported to take State territory with no historical connection to an Indian tribe, deem it an Indian reservation, and oust the State (and Glendale) from control over the land. The Indian Commerce Clause cannot be construed to allow Congress such unfettered power to oust States from territorial control. If it were, there would be no stopping point—Congress could take any land, anywhere, in any quantity, and convert it into a sovereign reservation. That is an exceedingly aggressive, and ultimately improper, interpretation of a constitutional provision that merely empowers Congress "[t]o regulate Commerce * * * with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The District Court rejected these arguments and affirmed the Secretary's July 2010 Decision. But its analysis was flawed in several key respects. On plenary review, this Court should reverse the District Court and reaffirm that there are limits on the federal power to wrest territory from state control.

STATEMENT OF JURISDICTION

This case arises from the Secretary's July 2010 Decision. Plaintiffs timely challenged that decision in the U.S. District Court for the District of Arizona, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. The District Court entered final judgment in favor of defendants on March 3, 2011. ER24. Plaintiffs timely noticed their appeals on March 15, 2011. ER33-39. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

1a. Whether Parcel 2 was ineligible for trust acquisition where Gila Bend Act Section 6(c) authorizes the Nation to purchase no more than 9,880 acres of land pursuant to the Act and the Nation had already purchased some 16,000 acres of land with Gila Bend Act funds before it bought Parcel 2.

1b. Whether the District Court erred in finding that plaintiffs waived the Section 6(c) argument by failing to raise it before the Secretary, where the Nation concealed the source of funds for its land purchases and plaintiffs only found out the truth through an investigation completed after the agency's decision.

2a. Whether the plain language of Gila Bend Act Section 6(d)'s "corporate limits" provision renders Parcel 2 ineligible for trust acquisition.

2b. Whether, assuming the "corporate limits" provision is ambiguous, the District Court erred by affirming at Chevron step two when the Secretary based his

decision only on plain meaning and thus made no attempt to grapple with the best choice among reasonable meanings of an ambiguous statutory text.

3. Whether a statute authorizing a federal agency to convert state territory into a sovereign Indian reservation, even where the state objects and the territory has no historical connection to an Indian tribe, exceeds Congress's power under the Indian Commerce Clause and violates the Tenth Amendment.

ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, an addendum containing pertinent statutes is attached at the end of this brief.

STATEMENT OF THE CASE

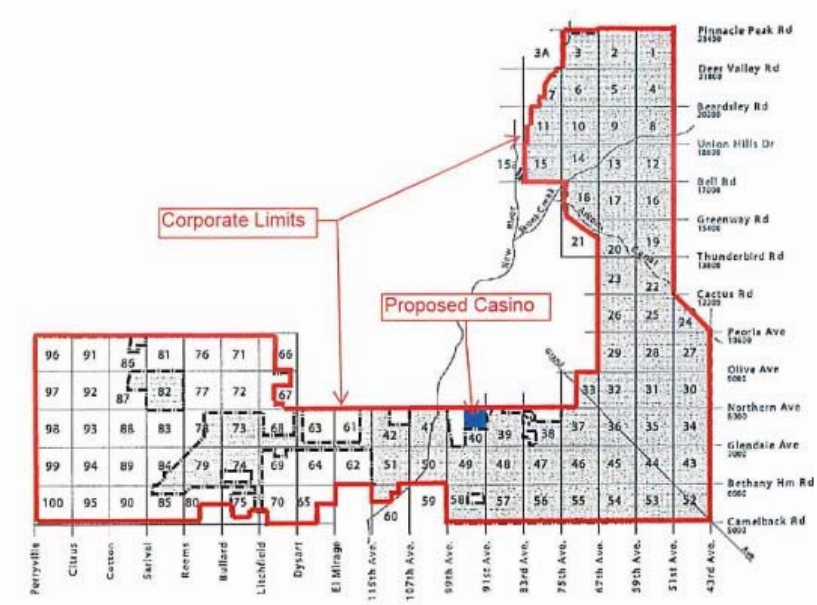
In the wake of the Secretary's July 2010 Decision, Glendale, two Glendale residents, GRIC, and several GRIC members filed separate complaints seeking review. See Gila River Indian Cmty. v. United States, No. 2:10-cv-01993-DGC (D. Ariz.) (D. Ariz. filed Sept. 16, 2010) ("Dist. Ct. Proceeding"), Docket No. 22. Those actions were consolidated. The State of Arizona and a group of Arizona legislative leaders intervened as plaintiffs, and the Nation intervened as a defendant. See id., Docket Nos. 22, 77, 120. Arizona joined Glendale's briefs.

On March 3, 2011, the District Court issued an order denying plaintiffs' motions for summary judgment and entering judgment for the United States and the Nation. See id., Docket No. 133.

STATEMENT OF FACTS

A. "Strip Annexation" and Parcel 2

Parcel 2 has a unique legal status that stems from a peculiarity of Arizona law. The land is physically located in Glendale and fully enclosed by Glendale's corporate limits. See id., Docket No. 75 ¶ 23; ER148. It is, however, under the jurisdiction of Maricopa County. In the parlance of Arizona land use, it is a "county island" within the city. Its location is depicted below, with the parcel in blue and Glendale's exterior boundary and corporate limits in red.[1] See ER148:



County islands, of which Parcel 2 is one of many in Glendale alone, stem from a once-common practice called "strip annexation." Strip annexation occurs

[1] The blue area depicts the Nation's full 135-acre fee holding in Glendale. The Nation originally asked the Secretary to take the full acreage into trust. But it subsequently amended the application to include only the western portion, "Parcel 2," due to a dispute over whether other portions of the property had been annexed by Glendale. ER149-51; ER155-56. That dispute is not relevant to the issues before the Court.

when a city "extend[s] [its] boundaries by annexing long strips of property" that encircle other, unincorporated areas. Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1254-55 (Ariz. 1990). After a strip annexation, unincorporated areas sit within, and are completely surrounded by, the city's outer boundaries. The process serves a practical purpose: Once land is encircled, no other municipality can annex it. Carefree Improvement Ass'n v. City of Scottsdale, 649 P.2d 985, 986 (Ariz. Ct. App. 1982). And within the encircled area, the city can "exercise a strong degree of control over zoning and development." Id. at 987. The city's General Plan—its primary land-use planning document—and zoning ordinances guide the zoning and subdivision of county islands. Id. at 986-987, 992; ER43.

Parcel 2 came to be within Glendale's exterior boundary in 1977, when the City annexed a large area west of the city center. ER42; ER52-64. And while Parcel 2 itself has not been annexed, Glendale has long controlled its development. ER42-43; ER165; ER172-73; ER190. The parcel is part of Glendale's Municipal Planning Area and is included in its General Plan. Id.; Dist. Ct. Proceeding, Docket No. 75 ¶ 19. The General Plan thus guides zoning and subdivision of the parcel. Ariz. Rev. Stat. § 11-831;[2] ER43. Parcel 2 currently is zoned R-43, a rural designation that would allow only very limited development. ER174.

[2] This statute has been recodified without change as Ariz. Rev. Stat. § 11-814(G), effective October 1, 2011. See 2010 Ariz. Legis. Serv. Ch. 244.

In reliance on this land-use control, Glendale invested significant resources to develop the area around Parcel 2. ER45; ER186. Since 2003, city, state, and private interests have invested in a $450 million stadium, a $240 million arena, and a $120 million Major League Baseball spring training facility in western Glendale. Id. In 2005, a school district that serves Glendale finished building a new public high school directly across the street from what turned out to be the Nation's acreage. ER46; ER186; ER190. And as the infrastructure grew, the population boomed. More than 30,000 people now live within two miles of the proposed casino. ER45-46; ER220. Residents have said they chose to move there because the area is "family friendly." ER73-75; ER224.

B. The Tohono O'odham Nation and the Gila Bend Act

The Nation is a federally recognized Indian tribe with "the second largest Tribal land base in the U.S., 2.8 million acres," and over 28,000 Tribal members. Dist. Ct. Proceeding, Docket No. 75 ¶ 31; id., Docket No. 78 ¶ 31. That land base amounts to 4,375 square miles of reservation lands in south and central Arizona, an area nearly the size of Connecticut. Id.

The Nation formerly counted among its lands the Gila Bend Reservation, which consisted of approximately 10,000 acres—less than 0.4 percent of the Nation's total land holdings—near Gila Bend, Arizona, more than 60 miles from Glendale. Id., Docket No. 75 ¶ 32; id., Docket No. 78 ¶ 32; ER187. But in 1950,

Congress enacted a law authorizing construction of a dam 10 miles from the reservation to address flooding problems on the Gila River. ER322. As part of the project, the federal government obtained a flowage easement for parts of the Gila Bend Reservation. ER323. Subsequently, during the 1970s and 1980s, Arizona experienced high levels of rainfall that flooded the reservation several times, leaving the land unsuitable for farming. ER323-24; ER181.

The Nation blamed the dam for the flooding and petitioned Congress "for a new reservation on lands in the public domain which would be suitable for agriculture." ER324. Congress responded in 1986 by enacting the Gila Bend Act. The legislation was designed to "replace[ ] * * * Gila Bend Indian Reservation land with land suitable for sustained economic use which is not principally farming[.]" ER321. Under the Gila Bend Act's terms, the Nation agreed to assign to the United States all rights and title to 9,880 acres of the Gila Bend Reservation for $30 million. Act § 4(a) (included in Addendum at A1). The Nation was then authorized to purchase not more than 9,880 acres of replacement land. Id. § 6(c). The Secretary, in turn, was authorized to take those lands into trust, creating an Indian reservation, if certain conditions were met. Id. § 6(d). The principal conditions involved the location and size of trust parcels:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. * * * 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.[3] The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate. [Id. § 6(d)].

The Act, in short, permitted the Nation to assemble new reservation acreage consisting of a few large tracts of land, none in a city. And while it authorized the Secretary to waive the contiguity and three-tract requirements where "appropriate," Congress made clear that the term "appropriate" included only circumstances in which parcels were "not entirely contiguous" but were "sufficiently close to be reasonably managed as a single economic or residential unit." ER329.

Pursuant to the Act, the Nation assigned its original 9,880 acres to the United States for $30 million. ER332-41. It then began buying land with the proceeds. The Nation first invoked the Act in the 1980s to purchase a 3,200-acre parcel in central Arizona. That parcel was taken into trust. ER225-26. Following that purchase, the Nation was authorized to purchase up to an additional 6,600 acres of "replacement" land with the remaining Gila Bend Act funds. See Act § 6(c).

The Nation waited more than a decade. Then, in 2002, it purchased 12,966 additional acres with Gila Bend Act funds. ER84-85; ER89; ER99-103; ER105-

[3] San Lucy Village is located near the former Gila Bend Reservation, at least 40 miles from Glendale. Dist. Ct. Proceeding, Docket No. 78 ¶ 39.

07. That property, known as the "Painted Rock" property, was purchased through complex transactions using tribally-owned entities and a double escrow. As described in the brief of the Gila River Indian Community ("GRIC"), the Nation set up the transaction this way to disguise the fact that it had purchased the 12,966 acres with Gila Bend Act monies. See GRIC Br., Statement of Facts. But the Nation went further still to disguise the monies it had used: It set an arbitrary purchase price of $1 per acre for the majority of the 12,966 acres—far below market value—and paid for those acres with non-Gila Bend Act funds. Meanwhile, it paid a much higher price for the remaining acres and paid for those acres with Gila Bend Act funds. ER84-85; ER89; ER99-103; ER105-07. These maneuvers made it appear as if Gila Bend Act funds had been used to purchase only a few thousands acres. Id. An officer of a corporation controlled by the Nation conceded in a deposition that that was the idea: He testified that the Nation structured the transaction the way it did precisely to avoid the Act's 9,880-acre land-purchase limitation. ER99-103.

C. The Nation's Glendale Plan

On August 21, 2003—shortly after supporting a ballot measure designed to prevent construction of new casinos in Arizona's cities[4]—the Nation bought its

[4] The measure, Proposition 202, was enacted in 2002. Many tribes, including the Nation, publicly supported it and asserted that it would not authorize additional Indian casinos in cities. ER202-219; ER238. The Nation's current chairman

135-acre parcel in Glendale with plans to use it for a casino. ER227-30; ER234-37; ER332-41. The Nation kept its purchase quiet by having a Delaware shell company with a Seattle address, "Rainier Resources, Inc.," buy the parcel. ER234-37. The Nation then sat on the property for nearly six years. During that time, it never told Glendale officials that it owned the property or that it planned to create a reservation and casino there. Dist. Ct. Proceeding, Docket No. 78 ¶¶ 51-53.

Finally, in January 2009, the Nation revealed its plans. On January 20, the Nation transferred ownership of Parcel 2 from Rainier Resources to itself. ER284. Days later, the Nation filed its application asking the Secretary to take the property into trust and grant the Nation permission to establish a "Class III" gaming complex. Dist. Ct. Proceeding, Docket No. 78 ¶¶ 52-53. ("Class III" includes Las Vegas-style gambling facilities offering high-stakes card games such as poker and electronic games of chance such as slots. See 25 U.S.C. § 2703.) The Nation has released advertising materials proclaiming that its "new casino will be the largest in the state." ER261. It will include "150,000 square feet designated for a gaming floor" with "over 1,000 slot machines," "50 table games, 25 poker tables, and a bingo hall large enough to seat a thousand guests." Id. The complex also will include—among many other things—two bars, a nightclub, and "parking for over 4,000 vehicles." Id.

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argued that voters should reject an alternative measure, and choose Proposition 202, because the alternative would "open gaming into cities." ER232.

The Nation's plan shocked City officials. Glendale has no gaming facilities. ER187. The Nation's closest reservation lands are many miles from Glendale and its government seat is 180 miles away. Id. And the Nation already operates three casinos, all located on its traditional lands, far from Glendale. Dist. Ct. Proceeding, Docket No. 87 ¶ 55; id., Docket No. 99 ¶ 55.

D. Opposition to the Nation's Plan

Opposition to the Nation's plan was widespread. Arizona's Senators, several members of Congress, and Governor Brewer all urged the Secretary to reject the Nation's application. ER262-67; Dist. Ct. Proceeding, Docket No. 57 ¶ 55; id., Docket No. 78 ¶ 55. Five Arizona Indian tribes opposed the plan, stating that it constituted "[b]reaking faith with Arizona voters" who had approved Proposition 202. ER238. Glendale, too, urged the Secretary to reject the Nation's plan. In filings with the Department of the Interior ("Department"), Glendale argued that the Nation's parcel was ineligible for trust status under the Gila Bend Act because it lay within Glendale's "corporate limits," Act § 6(d), and that the acquisition would violate the Constitution. ER189-201.

Glendale also argued that the Nation's reservation and casino would cause the city serious harms, over and above the prospect of having a giant gaming center within a quarter-mile of churches, schools, and neighborhoods. Glendale would be stripped of its long-standing authority to control land use on the parcel—a

substantial harm, considering that Glendale had carefully developed the area around Parcel 2. See supra at 7-8. Glendale also would incur steep infrastructure costs: City officials estimated the casino complex would require Glendale to build a new fire station at a cost of more than $14.6 million and would require some $3.75 million in annual public safety outlays. ER47; ER271-72. On top of these direct costs, the casino would siphon business from Glendale's tax-paying establishments, decreasing City revenues. ER46-47; ER271-72. And the City could recoup none of those costs through the usual methods—development and permitting fees—because the property would be a "reservation," immune from such fees. ER191; ER272-73.

E. The Secretary's Decision

Pursuant to its usual practices, the Department treated the Nation's land-into-trust application as an ex parte filing: It never notified the public of the application, created a docket, set a pleading schedule, or held a hearing. See ER28 (stating that notice-and-comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d) do not apply to Gila Bend Act trust decisions); ER157-61 (correspondence noting that Glendale requested a public hearing but none occurred). Opponents submitted arguments against the application by letter only because they happened to be aware of it; they were not parties in any formal sense. Indeed, the Secretary did not even alert them when the Nation filed amendments to its application.

The Secretary kept the Nation's application under consideration for more than a year. On March 22, 2010, the Nation filed a mandamus action demanding that the Secretary act to take Parcel 2 into trust. Tohono O'odham Nation v. Salazar, No. 1:10-cv-00472-JDB (D.D.C.). At a June 21, 2010 hearing in that action, the District Court ordered the United States to provide, no later than July 23, a report on the application's status. Id. (Minute Order, June 22, 2010).

On the July 23 deadline, the Department sought to moot the mandamus action by issuing the decision now on review. ER25-32. The Secretary concluded in the July 2010 Decision that Parcel 2 was eligible under the Gila Bend Act. ER32. The Secretary rejected Glendale's "corporate limits" argument, reasoning that the phrase "within the corporate limits" "shows a clear intent to make property eligible under the Act if it is on the unincorporated side of a city's boundary line." ER30. The Secretary thus concluded that Parcel 2 is not within Glendale's "corporate limits"—though it is within the "city limits"—because it had not been officially annexed. Id. He explicitly rejected any notion of statutory ambiguity, stating that the Indian canon of construction, which is sometimes applied when a statute involving a tribe is ambiguous, "is unnecessary here because we have determined that the meaning of 'corporate limits' is plain." Id. n.6.

The Secretary went on to address other Section 6(d) requirements and determine that they had been met. ER29-32. He did not, however, address

whether the purchase of Parcel 2 conformed with Section 6(c)'s acreage limit. ER25-32. The record contains no evidence of any effort by the Department to determine whether the tribe had already exceeded that acreage limit.

On August 26, 2010, the Department published a Federal Register notice announcing its final determination "to acquire Parcel 2 consisting of 53.54 acres of land into trust for the Tohono O'odham Nation." 75 Fed. Reg. 52550, 52550-51 (Aug. 26, 2010). The Secretary agreed to stay the acquisition during proceedings in the District Court. See ER133-34.

F. District Court Proceedings and Decision

Plaintiffs sought review in the District Court. They raised the statutory and constitutional arguments they had raised before the agency. In addition, GRIC raised an argument based on newly discovered evidence: An investigation revealed that, well before the Nation purchased its Glendale property, it had exceeded the 9,880 acres of land it was entitled to buy pursuant to the Gila Bend Act and had intentionally hidden that fact. See supra at 10-11. GRIC argued that the Secretary's decision should be vacated and remanded for consideration of this new evidence, which showed that Parcel 2 was ineligible for trust acquisition. See Dist. Ct. Proceeding, Docket No. 88.

The District Court rejected plaintiffs' arguments in an Order issued March 3, 2011. The court held that GRIC's acreage argument was waived "because no party

raised it during the administrative process." ER8. It recognized that GRIC had not possessed the key information that made the argument relevant—namely, that the Nation had purchased some 16,000 acres with Gila Bend Act funds and had hidden the purchase—until after the administrative process ended. ER9. The court nevertheless deemed the argument waived on the theory that GRIC was obligated to raise the acreage cap before the agency, even though at that time it lacked any factual predicate for the contention. Id.

The District Court next rejected the "corporate limits" argument. The court, however, did not do so on the ground the agency had adopted. It rejected the Secretary's finding that "corporate limits" was plain and unambiguous, and instead concluded that the phrase was ambiguous and that it "must defer to the agency's interpretation of the statute" under Chevron step two. ER14-15. The District Court reached this conclusion even though the Secretary's July 2010 Decision " 'rest[ed] simply on its parsing of the statutory language,' " Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) (citation omitted), and did not purport to address or resolve a statutory ambiguity.

Finally, with respect to the constitutional arguments, the District Court followed a handful of prior court decisions holding, without detailed analysis, that Congress must have the unfettered authority to take state territory and turn it into a reservation because the Supreme Court has described Congress's power to regulate

Indians as "plenary." ER21-23. The District Court did not address the question—raised by Glendale, and ignored by the United States and the Nation—whether the Indian Commerce Clause has any limits at all, and if so where they might lie.

Plaintiffs timely appealed. They also sought an injunction from the District Court to block the Secretary from taking Parcel 2 into trust during the appeal. See Dist. Ct. Proceeding, Docket No. 153. The District Court granted the injunction, concluding that plaintiffs had raised "difficult" questions about the Section 6(c) issue and the corporate limits argument. ER137-38. The court found that these issues "raise substantial legal questions warranting more deliberative consideration on appeal." Id. It also found that plaintiffs would suffer irreparable harm absent an injunction because (among other things) Glendale would lose its right to annex the land if it were taken into trust and Glendale residents "likely will suffer irreparable quality-of-life injuries from gaming activities on Parcel 2." ER138-39. The court therefore enjoined the Secretary from taking the land into trust pending appeal. To preserve the status quo, the court also enjoined Glendale from annexing Parcel 2—an action that would render the parcel ineligible under the Gila Bend Act by bringing it within the "corporate limits" under any definition.[5] ER141.

[5] In February 2011, in reaction to the events of this case, the Arizona legislature enacted a statute making it easier for municipalities to annex land in certain circumstances where the land's owner is seeking to place the land in trust. The statute, known as H.B. 2534, would apply to Parcel 2. The Nation challenged H.B. 2534's legality in a separate proceeding, Tohono O'odham Nation v. Glendale, 2:11-cv-00279-DGC (D. Ariz.), and Judge Campbell recently ruled that the Gila

SUMMARY OF ARGUMENT

1. The Secretary's July 2010 Decision should be vacated because the Nation had already exceeded Section 6(c)'s acreage cap before it purchased Parcel 2. The District Court deemed this argument waived because plaintiffs did not raise it before the agency. That is error. Plaintiffs could not have been expected to raise an argument against a trust application when the applicant was intentionally hiding the facts giving rise to the argument. In any event, the District Court should not have applied an issue-exhaustion requirement at all. Issue exhaustion does not apply to an application like this one, which never spawned a formal proceeding, was not the subject of a comment cycle, was never even formally made public, and was not subject to an exhaustion requirement by statute or regulation.

2. The agency's decision likewise should be vacated because Parcel 2 is "within the corporate limits" of Glendale, making it ineligible for acquisition under Section 6(d). The statute's plain language dictates that result. In any event, if the language were ambiguous, as the District Court believed, remand would still be required. The Secretary deemed Section 6(d)'s language plain and did not apply its expertise to interpret ambiguity. When that happens, a reviewing court cannot affirm at Chevron step 2. It must instead remand so that the agency can consider how to reasonably interpret the ambiguity in the first instance.

Bend Act preempts H.B. 2534. Because Glendale is enjoined from annexing Parcel 2 pending appeal, issues relating to H.B. 2534 are not before this Court.

3. Reversal separately is required here because the Gila Bend Act, as applied, exceeds Congress's Indian Commerce Clause power. The Secretary purported to take from Arizona an aspect of state sovereignty—namely, control over Arizona's own territory—that is protected by the Constitution. That flies in the face of the Supreme Court's square holding that the Indian Commerce Clause cannot be used to invade aspects of state sovereignty "embodied" in the Constitution. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

4. For similar reasons, the Act violates the Tenth Amendment. The Amendment forbids Congress to take from a state any of "the dignity and essential attributes inhering" in sovereign status, Alden v. Maine, 527 U.S. 706, 714 (1999), and "[o]f all the attributes of sovereignty, none is more indisputable than that of [a state's] actions upon its own territory." Green v. Biddle, 21 U.S. 1, 42-43 (1823). The Secretary's action goes too far. If the Secretary desires to remove swaths of historically state land from state control, he must have the state's consent.

STANDARD OF REVIEW

This Court reviews the decision below "de novo, viewing the agency's decision from the same position as the district court." Lawrence v. Department of Interior, 525 F.3d 916, 920 (9th Cir. 2008). The Court will set aside the Secretary's decision if that decision was arbitrary, capricious, contrary to law, or unsupported by substantial evidence. Id.

ARGUMENT

I. PARCEL 2 IS INELIGIBLE FOR TRUST ACQUISITION BECAUSE IT EXCEEDS THE SECTION 6(c) ACREAGE LIMIT.

Section 6(c) of the Gila Bend Act provides that the Nation "is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, 9,880 acres." As explained in GRIC's brief, this provision limits the number of acres that the Nation may purchase using Gila Bend Act funds, and the Nation exceeded the acreage limit long before acquiring Parcel 2. The Secretary accordingly is precluded from taking Parcel 2 into trust.

The District Court declined to reach this argument, ruling that it had been waived "because no party raised it during the administration process." ER8. That was error.[6]

To begin with, the District Court cannot reasonably expect plaintiffs to have raised issues that the Nation succeeded in hiding from them (and the Department). As described above and in GRIC's brief, the Nation went to extraordinary lengths to mask the true nature and scope of its "Painted Rock" property acquisition. See GRIC Br., Statement of Facts. Taking the then-available documentation at face value, plaintiffs had no reason to believe that the Nation had exceeded the acreage cap imposed by Section 6(c). ER129. They therefore had no reason to believe that

[6] To avoid duplicative briefing, Arizona and the Glendale appellants focus only on the waiver issue and otherwise adopt GRIC's arguments regarding Section 6(c).

Section 6(c) would have a material effect on the Secretary's analysis, and they had no cause to address Section 6(c) in their agency submissions or challenge the Nation's mistaken interpretation of that statutory provision. Id.

Ultimately, GRIC hired an investigator to research the underlying facts—a process "that took quite a lot of time." Id. GRIC brought the issue to the Department's attention as soon as possible upon completing the investigation. Id. No more could have been expected of plaintiffs. The District Court's contrary ruling effectively rewards the Nation for deceitful behavior and runs contrary to well-established precedent requiring a remand in similar situations involving newly-discovered evidence. See GRIC Br. § II (collecting cases).

The District Court also erred in holding that an issue-exhaustion requirement applied to the application process before the Secretary in the first place. Issue exhaustion "is typically a creature of statute or agency regulation." Vaught v. Scottsdale Healthcare Corp. Health Plan, 546 F.3d 620, 630 (9th Cir. 2008) (citing Sims v. Apfel, 530 U.S. 103, 107-08 (2000)). Where the relevant statute and regulations impose no issue-exhaustion requirement, courts occasionally will impose one of their own accord. The rationale for doing so "is at its greatest" in cases "[w]here the parties are expected to develop the issues in an adversarial administrative proceeding." Sims, 530 U.S. at 110. Issue-exhaustion requirements also are frequently imposed on notice-and-comment proceedings. See, e.g.,

Portland General Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1023-24 (9th Cir. 2007). All of the issue-exhaustion cases relied upon in the District Court's Opinion fall into these categories. See ER9-11; GRIC Br. § 3.

By contrast, "[i]n a non-adversarial proceeding, 'the reasons for a court to require issue exhaustion are much weaker.' " Vaught, 546 F.3d at 631 (quoting Sims, 530 U.S. at 110). That is particularly true where the agency fails to notify claimants of an issue-exhaustion requirement. Id. at 632 ("Because ERISA and its implementing regulations create an inquisitorial, rather than adversarial process, and because the [explanation of benefits] does not notify a claimant that issue exhaustion is required, Sims leads us to conclude that [the plaintiff] was not required to exhaust his issues[.]"). This is just such a case. The land-into-trust application that led to the July 2010 Decision was informal, non-adversarial, and had none of the trappings of agency process. The agency certainly did not "notify" opponents of the Nation's application "that issue exhaustion is required." Id. In fact, as discussed supra at 14, the agency had no obligation to—and did not—notify interested parties even of the pendency of the Nation's application, much less of any subsidiary procedural requirements.

The District Court nonetheless concluded, without elaboration, that this case warranted an issue-exhaustion requirement because "the administrative proceedings before [the Department] in this case involved the adversarial

development of issues by the parties." ER11. But that rationale conflates the question whether parties expressed concerns regarding the application—which they did—with the question whether, as a structural matter, the proceeding at issue here was adversarial. It is the latter question that is determinative. See Sims, 530 U.S. at 110; see also Ballanger v. Johanns, 495 F.3d 866, 869 (8th Cir. 2007) (examining whether "[t]he regulations that describe the hearings and review process" create an adversarial hearing in order to decide whether "issue exhaustion should be required"). And here, the process was decidedly non-adversarial, for all the reasons already discussed. Neither the Secretary nor the Department's regulations provided for the Nation to "face an adversary * * * in the review process." Vaught, 546 F.3d at 631. The Secretary did not "require[] * * * formal briefing," as typically would be the case in an adversarial proceeding. Id. at 631-632. Indeed, the Secretary did not require, or make allowance for, any briefing. Instead, the Secretary simply collected application materials provided by the Nation and whatever materials opponents such as Glendale, who had managed to learn of the application, were able to submit. The Secretary did not place those filings in any sort of docket, did not make filings available to the other interested parties, and accordingly did not give opponents of the application a chance to respond to the Nation's arguments. That does not an adversarial proceeding make.

In sum, the Department's administrative process was non-adversarial, did not involve a notice-and-comment period, and did not feature an exhaustion requirement imposed by statute or regulation. Nor did the Department notify interested parties of an issue-exhaustion requirement at any stage. See Vaught, 546 F.3d at 631-32. Under these circumstances, the District Court erred in deciding the Section 6(c) claim on the basis of issue exhaustion. This Court should remand this action for a full hearing on the merits of the Section 6(c) arguments.

II. PARCEL 2 IS INELIGIBLE FOR TRUST ACQUISITION BECAUSE IT LIES "WITHIN THE CORPORATE LIMITS" OF GLENDALE.

Section 6(d) of the Gila Bend Act prohibits the Secretary from taking Parcel 2 into trust because Parcel 2—which is completely encircled by the City of Glendale—is located "within the corporate limits" of the City. The District Court's contrary conclusion was error for at least three reasons. First, the Act's plain language requires the conclusion that Parcel 2 is ineligible. Second, even if the language were ambiguous, the court could not apply "step 2" Chevron deference here because the Secretary failed to acknowledge any ambiguity in the provision, much less apply his expertise in interpreting it. And third, the District Court's alternate ground for affirmance, the Indian Canon of Construction, does not apply.

A. The Plain Meaning of "Within the Corporate Limits" Renders the Land Ineligible.

The July 2010 Decision should be reversed, first and foremost, because the statutory language at issue here is plain and unambiguous.

1. "In reviewing an agency's construction of a statute that it administers, [the Court] appl[ies] the well-established test in Chevron." Eisinger v. FLRA, 218 F.3d 1097, 1104-05 (9th Cir. 2000). "Under Chevron, the first step is 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron USA v. Natural Res. Def. Council, 467 U.S. 837, 842-843 (1984)). "In determining if Congress has 'an intention on the precise question at issue,' [the Court] employ[s] 'traditional tools of statutory construction.' " Hamilton v. Madigan, 961 F.2d 838, 840 n.3 (9th Cir. 1992) (quoting Chevron, 467 U.S. at 843 n.9). In particular, the Court should " 'begin 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., Inc., 129 S. Ct. 2343, 2350 (2009) (citation omitted). " '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) (citation omitted).

Here, no further investigation is necessary. The statutory phrase—"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," Act § 6(d) (emphasis added)—plainly refer to land based on its geographic location; it makes land ineligible if it physically lies inside, or within, the boundary, or limits, of a city. This interpretation should not be controversial. In the proceeding below, the Government conceded that the word "limit" refers to the " 'outer line of [a] thing.' " ER110 (quoting Black's Law Dictionary 926 (6th ed. 1990)).[7] The Government also conceded that the word "within" means simply " 'in inner or interior part of.' " Id. (quoting Black's Law Dictionary 1602-03 (6th ed. 1990). Applying the definitions the Government itself has adopted, the phrase "within the corporate limits" should be interpreted to refer to land in the inner or interior part of the city's outer line. As the District Court found, Parcel 2 "is part of an unincorporated county island surrounded by the City of Glendale." ER3 (emphasis added). Parcel 2 therefore is "within the corporate limits" of Glendale.

2. Although this Court need not consider legislative history to reach the conclusion so plainly embodied in the statute's text, the history of the Gila Bend Act only underscores this interpretation. See Association of Irritated Residents v. EPA, 632 F.3d 584, 596-597 (9th Cir. 2011) (court may consider legislative

[7] The Secretary also acknowledged as much in his July 2010 Decision. ER30 n.5.

history as part of Chevron step one analysis). On two separate occasions, the Committee Report on the Gila Bend Act states that land will qualify for trust status only if it is "outside the corporate limits of any city or town." ER326; ER329 (emphasis added). The term "outside," like the term "within," refers to the location of the land, not its jurisdictional status. Merriam-Webster's Collegiate Dictionary 827 (10th ed. 1999) (preposition "outside" is "used as a function word to indicate * * * position on the outer side of").

3. This interpretation of the plain language likewise is consistent with Arizona law regarding corporate limits. The Arizona Supreme Court has interpreted the words "corporate limits" to refer to a municipality's "exterior boundar[ies]," holding that a state university campus was located within the City of Flagstaff's corporate limits because it was "completely surround[ed]" by the "exterior boundary of Flagstaff." Flagstaff Vending Co. v. City of Flagstaff, 578 P.2d 985, 987 (Ariz. 1978). That interpretation turned on the geographic location of the campus, not its jurisdictional status. Indeed, the campus's jurisdictional status was irrelevant to the court's analysis; as a concurring justice observed, "[t]he record * * * d[id] not make it clear whether the campus of Northern Arizona University is part of the City of Flagstaff." Flagstaff Vending, 578 P.2d at 990 (Cameron, C.J., concurring). That did not stop the Arizona Supreme Court from holding that an island within the city's outer boundaries was within the corporate

limits. While not binding on this Court, Flagstaff Vending is persuasive authority on the plain meaning of "within" and "corporate limits."

B. The Government's and Nation's Contrary Interpretations Are Flawed.

The Department at one time agreed with this understanding of the Gila Bend Act: In 1992, a Department legal brief described the language of the Gila Bend Act just as we do here—as establishing "geographical requirements." ER297. But in his July 2010 Decision, the Secretary took a different tack. He insisted that that the words "within the corporate limits" refer to land based on its "jurisdictional nature" rather than its geographic location, and that the phrase refers only to land that has been officially annexed by a municipality. ER30 & n.4. The Government and the Nation pressed this reading below. Even the District Court rejected it,[8] and for good reason: It is demonstrably incorrect.

1. The Nation and the Government argued in the District Court that "[w]hen a city's incorporated territory surrounds a county island, there are two 'corporate limits' " or borders—an "exterior" border and an "interior" border. ER115; see also ER110. In essence, the Nation and the Government interpreted the Gila Bend Act's use of the phrase "within the corporate limits of any city or

[8] The court rejected the Secretary's plain-meaning analysis: "[T]he Kingdom of Lesotho is entirely 'within' the Republic of South Africa, and yet not part of South Africa. Similarly, it reasonably can be said that Parcel 2 is 'within' the corporate limits of Glendale even though Parcel 2 is not part of Glendale." ER12-13.

town" to mean "within the [exterior border] of any city or town [but outside the interior border]." But this is not what the statute says. If Congress wished to refer to a municipality's "incorporated area" or to "annexation" of the land in question, it would have done so, as it has in other statutes. 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") (emphasis added); Pub. L. No. 102–402, § 4(d)(1), 106 Stat. 1961, 1965 (1992) (referring to "annexation of lands within the refuge by any unit of general local government") (emphasis added); Pub. L. No. 101–514, 104 Stat. 2074, 2076 (1991) (referring to "all incorporated units within the town of Matewan") (emphasis added); Pub. L. No. 100–693, § 3, 102 Stat. 4559 (1988) (referring to "the incorporated area of the cities of Union City and Fremont") (emphasis added). Instead, Congress used the words "within the corporate limits," and these words must be accorded their plain meaning. As this Court has recognized, "we are not vested with the power to rewrite the statutes, but rather must 'construe what Congress has written. * * * It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.' " Arizona State Bd. for Charter Schools v. U.S. Dep't of Educ., 464 F.3d 1003, 1007 (9th Cir. 2006) (citation omitted).

2. The Nation offered an alternative "plain language" theory, contending that the phrase "within the corporate limits" has a "settled legal meaning" referring

to the "incorporated territory of a city." Dist. Ct. Proceeding, Docket No. 98 (Tohono Mot. Summ. J. 9-12). But many authorities—of which Flagstaff is but one—take the opposite view. See, e.g., Village of Frankfort v. Illinois EPA, 852 N.E.2d 522, 524 (Ill. App. Ct. 2006) (referring to unincorporated land "within the corporate limits of Frankfort") (emphasis added); City of Des Moines v. City Dev. Bd., 335 N.W.2d 449, 450 (Iowa Ct. App. 1983) (city "notified respondent * * * that the city would not provide essential services to isolated unincorporated areas within the corporate limits of the city"); Town of Germantown v. Village of Germantown, 235 N.W.2d 486, 491 (Wis. 1975) (interpreting statute as giving municipalities an opportunity to annex islands "lying within the corporate boundaries"). While courts occasionally interpret statutory language in light of a settled legal meaning, that practice applies to "terms of art in which are accumulated the legal tradition and meaning of centuries of practice." Molzof v. United States, 502 U.S. 301, 309 (1992). The phrase "within the corporate limits" has no such pedigree.

C. The District Court's Attempt to Affirm the Agency at Chevron Step Two Fails Because the Agency Did Not Conduct a Chevron Step Two Analysis.

Because Parcel 2 is ineligible for trust acquisition under the Gila Bend Act's plain language, the July 2010 Decision should be reversed. But even if this Court were to conclude that "within the corporate limits" is ambiguous, it still must

vacate the agency's order: The Secretary did not consider statutory ambiguity, and the federal courts cannot affirm an agency at Chevron step 2 when the agency did not bring its knowledge and expertise to bear in interpreting how Congress would have wanted that ambiguity resolved.

1. One of the "principal justifications behind" Chevron deference is respect for agency expertise. Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-652 (1990). It follows that courts can affirm at Chevron step 2 only if the agency exercises its expertise in construing language that the agency recognizes as ambiguous. In Peter Pan, for example, the D.C. Circuit explained that "Chevron step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face." 471 F.3d at 1354. Under Chevron step 2, " 'it is incumbent upon the agency not to rest simply on its parsing of the statutory language.' " Id. (citation omitted). Instead, the agency " 'must bring its experience and expertise to bear in light of competing interests at stake.' " Id. (citation omitted). " 'When it does so it is entitled to deference, so long as its reading of the statute is reasonable.' " Id. (citation omitted).

The same cannot be said when an agency bases its statutory interpretation "on the plain language of the statute, which it treated as unambiguous." Peter Pan, 471 F.3d at 1352. In those circumstances, a reviewing court finding ambiguity in a statute must remand to enable the agency "to interpret the statutory language

anew." Id. at 1354. As the D.C. Circuit wrote in Peter Pan: "[B]ecause we find that the statutory language is in fact ambiguous, we vacate the [the agency's] decision and remand for it to interpret the statute accordingly." Id. at 1352; accord Secretary of Labor v. National Cement Co. of Calif., Inc., 494 F.3d 1066, 1075 (D.C. Cir. 2007) ("Because the Secretary did not recognize the ambiguities inherent in the statutory terms, we do not defer to her plain meaning interpretation but instead remand for her to treat the statutory language as ambiguous.").

2. The Secretary's July 2010 Decision was based on the Act's purported plain meaning, and nothing more: "We base our conclusion on the plain meaning of 'corporate limits,' as used by Congress in the Gila Bend Act." ER30; see also id. ("While there is no statutory definition of 'corporate limits' in the Gila Bend Act, the plain meaning of the phrase is clear."); id. n.6 ("The [Indian Canon of Construction] is unnecessary because we have determined that the meaning of 'corporate limits' is plain.' "). Even the District Court acknowledged as much: "DOI ultimately found the meaning of § 6(d) to be plain[.]" ER17. And the District Court then disagreed with the agency (and the plaintiffs), finding the statute ambiguous. ER15. At that point, the District Court should have remanded to enable the agency to interpret the statute accordingly. See Peter Pan, 471 F.3d at 1352, 1354; National Cement Co., 494 F.3d at 1075.

In its opinion, the District Court rejected any suggestion that the agency should be required to undertake further analysis of the provision it found ambiguous, relying on the fact that one of the Department's field solicitors had himself earlier concluded that the provision was ambiguous. ER16-17. But the Secretary rejected the field solicitor's analysis in the July 2010 Decision, and relied instead on the Act's purported plain meaning. ER30 & n.6. It thus remains to be seen how the Secretary himself will interpret the Gila Bend Act if this Court concludes that the relevant language is ambiguous.

3. The Government and the Nation insisted to the District Court that the Secretary already had provided an alternative interpretation of Section 6(d) sufficient to withstand a remand. They cited a sentence at the end of a short footnote in the July 2010 Decision, in which the Secretary stated, "Even if Congress's intent was less clear, however, we interpret the term not to support a conclusion that Parcel 2 is ineligible under the Act, with or without consideration of the canon." ER30 n.6. According to the Government and the Nation, this cryptic remark explains how the Secretary would interpret the language of Section 6(d) if it were found to be ambiguous. They are incorrect. The remark is insufficient to allow a court to affirm at Chevron step 2.

Courts will defer "to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation."

Village of Barrington v. Surface Transp. Bd., 656 F.3d 650, 660 (D.C. Cir. Mar. 15, 2011). As part of its inquiry, the Court must "ask whether the [agency] has reasonably explained how the permissible interpretation it chose is 'rationally related to the goals of' the statute." Id. at 665 (quoting AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388 (1999)). "At a minimum, the agency must explain how its interpretation of the statute conforms to the text, structure and legislative history of the [statute]; how its interpretation is consistent with judicial interpretations of the [statute] (if there are any on point); and how its interpretation serves the [statute's] myriad policy objectives." Humane Soc'y v. Kempthorne, 579 F. Supp. 2d 7, 20 (D.D.C. 2008)); accord In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig., 748 F. Supp. 2d 19, 30 (D.D.C. 2010). The Secretary's obscure footnote is no explanation at all, and hardly the reasonable explanation that Chevron deference requires.

D. The Indian Canon of Construction Does Not Apply.

The District Court cited the Indian canon of construction as an additional factor "compell[ing]" deference to the Secretary's interpretation of the Gila Bend Act. ER16 (stating that under the canon, " 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit' ") (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)). The District Court was mistaken.

The Secretary's interpretation of Section 6(d) was based on the purported plain meaning of the provision's language, rather than the Indian canon. See ER30 n.6 ("The canon is unnecessary here because we have determined that the meaning of 'corporate limits' is plain.").[9] And it is established that a court "can uphold an agency's decision only on the basis of the reasoning in that decision." de la Fuente v. FDIC, 332 F.3d 1208, 1219 (9th Cir. 2003) (emphasis added). The agency did not rely on the canon; the District Court therefore could not rely on the canon.

In any event, the canon cannot be applied for the benefit of one tribe where, as here, "such application would adversely affect" the interests of another tribe. Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 340 (9th Cir. 1996) (declining to apply canon where two tribes sued to share fishing rights of another tribe); see also Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976) (declining to apply canon because the "contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members"). Here, as the District Court observed, the Secretary's interpretation would adversely affect the economic interests of another tribe, Appellant GRIC. See ER5-6 (explaining that "[t]he Community will also suffer genuine injury because a major casino in Glendale will reduce the Community's revenue from its

[9] The Secretary correctly recognized that the canon has no application when a statute's meaning is plain. See Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1257 (9th Cir. 1994) (courts "will not rely" on the canon "to contradict the plain language of a statute").

own casinos, particularly the Vee Quiva Casino located less than 20 miles from Parcel 2"). But the District Court brushed aside these points, citing two cases for the proposition that the canon applies even in situations where "Indians [a]re on both sides of the case." ER16.

The District Court's authorities are inapposite. In the first, EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001), this Court cited the Indian Canon for the limited proposition that " 'the standard principles of statutory construction do not have their usual force in cases involving Indian law.' " Id. at 1082 (quoting Blackfeet, 471 U.S. at 766). The Court did not apply the canon in performing its analysis.[10] Nor did it address exceptions to the canon where tribes have competing interests. In the second, Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), this Court indicated in dicta that the canon provided further support for its conclusion that a federal court had jurisdiction over a state child custody dispute. Id. at 1041-47. Applying the canon under those circumstances would not adversely affect other tribes' interests.[11] The canon has no bearing on this case.

[10] The case instead turned on a doctrine announced in Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), addressing situations in which federal statutes of general applicability apply to tribes. Karuk Tribe, 260 F.3d at 1078-82.

[11] Other Native Americans—the individuals who adopted the plaintiff's daughter—were parties in Doe, but their interests were not adversely affected by this Court's ruling on jurisdiction. Quite the contrary; they ultimately succeeded in retaining custody of the plaintiff's child. 260 F.3d at 1040-41.

Finally, even if these legal principles did not foreclose reliance on the canon, the Court still should not apply the canon to construe any supposed statutory ambiguity in the Nation's favor. In interpreting ambiguous treaties, courts have refused to apply the canon " 'to divest a state of land it has acquired,' " Seneca Nation of Indians v. New York, 382 F.3d 245, 259 (2d Cir. 2004) (citation omitted), unless " 'the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question.' " Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1164 (2d. Cir. 1988) (quoting United States v. Minnesota, 270 U.S. 181, 209 (1926)). The same principles should apply in construing statutes like the Gila Bend Act. See Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001). If the Court finds that the Gila Bend Act is ambiguous, it should also conclude that Congress has not made clear its intent to divest Arizona of control over county islands. Under these circumstances, the canon does not apply.

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

The Supreme Court held in Seminole Tribe, 517 U.S. at 72, that Congress cannot use the Indian Commerce Clause to infringe on an attribute of state sovereignty embodied in the Constitution. But that is exactly what Congress did here: It authorized the Secretary to infringe on Arizona's territorial integrity—an attribute of state sovereignty protected by multiple provisions of the Constitution—by turning control over state land over to another sovereign without Arizona's

consent. That encroachment dwarfs the one the Supreme Court disapproved in Seminole Tribe. The Indian Commerce Clause does not authorize what Congress did. For this reason, too, the Secretary's order should be vacated.

A. The Indian Commerce Clause Does Not Authorize Congress to Invade Attributes of State Sovereignty Embodied in the Constitution.

The Constitution creates a federal government of enumerated powers: " '[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45). That structure was chosen precisely to protect the states' " 'residuary and inviolable sovereignty.' " Printz v. United States, 521 U.S. 898, 919, 923 n.13 (1997) (citation omitted). As Justice Kennedy observed: "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

The question, then, is whether Congress's assertion of power in the Gila Bend Act, as applied here, exceeds "the powers delegated by the proposed Constitution to the federal government." The Federalist No. 45. The answer lies

in the words and judicial interpretations of the Indian Commerce Clause, on which Congress relied to enact the Gila Bend Act. See ER325.

The Clause, which empowers Congress "to regulate Commerce * * * with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, was a reaction to a deficiency in Congress's power under the Articles of Confederation. The Articles gave Congress "the sole and exclusive right of 'regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not infringed or violated.' " Worcester v. Georgia, 31 U.S. 515, 558-559 (1832) (quoting Articles of Confederation art. IX) (emphasis added). But as Justice Story explained, no one could make heads or tails of the underscored proviso, because it would be impossible for Congress to exercise its right of exclusive regulation over Indians living in a state without "infring[ing]" on that state's ability to regulate them: "[H]ow the trade with Indians * * * residing within [a state's] legislative jurisdiction, was to be regulated by an external authority, without so far intruding on the internal rights of legislation, was absolutely incomprehensible." 3 J. Story, Commentaries on the Constitution of the United States § 1094 (1833). The Framers accordingly deleted the caveat when it came time to draft the Constitution: "Intending to give the whole power of managing [Indian] affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those

qualifications which embarrassed the exercise of it as granted in the confederation." Cherokee Nation v. Georgia, 30 U.S. 1, 14 (1831). Justice Story described the Indian Commerce Clause as providing the federal government the "right of exclusive regulation of trade and intercourse with [the tribes], and the * * * authority to protect and guarantee their territorial possessions, immunities, and jurisdiction." Commentaries § 1094.

The Supreme Court has never articulated a test to determine whether assertions of congressional power fall within the Indian Commerce Clause. It has, however, offered guideposts. It has explained that "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). And it has stated that "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). But it also has held that the Clause has boundaries. In Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), the Court observed 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)).[12] In United States v. Lara,

[12] Defendants relied below on a handful of decisions rejecting challenges to land-into-trust statutes on the rationale that because the Indian Commerce power is "plenary," it must provide the authority to take land into trust. See, e.g., Carcieri

541 U.S. 193, 205 (2004), the Court suggested that Congress could run up against "constitutional limits" if its Indian legislation "interfere[d] with the power or authority of any State"—a statement one academic characterized as a "warning shot at Congress" regarding limits on the Clause. A. Skibine, Tribal Sovereign Interests Beyond the Reservation Borders, 12 Lewis & Clark L. Rev. 1003, 1039 (2008). And most importantly, in Seminole Tribe, the Court held that the Clause has a hard-and-fast limit: It "does not grant Congress th[e] power" to abrogate an element of state sovereignty—there, sovereign immunity—embodied in another provision of the Constitution. 517 U.S. at 47.

Seminole Tribe involved a statute, the Indian Gaming Regulatory Act, that instructed states to negotiate gaming pacts with tribes and authorized the tribes to sue if the states failed to negotiate in good faith. Id. at 47-49; 25 U.S.C. § 2710(d). The Supreme Court held that Congress could not unilaterally authorize such suits because to do so intruded on the states' sovereign right of immunity, embodied in

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v. Kempthorne, 497 F.3d 15, 39 (1st Cir. 2007), rev'd on other grounds, Carcieri v. Salazar, 129 S. Ct. 1058 (2009). That analysis is flawed. To say Congress has "plenary" authority is merely to say it is the only body that can legislate on the topic. See Seminole Tribe, 517 U.S. at 62 (states "have been divested of virtually all authority over Indian commerce"). This Court has recognized that that is all "plenary" signifies: In American Vantage Cos., Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1096 (9th Cir. 2002), it wrote that "[b]ecause 'Congress possesses plenary power over Indian affairs,' Indian tribes fall under nearly exclusive federal, rather than state, control." (citation omitted). In any event, no matter how broad the power is, it cannot be used to invade rights protected by the Constitution. See Gibbons v. Ogden, 22 U.S. 1, 196 (1824) (the Commerce Clause power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.") (emphasis added). Indeed, that is the whole point of Seminole Tribe, as we discuss below.

the Eleventh Amendment. Seminole Tribe, 517 U.S. at 72. The Court said it had always " 'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition * * * which it confirms: * * * first, that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' " Id. at 54 (citations omitted). On that basis, the Court held:

> [T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. [Id. at 72 (emphasis added)].

B. The Gila Bend Act Invades Attributes of State Sovereignty Embodied in the Constitution.

Seminole Tribe held that the Indian Commerce Clause does not authorize Congress to take from unconsenting states attributes of sovereignty "embodied" in the Constitution. Id. That holding controls this case. The principle of state territorial integrity is embodied in the Constitution as clearly as the principle of state sovereign immunity. The Gila Bend Act authorizes an unconstitutional encroachment on that territorial integrity.

1. The Constitution Protects States' Territorial Integrity.

a. Multiple provisions of the Constitution stand for the principle that the federal government cannot encroach on a state's control over its territory without consent. The Enclave Clause, for example, authorizes Congress "[t]o exercise exclusive Legislation" on land "for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings"—but only if the land is "purchased by the Consent of the Legislature of the State in which the Same shall be located." U.S. Const. art. I, § 8, cl. 17 (emphasis added). The Statehood Clause, likewise, provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl. 1. The Supreme Court has held that this clause is a "guarantee * * * of state territorial integrity," and that it constitutes an "express element[ ] 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) (emphasis added). And the Tenth Amendment has long been understood to "expressly declare[ ] the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity," Fry v. United States, 421 U.S. 542, 547 n.7 (1975), and to block Congress from taking from states any of the "essential attributes inhering" in sovereign status.

Alden, 527 U.S. at 714. Atop the list of "essential attributes" is a state's territorial integrity: "Of all the attributes of sovereignty, none is more indisputable than that of [a state's] actions upon its own territory." Green, 21 U.S. at 43.

b. Recognizing that the Constitution protects state territorial integrity, the Supreme Court long ago held that "[i]t is incontestable" that a state "cannot be deprived" of control over its territory without its consent. Id. at 42. The Court has often reiterated this principle. In Geofroy v. Riggs, 133 U.S. 258, 267 (1890), the Court said "[i]t would not be contended that [the Treaty power] extends so far as to authorize * * * a cession of any portion of the territory of [a state] without its consent." Id. at 267. In Fort Leavenworth Ry. v. Lowe, 114 U.S. 525 (1885), the Court held that agreement of "the state within which * * * territory is situated" must be obtained "before any cession of sovereignty or political jurisdiction can be made to a foreign country." Id. at 540-541. More recently, the 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) (citation omitted), and that it "would raise grave constitutional concerns" if Congress "purported to 'cloud' [a state's] title to its sovereign lands" by recognizing a native land claim long after the state's admission to the Union. Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1445 (2009). And the Court has suggested that congressional action that causes a state to suffer a "loss of

political jurisdiction" over land—including by expansion of tribal prerogatives—unlawfully "interfere[s] with the sovereignty of the state." Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 & n.58 (1941).

2. The Gila Bend Act Infringes on Arizona's Territorial Integrity.

Just as the Constitution "confirms" that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,' " Seminole Tribe, 517 U.S. at 54 (citation omitted), it likewise confirms that it is inherent in the nature of sovereignty that a sovereign cannot be stripped of control over its territory against its will. Green, 21 U.S. at 42-43. But that is precisely the effect the Gila Bend Act has here.

The Act provides that land taken into trust for the Nation "shall be deemed to be a Federal Indian Reservation for all purposes." Gila Bend Act § 6(d). And while "[s]tate sovereignty does not end at a reservation's border," Nevada v. Hicks, 533 U.S. 353, 361 (2001), in the sense that states can still regulate individuals (usually non-Indian individuals) on reservations in some circumstances, see Bryan v. Itasca Cnty., 426 U.S. 373, 376 n.2 (1976), the state's territorial control—the ability to tax, to regulate, to control land use—is effectively eliminated when state land is turned into a reservation. As courts have recognized, "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) (citation omitted). For that reason, "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). Moreover—and importantly for this case—tribal sovereignty blocks "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. Montana, 650 F.2d 1104, 1110 (9th Cir. 1981). This Court thus has rejected attempts to apply local laws, including zoning ordinances, to reservation lands. See, e.g., Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390-94 (9th Cir. 1987). So it will be if Parcel 2 if it is taken into trust. Arizona and Glendale will be stripped, in large measure, of power to govern, control, and tax the land.

In short, the Secretary seeks under the Gila Bend Act's auspices to undercut an element of state sovereignty—territorial control—embodied in the Constitution, and to do so without state consent. Seminole Tribe requires the conclusion that that extraordinary assertion of power exceeds Congress's authority under the Indian Commerce Clause. Indeed, this is an a fortiori case: While immunity is an

important aspect of sovereignty, territorial control is the very "essence of a state." H. Kelsen, General Theory of Law and State 207 (Harvard Univ. Press 1945). If Congress cannot employ the Clause to infringe on state immunity, it cannot employ the Clause to infringe on state territory either. This Court should so hold.[13]

Nor would that holding mean the federal government could no longer create reservations, as the defendants have suggested. See Dist. Ct. Proceeding, Docket No. 98 (Tohono Mot. Summ. J. 22). First, the Constitution and the cases make clear that while Congress cannot unilaterally strip control over territory away from a state, the state can consent to that diminution of control. See, e.g., U.S. Const. art. I, § 8, cl. 17 (state can consent to creation of a federal enclave); id. art. IV, § 3, cl. 1 (state can consent to creation of a new state from a portion of its territory); Geofroy, 133 U.S. at 267 (state can consent to cede territory); cf. Seminole Tribe, 517 U.S. at 72 (state can consent to immunity waiver). There no doubt would be many circumstances in which Arizona would gladly give such consent. This

[13] The same holding follows from Printz, discussed in greater depth infra at 52-53. There the Supreme Court rejected the notion that the Necessary and Proper Clause authorizes Congress to commandeer state officials. 521 U.S. at 923-924. It explained: "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 and the Statehood Clause—"it is not a 'La[w] * * * proper for carrying into Execution the Commerce Clause.' " Id. (quoting The Federalist No. 33) (emphasis in Printz). Just so here. Removal of territory from nearly all incidents of state control does not itself regulate commerce with a tribe. It must be justified, if at all, under the Necessary and Proper Clause. But Printz teaches that it cannot be because it "violates the principle of state sovereignty" reflected in the provisions the Court named, including the Tenth Amendment and Statehood Clause.

case—one where a tribe is looking for loopholes to create a reservation in the midst of a city, purely for gaming—is not one of them. See ER122-27 (Arizona legislative resolution observing that the State has "the right to maintain full governmental authority over its territory unless this legislative body grants the federal government leave to diminish that territorial authority" and formalizing the State's opposition to the trust acquisition). Second, even where a state will not consent, Congress may have the authority to create reservations on land over which the tribe historically exercised sovereign control. After all, Indian sovereignty flows from the tribe's aboriginal control over the land, see American Vantage Cos., 292 F.3d at 1096, and that aboriginal claim is not necessarily extinguished by the passage of time (though it may be on certain facts). See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 215-220 (2005). In situation where the tribe has retained a sovereign claim to land, any congressional move to re-establish a reservation would merely recognize a limit on state control that already exists. That is very different from creating such a limit from whole cloth.

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

For similar reasons, the Gila Bend Act violates the Tenth Amendment.

1. 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. The

Amendment is the core expression of federalism. As the Supreme Court has said, "[t]he Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves[.]" Bond v. United States, 131 S. Ct. 2355, 2364 (2011). That structure "serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another" and "preserves the integrity, dignity, and residual sovereignty of the States." Id. Thus, explained the Court, federalism is "expressed by" the Tenth Amendment, and the core goal of that expression is "to ensure that States function as political entities in their own right." Id. at 2364, 2366.

While the particulars of Tenth Amendment jurisprudence have shifted through 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, 469 U.S. at 547 (citation omitted). 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. at 547 n.7—at least not without state consent.[14] Thus Congress cannot undercut a state's "ability to function effectively in a federal system," id.,

[14] As in the Indian Commerce Clause context, consent would change matters. In some circumstances consent renders permissible federal action that otherwise would invade state sovereignty. See Printz, 521 U.S. at 911 ("the critical point" in cases approving commandeering was that Congress could not have "impose[d] these responsibilities without the consent of the States") (emphasis in original).

"curtail in any substantial manner the exercise of its powers," Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926), or take from it any of "the dignity and essential attributes inhering" in sovereign status. Alden, 527 U.S. at 714.

The Gila Bend Act runs afoul of these principles. As we discussed above, a state's power to control its own territory is the very core of sovereignty. Green, 21 U.S. at 42-43; H. Kelsen, General Theory of Law and State 207. And the Gila Bend Act authorizes the Secretary to take actions that will effectively foreclose Arizona from controlling a portion of its territory: If Parcel 2 is taken into trust, Arizona (and Glendale) will no longer be able to tax the property, to exercise criminal jurisdiction over tribal members there, to enforce their laws on the property in most circumstances, to zone the land, or to control land use. See supra at 46-47. If that fundamental loss of control over territory does not "impair[ ] the State['s] integrity," Fry, 421 U.S. at 547 n.7, it is difficult to imagine what would.

The Supreme Court explained in New York v. United States, 505 U.S. 144 (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 a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Id. at 156. There can be no doubt that a state's power to control its own territory is "an attribute of state sovereignty

reserved by the Tenth Amendment." Id. The Gila Bend Act as applied here runs headlong into the Amendment. It cannot stand.

2. The Supreme Court in recent decades has employed the Tenth Amendment primarily to strike down federal laws that "commandeer" state officials. Printz, 521 U.S. at 935; New York, 505 U.S. at 188. The Government and the Nation relied on this fact below, arguing that the Tenth Amendment's import is limited to commandeering and that the Gila Bend Act cannot run afoul of the Amendment because "the [Supreme] Court has abandoned the attempt to define 'integral' or 'traditional' spheres of state sovereignty that must be free from federal interference." ER118.

This argument overstates the degree to which the Supreme Court has cabined the Tenth Amendment. The Court has never said that the Amendment only applies to forbid commandeering. And while the Court abandoned attempts to catalogue "traditional" or "integral" state government functions, such as waste disposal, that must be free from federal interference, see Garcia, 469 U.S. at 546-547, that is a far cry from a holding, as the Nation suggests, that there are no "spheres of state sovereignty that must be free from federal interference." ER118 (emphasis added). The Court has held no such thing. Nor could it: Such a holding would fly in the face of the many constitutional provisions that explicitly protect state territorial integrity from federal interference. See supra at 44-45. It would

make nonsense of the unwavering line of cases holding that states "cannot be deprived" of the single most "indisputable" aspect of sovereignty: "that of [the state's] actions upon its own territory." Green, 21 U.S. at 42-43. And it could not be reconciled with Seminole Tribe, in which the Court squarely held that a "sphere of state sovereignty"—namely, sovereign immunity—"must be free from federal interference." ER118.

Moreover, the notion that the Tenth Amendment would forbid commandeering, but allow the introduction of a new sovereign power on state land without state consent, makes little sense. "Commandeering," after all, refers to forcing a state government to effectively turn over its officers for a time to perform federally-mandated tasks. Printz, 521 U.S. at 925. What the Secretary seeks to do here is force a state government to effectively turn over control of its territory, forever. There is no reason in law or logic why the latter would be permissible when the former is not.

* * *

The District Court gave short shrift to the constitutional issues we present here. But the Supreme Court has clearly signaled that they raise thorny problems deserving serious attention. The Court recently observed that Congress could run up against "constitutional limits" if its Indian legislation "interfere[d] with the power or authority of any State." Lara, 541 U.S. at 205. Chief Justice Roberts has

characterized the land-into-trust process as "an extraordinary assertion of power." Carcieri v. Kempthorne, No. 07-526, Oral Arg. Tr. 36:13-17 (Nov. 3, 2008). And Justice Kennedy suggested in the same case that there may be "some principle of Federalism which makes us be very cautious before we take land out of the jurisdiction of the State." Id. at 38:11-13 (emphasis added). That "principle of federalism" is squarely presented here. Trust acquisitions like this one offend the states' sovereign integrity like nothing else the United States does under the name of the Indian Commerce Clause. The Court should hold that the acquisition exceeds Congress's power.

CONCLUSION

The judgment below should be reversed, and the Secretary's July 2010 Decision should be vacated and remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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July 15, 2011

NINTH CIRCUIT RULE 28-2.6 STATEMENT

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the State of Arizona, the City of Glendale, Michael Socaciu, and Gary Hirsch state that they are unaware any related case pending in this Court.

Two related cases are pending in the District of Arizona. The first, Tohono O'odham Nation v. City of Glendale, No. 2:11-cv-279-NVW, involves the Nation's challenge to the legality of H.B. 2534, an Arizona statute authorizing municipalities to annex land in certain circumstances. The second, State of Arizona v. Tohono O'odham Nation, involves allegations by the State and GRIC, among other plaintiffs, that by gaming on Parcel 2 the Nation will violate a tribal-state compact limiting casino-style gaming within Arizona to certain defined lands. Both cases are pending before Judge Campbell.

/s/ Catherine E. Stetson
Catherine E. Stetson

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached Brief is proportionally spaced, has a typeface of 14 point, and contains 13,434 words.

/s/ Catherine E. Stetson
Catherine E. Stetson

ADDENDUM

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STATUTES:

Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986)

An Act to provide for the replacement of certain lands within the Gila Bend Indian Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Gila Bend Indian Reservation Lands Replacement Act".

CONGRESSIONAL FINDINGS

SEC. 2. The Congress finds that:

(1) Section 308 of Public Law 97-293 "96 Stat. 1282" authorizes the Secretary of the Interior to exchange certain agricultural lands of the Gila Bend Indian Reservation, Arizona, for public lands suitable for farming.
(2) An examination of public lands within a one-hundred-mile radius of the reservation disclosed that those which might be suitable for agriculture would require substantial Federal outlays for construction of irrigation systems, roads, education and health facilities.
(3) The lack of an appropriate land base severely retards the economic self-sufficiency of the O'odham people of the Gila Bend Indian Reservation, contributes to their high unemployment and acute health problems, and results in chronic high costs for Federal services and transfer payments.
(4) This Act will facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and do not require Federal outlays for construction, and promote the economic self- sufficiency of the O'odham Indian people.

DEFINITIONS

SEC. 3. For the purpses of this Act, the term:

(1) "Central Arizona Project" means the project authorized under title III of the Colorado River Basin Project Act (82 Stat. 887; 43 U.S.C. 1521, et seq.).
(2) "Tribe" means the Tohono O'odham Nation, formerly known as the Papago Tribe of Arizona, organized under section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476).
(3) "Secretary" means the Secretary of the Interior.
(4) "San Lucy District" means the political subdivision of the Tohono O'odham Nation exercising governmental functions on the Gila Bend Indian Reservation.

ASSIGNMENT OF TRIBAL LANDS; RETAINED RIGHTS

SEC. 4. (a) If the tribe assigns to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of land within the Gila Bend Indian Reservation, the Secretary of the Interior shall pay to the authorized governing body of the Tribe the sum of

$30,000,000 -- $10,000,000 in fiscal year 1988, $10,000,000 in fiscal year 1989 and $10,000,000 in fiscal year 1990 -- together with interest accruing from the date of enactment of this Act at a rate determined by the Secretary of the Treasury taking into consideration the average market yield on outstanding Federal obligations of comparable maturity, to be used for the benefit of the San Lucy District. The Secretary shall accept any assignment under this subsection.

(b) The Tribe shall be permitted to continue to hunt, fish, and gather on any lands assigned to the United States under subsection (a) of this section so long as such lands remain in Federal ownership.
(c) With respect to any lands of the Gila Bend Indian Reservation which the Tribe does not assign to the United States, the Tribe shall have the right to withdraw ground water therefrom from wells having a capacity of less than thirty-five gallons per minute and which are used only for domestic purposes.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. Effective October 1, 1987 there is authorized to be appropriated such sums as may be necessary to carry out the purposes of section 4.

USE OF SETTLEMENT FUNDS; ACQUISITION OF LANDS

SEC. 6. (a) The Tribe shall invest sums received under section 4 in interest bearing deposits and securities until expended. The authorized governing body of the Tribe may spend the principal and the interest and dividends accruing on such sums on behalf of the San Lucy District for land and water rights acquisition, econolmic and community development, and relocation costs. Such income may be used by the Tribe for planning and administration related to land and water rights acquisition, economic and community development and relocation for the San Lucy District.

(b) The Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section, nor shall the Secretary be subject to liability for any claim or cause of action arising from the Tribe's use and expenditure of such moneys. No portion of such moneys shall be used for per capita payments to any members of the Tribe.
(c) The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres. The Tribe and the United States shall be forever barred from asserting any and all claims for reserved water rights with respect to any land acquired pursuant to this subsection.
(d) The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. 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. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.
(e) The Secretary shall establish a water management plan for any land which is held in trust under subsection (c) which, except as is necessary to be consistent with the provisions of this Act, will have the same effect as any management plan developed under Arizona law.

REAL PROPERTY TAXES

SEC. 7. (a) With respect to any private land acquired by the Tribe under section 6 and held in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes.

(b) The Secretary is authorized to enter into agreements with the State of Arizona and its political subdivisions pursuant to which the Secretary may satisfy the obligation under subsection (a), in whole or in part, through the transfer of public land under his jurisdiction or interests therein, including land within the Gila Bend Indian Reservation or interests therein.

WATER DELIVERY

SEC. 8. If the tribe acquires rights to the use of any water by purchase, rental, or exchange within the State of Arizona, the Secretary, at the request of the Tribe, shall deliver such water, at no cost to the United States, through the main project works of the Central Arizona Project to any land acquired under section 5(c), if, in the judgment of the Secretary, sufficient canal capacity exists to convey such water: Provided, That deliveries of such water shall not displace deliveries of Central Arizona Project water. The rate charged to the tribe for water delivery shall be the same as that charged by the Central Arizona Water Conservation District pursuant to contracts entered into pursuant to the Colorado River Basin Project Act (43 U.S. C. 1521, et seq.). Nothing in this section shall be deemed to obligate the Secretary to construct any water delivery system.

WAIVER AND RELEASE OF CLAIMS; EFFECTIVE DATE

SEC. 9. (a) The Secretary shall be required to carry out the obligations of this Act only if within one year after the enactment of this Act the Tribe executes a waiver and release in a manner satisfactory to the Secretary of any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water) with respect to the lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Tribe of such a waiver.

(b) Nothing in this section shall be construed as a waiver or release by the Tribe of any claim where such claim arises under this Act.
(c) The assignment referred to in section 4 and the waiver and release referred to in this section shall not take effect until such time as the full amount authorized to be appropriated in section 4 has been appropriated by the Congress and paid to the Tribe.

COMPLIANCE WITH BUDGET ACT

SEC. 10. No authority under this Act to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts. Any provision of this Act which, directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal years beginning after September 30, 1987.

Approved October 20, 1986.

25 U.S.C. § 1724(i)(2)

(2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. The proceeds from any such condemnation shall be deposited in the land acquisition fund established by subsection (c) of this section and shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine. When the proceeds are reinvested in land whose acreage does not exceed that of the land taken, all the land shall be acquired in trust. When the proceeds are invested in land whose acreage exceeds the acreage of the land taken, the respective tribe or nation shall designate, with the approval of the United States, and within thirty days of such reinvestment, that portion of the land acquired by the reinvestment, not to exceed the area taken, which shall be acquired in trust. The land not acquired in trust shall be held in fee by the respective tribe or nation. The Secretary shall certify, in writing, to the Secretary of State of the State of Maine the location, boundaries, and status of the land acquired.

Pub. L. No. 102–402, § 4(d)(1), 106 Stat. 1961, 1965 (1992)

(d) LIMITATIONS.--
(1) PROHIBITION AGAINST ANNEXATION.--Notwithstanding section 4(a)(2) of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd(a)(2)), the Secretary of the Interior shall not allow the annexation of lands within the refuge by any unit of general local government. . . .

Pub. L. No. 101–514, 104 Stat. 2074, 2076 (1991)

Provided further, That with $7,500,000 of the funds herein appropriated to remain available until expended, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue the work for the levees/floodwalls and to undertake other structural and nonstructural work associated with the Barbourville, Kentucky, element of the Levisa and Tug Forks of the Big Sandy River and Upper Cumberland River project authorized by section 202 of Public Law 96-367: Provided further, That with $20,500,000 of the funds herein appropriated to remain available until expended, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue the work for the river diversion tunnels and to undertake other structural and nonstructural work associated with the Harlan, Kentucky, element of the Levisa and Tug Forks of the Big Sandy River and Upper Cumberland River project authorized by section 202 of Public Law 96-367 using continuing contracts: Provided further, That $6,000,000 of the funds herein appropriated to remain available until expended, the Secretary of the Army, acting through the Chief of Engineers, is directed to initiate construction of the lower Mingo County, West Virginia element of the Levisa and Tug Forks of the Big Sandy and Upper Cumberland River project authorized by section 202 of Public Law 96-367, in accordance with the costsharing principles of Public Law 99-662 using continuing contracts: *Provided further, That no fully allocated funding* policy shall apply to construction of the Barbourville, Kentucky, and Harlan, Kentucky, and lower Mingo County, West Virginia, elements of the Levisa and Tug Forks of the Big Sandy River and Upper Cumberland River project: Provided further, That the project for flood protection for the town of Matewan, West Virginia, shall include all incorporated units within the town of Matewan . . . .

Pub. L. No. 100–693, § 3, 102 Stat. 4559 (1988)

SEC. 3. DESCRIPTION OF PROPERTY.

(a) IN GENERAL. -- The property referred to in sections 1, 2, and 4 is certain real property situated in the County of Alameda, State of California, forming a part of the right-of-way granted by the United States to the Central Pacific Railway Company in the Act entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military, and Other Purposes", approved July 1, 1862 (12 Stat. 489).
(b) SPECIFIC DESCRIPTION. -- The real property referred to in subsection (a) involves certain real property situated in the unincorporated townships of Murray, Pleasanton, and Washington, and in the incorporated area of the cities of Union City and Fremont, and is more particularly described as follows . . . .

Ariz. Rev. Stat. § 11-831

§ 11-831. Additional requirements for certain lands

A. The rezoning or subdivision plat of any unincorporated area completely surrounded by a city or town shall use as a guideline the adopted general plan and standards as set forth in the subdivision and zoning ordinances of such city or town after the effective date of this section.

B. The board or commission, before taking any action on a rezoning or subdivision plat in an area as set forth in subsection A, may require the affected city or town to supply information to allow the county to meet the guideline. If an affected city or town objects to any such proposed action the board or commission shall set forth in the minutes of the meeting specific reasons why in its opinion the guideline is actually being followed or why it is not practicable to follow the guideline of the general plan.

CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk using the appellate CM/ECF system on July 15, 2011. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Arizona, Glendale, and the Glendale plaintiffs are filing joint Excerpts of Record with the GRIC plaintiffs. The GRIC plaintiffs compiled the Excerpts of Record and on July 15, 2011 sent four copies to the Clerk. Paper copies were served upon the following:

Aaron P. Avila
Joseph N. Watson
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