

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DAVID LITTLEFIELD, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, et al.,

Defendants.

CIVIL ACTION NO.

1:16-cv-10184-ADB

**UNITED STATES'
MEMORANDUM OF
LAW IN SUPPORT OF
MOTION FOR PARTIAL
DISMISSAL**

Pursuant to the Fed. R. Civ. P. 12(b)(6), the United States Department of the Interior (“Interior” or “Department”), Sally Jewell, in her official capacity as Secretary of the Interior (“Secretary”), Lawrence S. Roberts, in his official capacity as Acting Assistant Secretary – Indian Affairs (“Assistant Secretary”), and the United States of America (collectively, “United States” or “Federal Defendants”), respectfully submit this Memorandum of Law in support of the Motion for Partial Dismissal.

On September 18, 2015, the Department issued a Record of Decision (“ROD”) to accept in trust approximately 151 acres of land in the City of Taunton, Massachusetts and approximately 170 acres of land in the Town of Mashpee, Massachusetts (“Property”) for the benefit of the Mashpee Wampanoag Tribe (“Tribe” or “Mashpee”). David Littlefield, Michelle Littlefield, Tracy Acord, Deborah Canary, Francis Canary, Jr., Veronica Casey, Patricia Colbert, Vivian Courcy, Will Courcy, Donna DeFaria, Antonio DeFaria, Kim Dorsey, Kelly Dorsey, Francis Lagace, Jill Lagace, David Lewry, Michelle Lewry, Richard Lewry, Robert Lincoln, Christina McMahon, Carol Murphy, Dorothy Peirce, David Purdy, and Louise Silvia

(collectively, “Plaintiffs”) have brought an action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, challenging the ROD. The United States here moves for dismissal of Plaintiffs’ Fifth Cause of Action alleging that Section 5 of the Indian Reorganization Act (“IRA”), 25 U.S.C. § 465, is an unconstitutional delegation of legislative authority. This claim, which can be determined as a matter of law without review of the administrative record supporting the Department’s ROD, has been repeatedly rejected by the federal courts, including the First Circuit.

INTRODUCTION

This case concerns a challenge to the Department’s decision, under the IRA, to acquire the Property in trust for the Tribe and its determination that the Property, once acquired, is eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21. The majority of Plaintiffs’ claims are brought pursuant to the APA and must be addressed in the context of the administrative record underlying the Department’s decision. In addition to their First through Fourth Causes of Action, however, Plaintiffs claim that Section 5 of the IRA, 25 U.S.C. § 465, is an unconstitutional delegation of legislative authority. Compl. ¶¶ 157-61. That claim challenges the constitutionality of the IRA itself, raising a straightforward legal question that can and should be dismissed now as a matter of law.

Plaintiffs’ Fifth Cause of Action seeks a declaration that the IRA, enacted over eighty years ago, is unconstitutional. Plaintiffs specifically allege that the IRA’s provision authorizing the Secretary to acquire land in trust on behalf of federally-recognized Indian tribes somehow reflects an unconstitutional delegation of legislative authority. This legal question, however, has long been resolved against Plaintiffs by all courts to consider it, including the First Circuit in a decision binding on this Court. Federal courts have held, consistently and repeatedly, that the

Secretary's authority to acquire land in trust under the IRA does not violate the United States Constitution because there are sufficient intelligible principles provided in the statute and its legislative history to guide the Secretary's discretion whether to acquire land in trust on behalf of a tribe. Moreover, it has been over 85 years since the Supreme Court invalidated any statute on the grounds of excessive delegation of legislative authority. The Supreme Court in fact has only found two statutes to be a violation of the non-delegation doctrine, neither of which are comparable to the statute at issue here. Accordingly, the Court must dismiss Plaintiffs' Fifth Cause of Action.

STATUTORY BACKGROUND

Indian Reorganization Act

Congress enacted the IRA in 1934 as part of the federal government's return to supporting "principles of tribal self-determination and self-governance[.]" *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). This "sweeping" legislation, *Morton v. Mancari*, 417 U.S. 535, 542 (1974), manifested a sharp change in federal policy that replaced, and was further meant to reverse, the disastrous assimilationist policy of the Nineteenth Century, which intended "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima*, 502 U.S. at 255. *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (the IRA encouraged tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment").

The "overriding purpose" of the IRA was far broader than remedying the negatives effects of allotment, however, as Congress enacted the IRA to "establish machinery whereby

Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”¹ *Mancari*, 417 U.S. at 542. Through the IRA, Congress sought “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.” *Mescalero Apache Tribe*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804 at 6 (1934)). To that end, the IRA’s provisions aimed to preserve and further tribal organization and communal land ownership. *See e.g.* 25 U.S.C. § 461 (prohibiting further allotment of land); *id.* at § 462 (extending indefinitely the periods of trust or restrictions on alienation of Indian lands); *id.* § 463 (authorizing restoration of surplus lands to tribal ownership); *id.* at § 464 (prohibiting any transfer of Indian lands except exchanges authorized by the Secretary); *id.* at § 467 (authorizing the Secretary to proclaim new Indian reservations on lands acquired pursuant to the IRA).

The “capstone” of the IRA’s land provisions is 25 U.S.C. § 465 (“Section 5”) of the IRA, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012), which authorizes the Secretary to acquire land in trust for Indian tribes and individual Indians. 25 U.S.C. § 465. Section 5 states:

[t]he Secretary of the Interior is hereby authorized, in h[er] discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

...

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

¹ For example, under the IRA, Congress authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477.

Id.

In addition, the IRA defines “Indians” in three separate and distinct ways:

The term “Indian” . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Id. at § 479. By authorizing new trust acquisitions, Section 5 allows the Secretary to both establish and restore tribal land bases and to facilitate economic opportunities that were lost or placed out of reach through allotment and other governmental assimilationist policies. *See Mescalero Apache Tribe*, 511 U.S. at 151-52; *South Dakota v. U.S. Dep’t of Interior*, 423 F.3d 790, 799-98 (8th Cir. 2005).

The Secretary has issued regulations governing the implementation of her authority under Section 5 to acquire land in trust. *See* 25 C.F.R. Part 151. These regulations provide that the Secretary may acquire land into trust “[w]hen the Secretary determines [*inter alia*] that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a)(3). A tribe wishing to have land taken into trust must file a written request. *Id.* at § 151.9. Section 151.10 then requires the Secretary to notify the state and local governments having regulatory jurisdiction over the land to be acquired so that they can provide written comments on the potential impacts on jurisdiction, taxes and assessments. *Id.* The Secretary considers several factors when determining whether to acquire land in trust for an Indian tribe, including, *inter alia*: the need of the tribe for the 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 its tax rolls; jurisdictional problems and potential conflicts of land use; whether the Bureau of Indian Affairs (“BIA”) is equipped to discharge any additional responsibilities

resulting from the trust status; and whether the tribe has submitted adequate environmental-related information. *See id.* § 151.10(b)-(d), (f)-(h); *see also id.* § 151.11(b)-(c) (setting forth factors to consider for off-reservation acquisitions).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move for dismissal when the complaint fails “to state a claim upon which relief can be granted.” In ruling on a motion to dismiss, the court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). “The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint.” *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 13 (1st Cir. 2011). Dismissal pursuant to Rule 12(b)(6) is appropriate when the complaint fails to set forth “factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.” *Berner v. Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997) (quoting *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988) (internal quotation marks omitted)). The court may grant dismissal “only if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 25 (1st Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

ARGUMENT

The United States seeks dismissal of Plaintiffs’ Fifth Cause of Action, which alleges that, as a matter of law, Section 5 of the IRA is unconstitutional because it offends the non-delegation doctrine. *See* Compl. ¶¶ 158–161. Courts, including the First Circuit, have consistently rejected this argument, holding that the IRA and its legislative history contain sufficient intelligible

principles to guide the Secretary decision-making under Section 5. The Court is required to follow the binding precedent of the First Circuit and reject Plaintiffs' Fifth Cause of Action.

A. The IRA Does Not Violate the Non-Delegation Doctrine

In their Complaint, Plaintiffs assert the consistently rejected argument that Congress' delegation of authority, via Section 5 the IRA, to the Secretary to accept land into trust on behalf of Indian tribes violates the non-delegation doctrine. Article I, Section 1 of the United States Constitution, from which the non-delegation doctrine derives, provides that, "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Under this doctrine, Congress may not delegate its legislative powers, *see Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)), but it may confer decision-making authority so long as it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority," *Mistretta v. United States*, 488 U.S. 361, 372- 373 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). The doctrine considers whether Congress delegated untrammelled discretion to an agency in a statute entirely lacking any intelligible principles, such that "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" by the agency. *Mistretta*, 488 U.S. at 379 (quoting *Yakus v. United States*, 321 U.S. 414, 425-26 (1944)). When assessing whether the non-delegation doctrine has been offended, courts must, of course, accord acts of Congress the presumption of constitutionality. *See City of Roseville v. Norton*, 219 F. Supp. 2d 130, 154 (D.D.C. 2002) (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).²

² As these cases demonstrate, Plaintiffs' allegation, Compl. ¶ 160, that as the "federally mandated trustee of Indian lands" the Department has an "institutional bias in favor of Indians" is wholly irrelevant to the Court's evaluation of whether the IRA amounts to an unconstitutional

Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the grounds of excessive delegation of legislative authority. In one of these cases, the statute “provided literally no guidance for the exercise of discretion, and the other . . . conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” *Whitman*, 531 U.S. at 474 (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). Since 1935, the Court has narrowly construed the non-delegation doctrine and has consistently upheld congressional enactments containing broad conferrals of decision-making authority. *See, e.g., Whitman*, 531 U.S. at 475-76; *Mistretta*, 488 U.S. at 379; *Yakus*, 321 U.S. at 427. In *Whitman*, the Court explained that it has “‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” 531 U.S. at 474-75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). What is more, the Court has recognized that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta*, 488 U.S. at 372. In short, virtually any form of congressional guidance, no matter how general, suffices. *See, e.g., Am. Power & Light Co.*, 329 U.S. at 105 (rejecting non-delegation challenge even though standards for the executive action were “broad”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (finding that a charge to act in the “public interest” was sufficient); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (same).

delegation of legislative authority. In any event, “BIA’s policies of tribal self-determination, Indian self-government, and hiring preference for Indians are policies established by Congress in the IRA[;] . . . [f]ollowing Congress’s statutory policies does not establish structural bias warranting reversal” of a decision to acquire land in trust for a tribe pursuant to the IRA. *South Dakota v. U.S. Dept. of Interior*, 787 F. Supp. 2d 981, 1011 (D.S.D. 2011).

Accordingly, the doctrine has been described as “abandoned.” *See, e.g., Fed. Power Comm’n v. New Eng. Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) (“The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930s, has been virtually abandoned by the Court for all practical purposes”). And when presented with an opportunity to resurrect the doctrine, the Court has refused to do so. *See, e.g., Dep’t of Transp. v. Ass’n of Am. R.R.s.*, 135 S. Ct. 1225, 1232-34 (2015) (“*Amtrak*”). In *Amtrak*, the court of appeals, in *Ass’n of Am. R.R.s. v. Dep’t of Transp.*, 721 F.3d 666, 674 (D.C. Cir. 2013), found that a regulatory program concerning Amtrak, a private entity that receives federal funding and is chartered by a federal statute, was an improper private delegation. The Supreme Court reversed in 2015, mooted the delegation question by finding that Amtrak was indeed a governmental entity. *Amtrak*, 135 S. Ct. at 1232-34. *See also Clinton v. City of N.Y.*, 524 U.S. 417, 447-48 (1998) (declining to address non-delegation in the context of the Line Item Veto Act).

In keeping with Supreme Court precedent, federal appellate courts and district courts across the country, including the First Circuit, have consistently and uniformly held³ that Section 5 of the IRA is not an unconstitutional delegation of legislative power, finding that Congress has

³ In 1995, a panel of the Eighth Circuit held the IRA violated the non-delegation doctrine, *see South Dakota v. U.S. Dep’t of Interior*, 69 F.3d 878, 885 (1995), but that opinion was vacated and remanded by the Supreme Court, 519 U.S. 919 (1996), and other courts, including the First Circuit and the Eighth Circuit itself, have declined to place any precedential or persuasive value on that opinion, *see e.g., Kempthorne*, 497 F.3d at 41-42; *Shivwits*, 428 F.3d at 973 n. 4; *City of Roseville*, 219 F. Supp. 2d at 155. The Eighth Circuit has since rejected its early vacated reasoning and held that the IRA does not violate the non-delegation doctrine. *South Dakota*, 423 F.3d at 795-99. The rationale of the vacated *South Dakota* decision was based, in part, on the availability of judicial review. 69 F.3d at 880-83. We note that the Department, following this decision, enacted regulations to ensure judicial review of land-into-trust decisions. *See* 61 Fed. Reg. 18,082, 18,082-83 (Apr. 24, 1996). Thereafter, the Supreme Court confirmed the availability of judicial review of land-into-trust decisions when concluding that such challenges were “garden-variety APA claim[s].” *Patchak*, 132 S. Ct. at 2208.

set forth sufficient intelligible principles to guide the agency's exercise of power. *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc) *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379, (2009); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008) (court "join[ed] the First, Eighth, and Tenth Circuits . . . in upholding Section 5 of the IRA" and held, based on the "text, structure, and purpose of the IRA" that "Section 5 contains an intelligible principle and that it is not an unconstitutional delegation of legislative authority") *cert. denied*, 555 U.S. 1137 (2009); *United States v. Roberts*, 185 F.3d 1125, 1136-37 (10th Cir. 1999), *cert denied*, 529 U.S. 1108 (2000); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005); *South Dakota*, 423 F.3d at 795-99; *City of Roseville*, 219 F. Supp. 2d at 156 ("existing limitations on the Secretary's trust-acquisition authority are more than sufficient to provide the requisite 'intelligible principles'") *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied sub. nom.*, *Citizens for Safer Cmty's. v. Norton*, 541 U.S. 974 (2004); *Upstate Citizens for Equal., Inc. v. Salazar*, 2010 U.S. Dist. LEXIS 19787, *11-18 (N.D.N.Y. Mar. 4, 2010); *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, 1128 (D. Or. 2002); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 473 (D.D.C. 1978) ("The delegation claim fails because, even though the acquisition of lands in trust is discretionary with the Secretary, *see* 25 U.S.C. § 465, the legislative history and the Act itself, providing as it does a definition of an Indian tribe, do provide adequate standards for the exercise of this discretion.").

Here, Plaintiffs' non-delegation claim asserts that Section 5 of the IRA provides no limiting standards, and its implementing regulations place no boundaries, on the Secretary's ability to take land into trust for Indians. Compl. ¶ 159. In *Kempthorne*, the First Circuit held that Section 5 of the IRA is not an unconstitutional delegation of legislative authority. 497 F.3d

at 41-43. In support of its holding, the court relied primarily on the text of the IRA, *see, e.g.*, 25 U.S.C. § 465; *id.* at § 461 (prohibiting further allotment of land); *id.* § 462 (extending indefinitely the periods of trust or restrictions on alienation of Indian lands); *id.* § 463 (authorizing restoration of surplus lands to tribal ownership); *id.* § 464 (prohibiting any transfer of Indian lands except exchanges authorized by the Secretary), and the decision and reasoning of *South Dakota*, 423 F.3d at 795-99. Although *Kempthorne* was reversed on other grounds (involving a question of statutory interpretation of Section 479 of the IRA), *Kempthorne*'s holding that Section 5 of the IRA does not offend the non-delegation doctrine was not reversed by the United States Supreme Court and therefore remains good law that is binding on this Court. *See Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d. Cir. 2011) (circuit decision reversed by Supreme Court remains binding authority on holdings not subject to reversal). *See also Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004) ("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority."); *United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir. 1991) (circuit precedent binding "in the absence of supervening authority sufficient to warrant disregard of established precedent").

As in the First Circuit, the Eighth Circuit in *South Dakota* determined that, as opposed to the statutes the Supreme Court determined violate the non-delegation doctrine, the IRA "does not involve granting to the executive authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy." 423 F.3d at 797. The court also determined that "it is possible to 'ascertain whether the will of Congress has been obeyed' when examining an application of the Secretary's authority under § 465 based upon the guidance in the IRA and its legislative history." *Id.* (citing *Yakus*, 321 U.S. at 426). In looking at the legislative history, the

court in *South Dakota* also recognized that “Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support.” *Id.* at 798.

As discussed in *Andrus*, 458 F. Supp. at 473, one of the limits of the Secretary’s discretion comes from Section 479 of the IRA which defines “Indian” in three separate and distinct ways, thereby limiting who may benefit from Section 5. Plaintiffs’ Complaint alleges that the definition of “Indian” is so limited under Section 479 so as to prohibit the Secretary from acquiring land in trust for the Tribe. *See* Compl. ¶¶ 6-7. Plaintiffs’ non-delegation argument is fundamentally at odds with this claim. By claiming the Secretary lacks the discretion to acquire land in trust for the Mashpee, Plaintiffs are themselves recognizing, conceding even, that Congress has set forth limiting principles to which the Secretary must adhere in accepting land in trust for Indians under Section 5.

Moreover, courts “do[] not enforce the nondelegation doctrine with . . . vigilance” because “the other branches of Government have vested powers of their own,” such as executive power, “that can be used in ways that resemble lawmaking.” *Amtrak*, 135 S. Ct. at 1237 (Alito, J. concurring); *see also Whitman*, 531 U.S. at 474-75. Just as the Supreme Court recognizes that agencies have expertise that is deserving of deference, the Court’s recognition of a weak role for the non-delegation doctrine affirms the reality that courts, in reviewing agency actions under the APA, can reject agency decisionmaking if it is arbitrary and capricious. *See, e.g., Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (“Congress has been willing to delegate . . . broadly - and courts have upheld such delegation - because there is court review to assure that the agency exercises its delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”).

Despite this, Plaintiffs seek to have this Court take the dramatic step of questioning the constitutionality of the IRA, while at the same time invoking the APA as the basis for pursuing a declaration that the agency's decision, which relied upon its interpretation and application of the IRA, is arbitrary and capricious. Plaintiffs cannot have it both ways.

Finally, Plaintiffs' allegation that the Secretary has violated the separation of powers principles is simply another way of phrasing the non-delegation challenge. *See* Compl. ¶ 161. The non-delegation doctrine does not require, however, that Congress dictate every detail pertaining to the implementation of a federal policy or regulatory program. Congress may rely on the other branches to make rules that carry out its legislative will as expressed in statutory language. *Mistretta*, 488 U.S. at 372 ("the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches"). *See also Loving*, 517 U.S. at 758 ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). The non-delegation doctrine provides "that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of the separation of powers has occurred." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (internal quotations omitted).

In sum, given the binding effect of the First Circuit's prior decision in *Kemphorne*, as well as the weight of precedent established through federal court decisions issued across the country, the Court must reject Plaintiffs' constitutional attack on the IRA and dismiss their Fifth Cause of Action.

CONCLUSION

For the reasons stated above, Defendants request that the Court dismiss Plaintiffs' Fifth Cause of Action for failing to state a claim upon which relief can be granted.

DATED: April 18, 2016

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

/s/ Rebecca M. Ross
REBECCA M. ROSS, Trial Attorney
JOANN KINTZ, Trial Attorney
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
TEL: (202) 616-3148
FAX: (202) 305-0275
Email: rebecca.ross@usdoj.gov

Attorneys for the United States

OF COUNSEL:
BETHANY SULLIVAN
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior

Certificate of Service

I, Rebecca M. Ross, hereby certify that, on April 18, 2016, the foregoing UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR PARTIAL DISMISSAL will be sent electronically to the following registered participants as identified on the Notice of Electronic Filing:

David H. Tennant
Nixon Peabody, LLP
1300 Clinton Square
Rochester, NY 14604-1792
TEL: (585) 263-1000
Email: Dtennant@nixonpeabody.com

Matthew J. Frankel
Nixon Peabody, LLP
One Citizens Plaza
Providence, RI 02903
TEL: (617) 345-1038
Email: Mfrankel@nixonpeabody.com

/s/ Rebecca M. Ross
REBECCA M. ROSS, Trial Attorney
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice