Nos. 11-246 & 11-247

In The Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Petitioner,

v.

DAVID PATCHAK, et al.,

Respondents.

KEN L. SALAZAR, Secretary of the Interior, et al.,

Petitioners,

v.

DAVID PATCHAK, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The National Congress of American Indians ("NCAI") submits this brief as amicus curiae in support of the petitions for a writ of certiorari filed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (No. 11-246) and *Salazar v. Patchak* (No. 11-247).[1] As the oldest and largest national organization addressing American Indian interests, NCAI currently represents more than 250 tribes and Alaska native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of Indian issues, including the federal trust-acquisition authority at issue in this suit.

Amicus is in a unique position to more fully explain to this Court the vital role that trust land acquisitions have played, and continue to play, in the building of stable tribal governments and the development of strong tribal economies. In addition, amicus will show how the D.C. Circuit's decision, if

[1] In accord with Supreme Court Rule 37.6, NCAI affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of NCAI's intention to file this amicus brief under this Rule, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

allowed to stand, will immediately frustrate and curtail such development.

REASONS FOR GRANTING THE PETITIONS

The petitions present questions of significant importance to the United States and to Indian tribes nationwide. As thoroughly discussed in the petitions, the D.C. Circuit's decision creates an acknowledged circuit conflict with the Ninth, Tenth, and Eleventh Circuits on the scope of the United States' immunity from suit under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. Tribe Pet. 9-15; U.S. Pet. 15-16. In reaching its decision, and in conflict with decisions of this Court, the D.C. Circuit erroneously construed the United States' waiver of sovereign immunity under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. Tribe Pet. 15-19; U.S. Pet. 8-14.

As recognized by both petitions, if not corrected by this Court, the D.C. Circuit's decision will have significant long-term adverse consequences for the United States, tribal governments, state and local governments, as well as communities and businesses. Tribe Pet. 19-21; U.S. Pet. 16-18. The United States' ability to take land into trust for the benefit of Indian tribes is critical to tribal self-governance and economic self-sufficiency. Trust acquisition is not only the central means of restoring and protecting tribal homelands, but also is critical to tribal economic

development that benefits both tribes and their neighboring communities.

Under the D.C. Circuit's decision, the doors to the federal courts are, for the first time, open to post hoc challenges to fully finalized trust land acquisition decisions of the United States. This creates uncertainty for the United States in relation to the final trust status of these lands, which in turn generates instability in tribal governments' ability to use the lands for their intended purposes, driving away potential investors at a time when access to capital is already one of the primary impediments to economic development in Indian country.

In considering whether the questions presented in the petitions merit review, Amicus seeks to more fully inform this Court with respect to the vital role trust land acquisition plays in the federal government's recognition of tribes' rights to self-determination, and moreover, how such acquisitions are a critical component in tribal economic development, which benefits both tribes and their surrounding non-Indian communities alike.

I. The United States' Ability to Take Land Into Trust is Central to Restoring and Protecting Tribal Homelands and Critical to Tribal Economic Development that Benefits Both Tribes and the Surrounding Non-Indian Community.

A. Tribal Self-Determination, Development, and Economic Prosperity Depend Upon Trust Land.

The federal government's trust-acquisition authority[2] continues to serve as "the primary means to help restore and protect homelands of the nation's federally recognized tribes," with "[t]he vast majority of land-into-trust applications" intended for "purposes such as providing housing, health care and education for tribal members and for supporting agricultural,

[2] Tribal trust land is "land held in trust by the United States for the benefit of a tribe or individual Indian." *See Cohen's Handbook of Federal Indian Law* § 15.03, at 968 (2005). Statutory authority for the federal government to acquire land in trust for a tribe is generally premised on Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465, although other statutory bases, often specific to a particular tribe, exist as well. *See* U.S. Dep't of the Interior, *Bureau of Indian Affairs' Handbook on Acquisition of Title to Land Held in Fee or Restricted Fee to Trust* § 3.1 (May 20, 2008), *available at* http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf (listing statutory authorities). The land taken into trust can be located either within or contiguous to a tribe's existing reservation ("on-reservation") or outside the reservation's boundaries ("off-reservation"), with corresponding federal regulations governing each type of discretionary acquisition. *See* 25 C.F.R. § 151.10 (on-reservation); *id*. § 151.11 (off-reservation).

energy and non-gaming economic development." News Release, U.S. Dep't of the Interior, Salazar Policy on Land-into-Trust Sees Restoration of Tribal Lands as Key to Interior Strategy for Empowering Indian Tribes: Majority of Non-Gaming Trust Applications are Vital to Building Tribal Self-Determination Through Self-Sufficiency (Jul. 1, 2010), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc009902.pdf. Trust acquisitions thus serve to promote investment in tribal lands and infrastructure. Trust land accordingly plays a critical role in tribal economic development, which, as recognized by the U.S. Government Accountability Office ("GAO") in recent Congressional testimony, is correspondingly vital to improving the socioeconomic conditions of Indian tribes and their members. U.S. Gov't Accountability Office, GAO-11-543T, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands: Testimony Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives* 1, 5-7 (Apr. 7, 2011) (statement of Anu K. Mittal, Director, Natural Resources and Environment).

This correlation between investment on tribal land and improved socioeconomic conditions is well documented. Indeed, as tribes in the 1990's began to "invest[ ] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other areas supporting tribal self-governance, gaming and non-gaming tribes alike made "striking"

socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix-xi (The Harvard Project on Economic Development, Jan. 2005). These gains notwithstanding, however, tribes remain among the most economically distressed groups in the United States, with the U.S. Census Bureau reporting in 2008 a poverty rate of 27% among American Indians and Alaska Natives, compared with 15% among the population as a whole. U.S. GAO, GAO-11-543T, *supra*, at 1.

Further socioeconomic improvement in Indian country thus depends upon continued tribal economic development, in which the trust-acquisition process plays a vital role. *See generally* Julian Schriebman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol'y Rev. 353, 384 (1996) ("Trust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development efforts."). The Department of the Interior has accordingly asserted a strong commitment to "fulfill[ing] [its] trust responsibilities," which it recognizes are critical in "empower[ing] tribal governments to help build safer, stronger and more prosperous tribal communities."[3] Press Release, U.S. Dep't of the Interior,

[3] In total, more than nine million acres of tribal land have been reacquired and taken into trust following the federal government's removal of more than 90 million acres of tribal land during the allotment period from 1887 to 1934 and the Termination Era of the 1950's and 60's. News Release, Salazar Policy, *supra*.

Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference.cfm. These trust land acquisitions go hand-in-hand with economic development, since "[h]aving a land base is essential for many tribal economic activities." U.S. GAO, GAO-11-543T, *supra*, at 3.

B. State and Local Governments and the Neighboring Non-Indian Communities also Reap Benefits from Trust Land Acquisitions.

Economic development in Indian country benefits not only tribes and their members, but surrounding local communities and states as well. Indeed, while the Department of the Interior specifically solicits comments from state and local governments detailing their concerns about the impact trust acquisitions may have on their tax bases and jurisdiction, *see* 25 C.F.R. §§ 151.10, 151.11, many trust acquisitions enjoy enthusiastic support from surrounding state and local governments, *see* U.S. GAO, GAO-11-543T, *supra*, at 4. This should not be surprising for several reasons. First, continued increases in tribes' socio-economic conditions lessen welfare service costs for all levels of government. Schriebman, *supra*, at 380. In addition, tribal economic development also directly infuses money into the broader non-Indian community. For example, tribal governments and reservation

businesses separately account for billions of dollars in off-reservation spending. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 604 (2004).[4] Moreover, tribal-state revenue sharing agreements and other voluntary payments provide millions in additional revenue to state and local government coffers. *See, e.g.*, Arizona Dep't of Gaming, Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties as of September 8, 2011, *available at* http://www.gm.state.az.us/tcontributions_pdf/TC_CummulativeFinal_FY11.pdf (last visited Sept. 25, 2011) (reporting $89 million contributed in the 2010 fiscal year and $721 million since contributions began in 2004); *see also* Schriebman, *supra*, at 381.

The Mississippi Band of Choctaw Indians provides just one example of a tribe whose impressive economic development efforts have conferred tremendous benefits on the broader local, state – and even national – communities. As of 2006, the Band had not only reinvested more than $210 million in projects throughout the State of Mississippi, but was also one of the ten largest employers in the State. U.S. Dep't of the Treasury, Comptroller of the Currency, *Commercial Lending in Indian Country: Potential Opportunities in an Emerging Market* 6 (Mar. 2006). By decreasing governmental costs, expanding revenue

[4] In 1998, it was shown that tribal governments and reservation businesses accounted for $1.2 billion and $4.4 billion, respectively, in off-reservation spending. Graham, *supra*, at 604.

bases, and providing job opportunities, tribal economic development benefits Indians and non-Indians alike.

C. Two Case Studies in Successful Economic, Governmental, and Cultural Uses of Lands Acquired by the United States in Trust for Indian Tribes.

The successful use of tribal trust land extends far beyond gaming. The Mississippi Band of Choctaw Indians noted above, for example, successfully manages small businesses, industrial, and retail activities in addition to its gaming operations. *Id.* Moreover, the majority of the 560 federally recognized Indian tribes do not engage in any form of gaming operation. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 Lewis & Clark L. Rev. 943, 945 (2008). Indeed, of the more than 1,900 trust land applications pending in 2010, over 95% were for non-gaming purposes. News Release, Salazar Policy, *supra*.

The size, scope, and type of non-gaming development occurring on trust land varies greatly, as reflected in a 2006 GAO report that examined all non-gaming trust acquisition applications decided in 2005. U.S. Gov't Accountability Office, GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications: Report to Congressional Committees* 45-49 (July 2006). The proposed

uses for these trust lands included water treatment plants for bands of the Minnesota Chippewa Tribe, tribal schools for the Muckleshoot Indian Tribe in Washington and the Saginaw Chippewa Indian Tribe in Michigan, agriculture for tribes in Wyoming, Kansas, and Montana, community recreation and potential commercial development for the Ho-Chunk Nation of Wisconsin, and housing for various tribes in California, Connecticut, Minnesota, Wisconsin, Michigan, and Washington. *Id.*

1. The Chickasaw Nation.

The Chickasaw Nation in Oklahoma is also listed in the GAO report, and offers an illustration of how trust land acquisitions can be effectively used for an array of economic, governmental, and cultural purposes that empower the tribe's self-governance and benefit its members as well as the surrounding non-Indian community. Through cession of lands in the early 19th century – and ultimately forcible removal on the infamous Trail of Tears in 1837 – the Chickasaw were displaced from their ancestral homelands in and around what are now the states of Mississippi, Alabama, Tennessee, and Kentucky.[5] *See* Barry Pritzker, *A Native American Encyclopedia: History, Culture,*

[5] The treaties by which this cession occurred include the Treaty with the Chickasaw, 7 Stat. 89 (1805); Treaty with the Chickasaw, 7 Stat. 150 (1816); Treaty with the Chickasaw, 7 Stat. 192 (1818); and Treaty with the Chickasaw, 7 Stat. 381 (1832).

and Peoples 371-72 (2000). The Chickasaw settled in the Indian Territory (modern-day Oklahoma) and, by an 1837 treaty, were made a district within the Choctaw nation. Treaty with the Choctaw and Chickasaw, 11 Stat. 573 (1837). The Chickasaw Nation's governmental independence was restored in 1855, though the Nation retained its interests in the lands secured to it under the 1837 treaty. *See* Pritzker, *supra*, at 372; *see also* Treaty with the Choctaw and Chickasaw, art. 2, 11 Stat. 611 (1855).

The Chickasaw Nation's land base was radically fractured through allotment around the turn of the 20th century, *see Cohen's*, *supra*, at § 4.07[1][c], at 305, "a situation that severely hampered tribal political and economic development well into the century," Pritzker, *supra*, at 372. Today, however, the Chickasaw Nation is recognized as a model of tribal economic development, with successful business endeavors that include not just gaming and tourism, but information technology, medical and dental staffing, aviation and space technology, construction, manufacturing, banking, and property management. *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of A Successful Policy* 11 (Native Nations Institute & Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs, Working Paper No. 1, Nov. 2010); *see also Diversifying Native Economies: Oversight Hearing Before the Comm. on Natural Res. of the U.S. House of Representatives*, 110th Cong. 109 (2007) (statement of Neal McCaleb,

Chairman of the Board of Directors, Chickasaw Nation Industries, Inc.).

This remarkable renaissance has been enabled in large part by the strategic rebuilding of the Chickasaw Nation's land base through trust acquisitions. In 2005, for example, the Secretary took a number of parcels into trust for the Nation to put to a variety of uses: tribal government offices; a tribal community center; expansion of a chocolate factory owned by the Nation; operation of a convenience store, gas station, restaurant, video arcade, and attendant parking space; and a sand and gravel processing plant. *See* U.S. GAO, GAO-06-781, *supra*, at 45-47. Acquisitions such as these have enabled the Nation both to build a diverse economic base and to make crucial investments in its government infrastructure and public services.

In addition, the benefits of the Chickasaw Nation's development efforts have been felt well beyond the Nation itself. As of 2007, the Nation employed some 10,400 workers, both Indian and non-Indian, with an annual payroll of nearly $200 million, estimated to generate more than $7.5 million in state tax revenues. *See Diversifying Native Economies*, *supra*, at 110-11 (statement of Neal McCaleb). As illustrated by this example, trust land acquisition can be instrumental in restoring a tribe's land base, and fostering economic, cultural, and governmental development benefiting the tribe and the surrounding community alike.

2. The Confederated Tribes of the Warm Springs Reservation.

In addition to its vital role for economic development, trust land acquisition also plays a critical role in benefiting tribes and local communities with respect to important non-economic development activity. This is particularly true in the area of natural resource preservation, as illustrated by the Confederated Tribes of the Warm Springs Reservation of Oregon. NCAI has been informed that this Tribe, for many years, has had the United States take land into trust in order to protect and enhance the off-reservation fishing, hunting, and traditional food gathering rights secured by the Tribe in an 1855 Treaty. *See* Treaty with the Tribes of Middle Oregon of June 25, 1855, 12 Stat. 963 (1855). In the late 1970's, for example, the Tribe, learning that an 888 acre off-reservation Treaty fishing site at Shears Falls on the Deschutes River was being sold by Burlington Northern Railroad, and fearing the site would be harmed if bought for development, purchased the site and applied to the Department of the Interior to have the land taken into trust. This trust acquisition occurred in 1980, with a guarantee from the Tribe of continued public access to the fishery, thus preserving the site for continued and uninterrupted use by both Treaty Indian and non-Indian fishermen alike.

Given this early success, trust acquisition continues to play a vital role in the Tribe's natural resource preservation efforts. NCAI is advised that just last year, for example, the Tribe succeeded in having

another 197 acre fishing site, the Eyerly property along the Metolius River, taken into trust. This marked the completion of an eleven-year administrative process with the Department of the Interior, and the land's newly-acquired trust status ensures that the Tribe can continue to actively manage the property in order to preserve and enhance its value as a fish and wildlife habitat, and as an area where tribal members may exercise their fishing, hunting and traditional food gathering rights under the 1855 Treaty. Moreover, the Tribe also has a number of other off-reservation fee land holdings it acquired for the specific purpose of protecting and enhancing their fish and wildlife resources, and that it hopes to have taken into trust in the future. As the Warm Springs Tribe illustrates, trust land plays a vital role in these conservation efforts.

II. The D.C. Circuit's Decision Creates Uncertainty as to Tribal Trust Lands' Status that will Drive Away Investors with the Capital Required for Tribal Economic Development.

The court of appeals' decision, if allowed to stand, threatens to critically undermine future development on trust land for tribes such as the Chickasaw Nation, frustrate the wildlife preservation and conservancy efforts of tribes like Warm Springs, as well as stymie proposed developments for the approximately 1,900 trust acquisition applications pending before the Department of the Interior and for all future trust

applications to be filed. The decision creates an omnipresent fear that the United States could be divested of title to land already taken into trust and slated for development. This is precisely the kind of uncertainty the GAO has identified as threatening to suffocate economic development and economic activity on trust land. *See* U.S. GAO, GAO-11-543T, *supra*, at 3-5. Irrespective of whether any such APA challenges are ever brought, much less succeed, the mere *possibility* of such suits being filed is enough to scare off investors wary of committing capital to development projects in which uncertainty is embedded. For these reasons, it is critical that the Court grant certiorari and clarify the law in this area promptly.

A. Access to Capital is Critical to Tribal Development But Withers When Faced With Perceived Instability.

It is widely recognized that inadequate access to capital is among the most significant impediments to tribal development. *See* U.S. Dep't of the Treasury, Community Development Financial Institutions Fund, *Report of the Native American Lending Study* 1-2 (Nov. 2001) ("lack of access to capital" was the "one significant factor" identified as the reason behind economic problems in Native American communities); Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* 6 (Native Nations Institute & Harvard Project on American Indian Economic Development, Joint Occasional Papers on

Native Affairs, No. 2003-02, 2003) (identifying the fact that "Tribes and individuals lack access to financial capital" as the first reason for "continuing reservation poverty"). The Director of the Office of Indian Energy and Economic Development succinctly summarized this problem in a statement to Congress: "Without capital, there is no enterprise; without enterprise, there are no private sector jobs." *Economic Development, Hearing Before the Senate Committee on Indian Affairs*, S. Hrg. 109-504, at 108 (May 10, 2006) (prepared statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Econ. Dev., Dep't of Interior). In fact, it has been reported that "[u]pwards of $50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development." Clarkson, *supra*, at 945.

It is similarly well recognized that uncertainty is one of the primary roadblocks to access to capital, and that greater stability is the main ingredient necessary in overcoming this barrier. Cornell & Kalt, *Reloading the Dice*, *supra*, at 24-25 ("Investors' risks are raised, for example, by uncertainty in tax and/or regulatory policy, and by insecurity in the enforcement of contracts and agreements. . . . The central problem is to create an environment in which investors – whether tribal members or outsiders – feel secure, and therefore are willing to put energy, time, and capital into the tribal economy."); *see also* U.S. Dep't of the Treasury, *Report of the Native American Lending Study*, *supra*, at 4 (listing areas of "uncertainty"

relating to legal infrastructure and government operations as among the barriers to capital access).

Questions regarding land title and jurisdictional status create the very kind of uncertainty that can hinder the availability of capital. Indeed, the GAO this past year spoke of this very concern – that "land in trust issues may create uncertainty" affecting economic activity on tribal land. U.S. GAO, GAO-11-543T, *supra*, at 3-5.

B. Heretofore, the Trust Acquisition Process Has Effectively Balanced the Need for Outside Input with the Stability Finality Affords.

Up until the D.C. Circuit's opinion, the trust acquisition process struck a well-formulated balance between the need to give voice to all interested parties and the need for finality once acquisition is complete. The federal regulations set forth in 25 C.F.R. Part 151 provide for the specific solicitation and consideration of comments from local and state governments regarding a proposed trust acquisition, as well as an opportunity for interested persons to seek judicial review after notice is published in the Federal Register. Once the administrative process is complete and title has transferred to the United States, however, the QTA forecloses challenge to the transfer, providing the finality that is vital to effective land use and development. Indeed, the Department of the Interior specifically crafted 25 C.F.R. § 151.12(b)'s

requirement for notice in the Federal Register in order to ensure that interested persons with the appropriate legal interest would have an opportunity for "judicial review before transfer of title to the United States," given that "[t]he Quiet Title Act (QTA), 28 U.S.C. 2409a, precludes judicial review after the United States acquires title." 61 Fed. Reg. 18082 (1996).

The Department of the Interior's trust-acquisition process is thus detailed and carefully crafted, allowing for local and state government input, as well as challenges from other appropriate persons, prior to the land being taken into trust. *See* U.S. GAO, GAO-06-781, *supra*, at 43. Moreover, it is a process that works, as shown in a 2006 GAO report noting the Department's compliance with its regulations for processing land in trust applications, including the comment process with respect to relevant state and local governments. *Id.* at 5. Furthermore, the Department of the Interior continually strives to make the trust acquisition process transparent, as evidenced by the 2008 introduction of its Handbook on Acquisition of Title to Land Held in Fee or Restricted Fee to Trust, which was specifically intended to provide "a single resource available to BIA staff and tribes [that] will enhance the quality and efficiency of service." Memorandum from Carl J. Artman, Assistant Secretary-Indian Affairs, to Jerry Gidner, Director, Bureau of Indian Affairs, and Vicki Forrest, Deputy Director, Trust Services (May 22, 2008), *Memo*

and Handbook available at http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf.

The regulatory scheme in place thus strikes the necessary balance to foster successful tribal development. It recognizes the finality of the United States' taking of land into trust, after first ensuring that interested local entities, individuals and governments have an opportunity to raise any of their concerns prior to completion of the trust acquisition.

C. The D.C. Circuit's Decision Undermines the Stability that the Trust Acquisition Process Provides.

The D.C. Circuit's decision upsets the careful balance that Congress and the Executive Branch have struck between outside input and finality. It casts an enduring shadow of uncertainty over the United States' title to all Indian land that has been or will be taken into trust, creating the very kind of instability and uncertainty that drives investors away from economic development.

This uncertainty is exacerbated by the fact that nothing in the D.C. Circuit's decision limits the grounds for potential challenges, so long as, perversely enough, the plaintiffs themselves are not claiming the most readily cognizable interest – a claim to title in the land. Under the court's rationale, a plaintiff claiming that a trust acquisition is ultra vires or otherwise unlawful for any reason – statutory or

otherwise – could proceed with his suit so long as the plaintiff himself did not claim title to the land. To take the most obvious example, the regulations governing trust acquisitions require the Secretary to consider numerous specific factors before making an acquisition, including (among others) the "need of the . . . tribe for additional land," the "purposes for which the land will be used," the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and "[j]urisdictional problems and potential conflicts of land use." *See* 25 C.F.R. § 151.10(b), (c), (e), (f). A plaintiff who is simply dissatisfied with the outcome of the Secretary's decision can sue to challenge a trust acquisition on the purported ground that the Secretary did not adequately consider these factors. *See, e.g., South Dakota v. U.S. Dep't of Interior*, 775 F. Supp. 2d 1129, 1141-44 (D. S.D. 2011) (rejecting State's arguments that trust acquisitions were arbitrary and capricious because DOI failed to adequately consider factors set forth in 25 C.F.R. § 151.10); *see also* 61 Fed. Reg. 18082-83 (recognizing that "[j]udicial review [of trust acquisitions] is available under the APA because the IRA does not preclude judicial review and the agency action is not committed to agency discretion by law").

As set forth above, challenges such as this (provided prudential standing exists) have heretofore been limited to the 30-day window between notice of an acquisition and actual transfer of title to the United

States. *See supra* Part II.B. The D.C. Circuit's decision, however, now opens the possibility of a spate of challenges to trust acquisitions based on variegated legal theories, brought by a virtually limitless class of potential plaintiffs, and subject only to the APA's six-year statute of limitations. The decision is devastating to tribal development efforts precisely because this theoretical possibility alone – not the merits or actual success of any particular suit – breeds the uncertainty that is so noxious to investment. Investors will balk at the prospect of committing millions of dollars to finance a major development project if there exists some significant and ever-enduring possibility that, after a parcel is taken into trust, the United States' title to the land will suddenly be challenged in court.

Further compounding this problem is the D.C. Circuit's equally expansive and unprecedented holding on prudential standing, such that the United States' title can be challenged by any person deemed appropriate to police agency compliance with the law. *See* Tribe Pet. 32-36; U.S. Pet. 18-23. Because the list of possible plaintiffs in such an APA action is seemingly limitless, tribes and developers will be unable to eliminate the possibility of such lawsuits by proactive negotiation and compromise.

In addition, the D.C. Circuit's decision is particularly problematic because, as a practical matter, it knows no geographical bounds. Up until that court's

decision, the Ninth, Tenth, and Eleventh Circuits – the only courts to directly confront this issue – were unanimous that the QTA barred challenges to the United States' title to Indian trust lands after the lapse of the 30-day review period contemplated by Part 151. The large number of tribes located within those circuits' geographical reach, *see generally* U.S. GAO, GAO-06-781, *supra*, at 11 (showing map and where tribes are located), however, can no longer rely upon those courts' long-established precedent in pursuing tribal economic development on trust land, inasmuch as any plaintiff could instead file suit in the District of Columbia and take advantage of the D.C. Circuit's holding.

For all these reasons, it is critical that this Court grant certiorari, and do so now, so that tribal development on trust land, which provides so many economic benefits to tribes, their members, and the surrounding communities, may continue.

CONCLUSION

For the foregoing reasons, NCAI urges the Court to grant the petitions for a writ of certiorari.

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