



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 03 2014

The Honorable Ned Norris, Jr.
Chairman, Tohono O'odham Nation
P.O. Box 830
Sells, Arizona 85634

Dear Chairman Norris:

We have completed our review of the issue remanded to us by the U.S. Court of Appeals for the Ninth Circuit. We thank you for your patience as we have worked through the question presented in the remand.

SUMMARY

After careful thought and analysis, and for reasons explained in detail below, we have concluded that the Gila Bend Indian Reservation Lands Replacement Act (Gila Bend Act or Act)¹ requires the Department of the Interior (Department) to take the Tohono O'odham Nation's (Nation) designated property into trust. The question we have been assigned is whether the land lies "within the corporate limits" of the City of Glendale (Glendale). This question is complicated by the fact that although Glendale has annexed a strip of land that surrounds a large area, it declined to incorporate the land inside of the strip, creating what is known as an "island" of unincorporated county land that nevertheless appears in some ways to be within Glendale because of the strip annexation.

If Glendale had incorporated the land inside the strip, our task would be easy. The land could not be taken into trust under the Gila Bend Act. But since Glendale has declined to incorporate the land at issue, the task is left to us to determine whether the land is "within the corporate limits" of Glendale.

On the face of the Gila Bend Act, Congress clearly authorized land into trust in Maricopa County for the Nation. Based on our extensive experience with the acquisition of land in trust for Indian tribes, the Department concludes that the phrase "within the corporate limits" is intended to apply only to lands that have actually been incorporated by a municipality. This is consistent with ordinary expectations in our work as to what it means to "incorporate" lands. In our experience, incorporated lands are lands as to which a local government has undertaken responsibilities for providing extensive governmental services and sometimes will levy taxes or fees to pay for such services. In this case, Glendale has neither incorporated the land at issue nor

¹ Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) [hereinafter Gila Bend Act].

taken on the substantial responsibilities that would accompany incorporation. Our interpretation is also consistent with the overriding goals of the Gila Bend Act to support the Nation's economic development and self-sufficiency. Accordingly, we conclude that the Gila Bend Act requires the acquisition of this land in trust for the Nation.

BACKGROUND

On July 23, 2010, former Assistant Secretary – Indian Affairs (AS-IA) Larry Echo Hawk issued a decision (2010 Decision) approving an application submitted to the Department by the Nation to acquire in trust 53.54 acres of land located in Maricopa County, Arizona (Parcel 2)² under the terms of the Gila Bend Act.

The 2010 Decision was challenged in U.S. District Court by the Gila River Indian Community (Gila River), individual members of Gila River, the State of Arizona (State), members of the Arizona Legislature, and Glendale. Judge David Campbell, of the U.S. District Court for the District of Arizona, upheld the 2010 Decision.³ On appeal, the U.S. Court of Appeals for the Ninth Circuit found that the term “within the corporate limits of any city or town” in section 6(d) of the Gila Bend Act was ambiguous and that the AS-IA had failed to grapple with that ambiguity in reaching the 2010 Decision.⁴ The Ninth Circuit rejected all other challenges to the 2010 Decision. The Ninth Circuit remanded the matter to the Department, ordering the AS-IA to consider the narrow question of the meaning of the term “within the corporate limits of any city or town.”⁵ The Ninth Circuit did not order the AS-IA to address any other issue.

As directed by the Ninth Circuit, we now provide our interpretation of the meaning of the ambiguous term “within the corporate limits of any city or town.” We do so having reviewed applicable law, the district court and Ninth Circuit opinions in *Gila River Indian Community v. U.S.*,⁶ the Nation's trust application and supporting documentation, an April 30, 2009 memorandum prepared by Phoenix Field Solicitor William Quinn on the legal merits of the Nation's application,⁷ the legislative history behind the Gila Bend Act, submissions from, among others, Glendale and the State, Gila River, the Salt River Indian Community (Salt River), Maricopa County, and the Nation.⁸

² The Nation originally submitted an application for the Department to acquire 134.88 acres of land in trust, but subsequently amended its application. Letter Submission from Seth Waxman, Regarding Tohono O'odham Nation Mandatory Trust Land Acquisition Request (March 12, 2010).

³ *Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977, 995 (D. Ariz. 2011).

⁴ *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1147 (9th Cir. 2013). The Ninth Circuit also concluded that section 6(c) creates a 9,880-acre statutory cap on land held in trust for the Nation – not on total land acquisition by the Nation under the Gila Bend Act, as argued by the Plaintiffs – and thus was not implicated in this case. *Id.* at 1145. The Ninth Circuit also rejected the Plaintiffs' arguments that the Gila Bend Act exceeds Congress's power under the Indian Commerce Clause and the Tenth Amendment. *Id.* at 1153-54.

⁵ *Id.* at 1151.

⁶ *Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977 (D. Ariz. 2011); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139 (9th Cir. 2013).

⁷ Memorandum from William Quinn, Phoenix Field Solicitor, Regarding the Acquisition of 134.88 Acres by Tohono O'odham Nation Pursuant to P.L. 99-503 (Apr. 30, 2009) [hereinafter Field Solicitor Memo].

⁸ For the purpose of addressing a number of the arguments raised on remand by the State, Glendale, Salt River, Gila River and Maricopa County, we refer to these entities in this decision collectively as “commenters.”

We find that Congress's prohibition on the Nation's ability to put in trust lands that are "within the corporate limits of any city or town" means that the Department may not acquire any lands that are part of a municipality's incorporated territory.⁹ Parcel 2 is not part of any municipality's incorporated territory. Rather it is part of a "county island," *i.e.* unincorporated land in Maricopa County. In sum, Parcel 2 was never annexed by any city or town, and is not part of Glendale's incorporated lands. Accordingly, we conclude that Parcel 2 satisfies the requirements of section 6(d) of the Act. Given our analysis below and the findings of AS-IA Echo Hawk's 2010 Decision as upheld by the Ninth Circuit (and incorporated herein by reference),¹⁰ we therefore conclude that Parcel 2 must be acquired in trust under the terms of the Gila Bend Act.

THE MEANING OF "WITHIN THE CORPORATE LIMITS"

The Gila Bend Act requires the Department to acquire land in trust for the Nation at the Nation's request, so long as certain conditions spelled out in the Act are met, including that the land is not "within the corporate limits of any city or town."¹¹ The relevant sections of the Act, sections 6(c) and (d) provide:

(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.¹²

As directed by the Ninth Circuit, we focus today on the narrow question of the meaning of "within the corporate limits of any city or town" found in section 6(d). We have taken a fresh look at this matter since the Ninth Circuit's remand to identify any additional relevant information that would inform the meaning of "within the corporate limits." We have carefully reviewed and considered the history behind the Gila Bend Act, the parties' submissions, Arizona case law, arguments related to potential land use conflicts, the Indian canon of construction, the Clear Statement Rule, and policy considerations that commenters argue are relevant to the

⁹ While similar to our interpretation of "within the corporate limits" set forth in the 2010 Decision, our conclusion here is reached only after considering the ambiguity of the phrase in light of a range of factors as directed by the Ninth Circuit, and not because we find that "within the corporate limits" has a plain meaning.

¹⁰ The 2010 Decision is included here as Attachment A.

¹¹ Gila Bend Act § 6(d).

¹² Gila Bend Act § 6(c)-(d).

analysis. Considering all of the above, we interpret the “within the corporate limits” restriction to prohibit our acquisition of those lands that are part of a municipality’s incorporated lands. Accordingly, Parcel 2 lies “within the corporate limits” of Glendale only if it has been incorporated by Glendale. As Parcel 2 is an unincorporated county island in Maricopa County (and meets all the other requirements of the Gila Bend Act per the 2010 Decision as upheld by the Ninth Circuit), it must be acquired in trust for the Nation.

A. History behind the Gila Bend Act

The Nation is divided into 11 political subdivisions, known as “Districts.” Two of these Districts are located geographically outside the exterior boundaries of the Nation’s main reservation in southern Arizona: the San Xavier District, located near the City of Tucson, Arizona; and the San Lucy District, located near the town of Gila Bend, Arizona. The Nation’s 10,297-acre reservation located in the San Lucy District was inundated by the Painted Rock Dam and Reservoir Project in 1960, leading Congress to pass the Gila Bend Act in 1986.¹³

The background section of the House Report for the Gila Bend Act offers important context for understanding the intent behind the Gila Bend Act. The modern history of the San Lucy District effectively began when President Chester A. Arthur, by Executive Order dated December 12, 1882, established a 22,400 acre reservation in southwestern Arizona for a distinct group of Tohono O’odham (then known as “Papago”) Indians living in the area of Gila Bend.¹⁴ By Executive Order dated June 17, 1909, President William Howard Taft reduced the reservation to 10,297 acres.¹⁵ The current members of the Nation at Gila Bend are descendants of people who lived along the banks of the Gila River for centuries.¹⁶

The House Report describes the status of the Tribe in 1949 and the development of the Painted Rock Dam:

In May, 1949, the Secretary of the Interior approved an extensive report which outlined “a plan for the social and economic development of this [Papago] Tribe and the discharge of the Federal Government’s obligation to these Indians.” The report found that fully two-thirds of the Tribe’s 7,000 members “obtain a precarious livelihood from subsistence farming, small cattle enterprises, wood cutting, and increasingly from seasonal off-reservation employment at low wages... They suffer from malnutrition, disease, and the other evils of extreme poverty...” In addition to a variety of health and educational efforts, the report recommended an economic program that emphasized development of irrigated agriculture, including 1200 [sic] acres at Gila Bend...

Three months after the Papago Development Program was published, the Secretary signed a letter to the Chief of the U.S. Corps of Engineers expressing no objection to a proposal by the Corps to construct Painted Rock Dam on the Gila River 10 miles downstream from the Gila Bend Reservation to provide flood protection to the Wellton-

¹³ H.R. Rep. No. 99-851, at 4-5 (1986).

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.*

Mohawk and Yuma Mesa divisions of the Gila Reclamation Project and the City of Yuma, Arizona. Neither the Secretary's letter nor the subsequent project report of the Corps (House Document 331, 81st Cong., 1st Sess., Sept. 16, 1949) included any mention of the reservation or the dam's potential effects on the reservation and its inhabitants. Congress subsequently authorized construction of Painted Rock Dam by the Act of May 11, 1950 (64 Stat. 176), and the Corps began efforts to acquire flowage rights to lands immediately upstream from the dam and to relocate persons living on those lands...

The Corps completed construction of Painted Rock Dam in 1960. Having failed to reach agreement on either an easement or acquisition of relocation lands, the United States on January 3, 1961, initiated an eminent domain proceeding in Federal district court to obtain a flowage easement. In November, 1964, the court granted an easement giving the United States the perpetual right to occasionally overflow, flood, and submerge 7,728.82 acres of the reservation (75 percent of the total acreage) and all structures on the land, as well as to prohibit the use of the land for human habitation. Compensation in the amount of \$130,000 was paid to the Bureau of Indian Affairs (BIA) on behalf of the Tribe.

Pursuant to the Act of August 20, 1964 (Public Law 88-462; 78 Stat. 559), the Papagos living within the reservoir were relocated to a 40 acre tract about one and a half miles south of the reservation and adjacent to the town of Gila Bend.¹⁷

The Report goes on to describe the flooding and the damage it caused:

The first major flooding of the reservation after construction of the dam occurred in 1978-79. A 6 mile-long lake took 11 months to recede off most of the reservation. Major flooding also occurred in 1981, 1983 and 1984, each time resulting in a large standing body of water. The extent and duration of this flooding was far greater than was projected at the time the dam was authorized. The floodwaters destroyed a 750 acre farm that had been developed at tribal expense and precluded any economic use of reservation lands.

Successive deposits of salt cedar (tamarisk) seeds left by the flood produced thickets so dense that economic use of the land was not feasible. The BIA in 1983 estimated the cost of just clearing the salt-cedar and leveling the reservation's arable land for farming at \$5,000,000. The Tribe has not had discretionary funds available to risk a farming venture, especially since all of the reservation's arable land lies within the flowage easement. Private investors have been unwilling to come on the reservation and farm because of the great uncertainty of flooding. The BIA has similarly been unwilling to invest funds in rehabilitating the land's productive capacity.

Unable to put their reservation land base to economic use, the Tribe in 1981 petitioned Congress for a new reservation on lands in the public domain which would be suitable for agriculture. It stipulated that the new lands must have water rights equivalent to those associated with the reservation lands for which they would be exchanged...

¹⁷ *Id.* at 4-5.

In 1982 Congress, in section 308 of the Southern Arizona Water Rights Settlement Act, (Public Law 97-293; 97 Stat. 1274), authorized and directed the Secretary of the Interior to exchange lands in the public domain within his jurisdiction for those arable lands of the Gila Bend Reservation which he determined had been rendered unsuitable for agriculture due to flooding behind Painted Rock Dam. The ensuing study, completed in October, 1983, found all of the arable land of the reservation – 5,962 acres – to be unsuitable for agriculture. The study also concluded that the combination of repeated flooding, silt deposition, and salt cedar infestation has obliterated any vestige of the former network of unpaved roads, thereby restricting access and rendering of little or no economic value the remaining 4,000-plus acres of the reservation otherwise suitable for grazing livestock.

Pursuant to the study findings and section 308 of the 1982 Act, the Secretary contracted with the Tribe for a study to identify lands within a 100-mile radius of the reservation suitable for agriculture and for exchange based on ownership, location, natural conditions, water, soils, land use, water use, economic factors and environmental concerns. This study, completed in April 1986, concluded that none of the sites identified were suitable from a lands/water resource standpoint and none were acceptable to the Tribe on a socio-economic basis.¹⁸

On October 20, 1986, based on the history of what had occurred to the San Lucy people and the referenced study, Congress enacted the Gila Bend Act to compensate the Nation for what it had lost.¹⁹ Under the Act, the United States paid the Nation \$30 million, and the Nation was permitted to spend those funds for “land and water rights acquisition, economic and community development, and relocation costs,” as well as related planning and administrative costs.²⁰ The Secretary is not responsible for the review, approval, or audit of the use and expenditure of those funds.²¹ The Act allows the Nation to obtain replacement reservation land, so long as certain enumerated conditions were met, including that the land not be “within the corporate limits of any city or town.”

Several other observations about the Gila Bend Act and its history are worth mentioning. In the Act’s “Findings,” Congress declares that “[t]he 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.”²² The Act conclusively demonstrates that Congress contemplated lands that could support economic development, noting that Congress intended to facilitate “replacement of Gila Bend Indian Reservation land with land suitable for sustained economic use which is not principally farming and does not require Federal outlays for construction, to promote the economic self-sufficiency of the O’odham Indian people.”²³ The

¹⁸ *Id.* at 5-6.

¹⁹ Gila Bend Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986).

²⁰ *Id.* §§ 4(a), 6(a).

²¹ *Id.* § 6(b).

²² *Id.* § 2(3).

²³ H.R. Rep. No. 99-851, at 3-4. Salt River and Gila River argue that excluding county islands from acquisition under the Act would not detract from the Act’s purpose to provide lands for economic development because “[c]ounty islands comprise only 0.67 percent of the unincorporated, non-reservation land in Maricopa, Pima and

House Report states that a DOI study commissioned by Congress in 1982 to identify suitable lands for the Nation concluded that no sites identified within 100 miles of the Nation's reservation "were suitable from a lands/water resource standpoint and none were acceptable to the Tribe on a socioeconomic basis."²⁴ The House Report further explains that the Nation's existing reservation "for all practical purposes cannot be used to provide any kind of sustaining economy. Significant opportunities for employment or economic development in the town of Gila Bend (population 1600) simply do not exist."²⁵ Thus, the Gila Bend Act allowed the Nation to look elsewhere for replacement lands.

Recognizing that the United States' construction of Gillespie and Painted Rock Dams had prohibited the Nation from using its land and water to sustain itself, the House Report states that by enacting Section 308 of Public Law 97-293, "Congress recognized a responsibility to exercise its plenary power over Indian affairs to find an alternative land based [sic] for the O'odham people at Gila Ben[d]."²⁶ The same report states that the Nation sought a legislative remedy because "the need to provide economic opportunities for their people at Gila Bend is immediate."²⁷ Further, in testimony before the Senate Select Committee on Indian Affairs, Tohono O'odham Chairman Josiah Moore reiterated the needs of the Nation for economic development, stating that "[the Nation] eliminated the provision [from an earlier version of the bill] authorizing the Secretary to purchase private lands to exchange for reservation lands in order to afford the tribe a greater degree of self-determination in land selection."²⁸ The House Report also states that "[t]he Committee intends that the tribe have great flexibility in determining the use of funds provided under this Act."²⁹

B. The Department's Interpretation of the Ambiguous Term

The Gila Bend Act's text and legislative history demonstrate that Congress aimed to promote the Nation's economic development efforts and self-sufficiency in mandating that the Department take land in trust for the Nation. Likewise, the terms of the Act empower the Nation to have broad choice in what lands could be selected for trust acquisition bounded only by a limited number of restrictions set forth in section 6(c)-(d) of the Act. We are mindful of these overriding goals of the Gila Bend Act, which suggest that we resolve any ambiguity with the objective of promoting economic development for the Nation and providing the Nation as much latitude as terms of the Act will allow in selecting lands for trust acquisition.

Pinal Counties." Submission from Salt River and Gila River Communities to the Assistant Secretary at 6 (Aug. 29, 2013) [hereinafter Salt River Submission]. However, it is the Nation, not other tribes or the Department, that select lands for acquisition, subject to the requirements of the Act, and we do not read any additional requirements for acquisition in the Act. *See* Gila Bend Act § 6(a).

²⁴ H.R. Rep. No. 99-851, at 6.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Settlement of Certain Land and Water Rights Claims of the Papago Tribe of Arizona: Hearing on S. 2105, S. 2106 and S. 2107 Before the S. Select Comm. on Indian Affairs, 99th Cong. 77 (1986)* (prepared statement of Josiah Moore, Chairman, Tohono O'odham Nation).

²⁹ H.R. Rep. No. 99-851, at 10.

The Gila Bend Act places very specific restrictions concerning acreage,³⁰ location by county,³¹ and number of parcels³² for lands that the Nation can place in trust under the Act. Unfortunately, Congress less clearly expressed the nature of its concerns about the Nation's selection of lands impacting a nearby municipality, stating only that the Nation could not acquire lands under the Act that are "within the corporate limits of any city or town." Looking to the Act's text and its legislative history, Congress provided little beyond the overriding purposes identified above to assist our analysis. The Ninth Circuit likewise concluded that Arizona statutes and case law reveal no clear or dispositive way to interpret the phrase "within the corporate limits."³³ Although three Arizona cases are potentially relevant to an abstract meaning of "within the corporate limits" – *Flagstaff Vending Co. v. City of Flagstaff*,³⁴ *Sanderson Lincoln Mercury Inc. v. Ford Motor Co.*³⁵, and *Speros v. Yu*³⁶ – none of them definitively resolve the meaning of the phrase and are also not dispositive for our interpretation of a Federal law.³⁷

³⁰ The Ninth Circuit confirmed that the Nation may put 9,880 acres in trust under the Act, and that the acquisition of Parcel 2 does not implicate that acreage limit. See 729 F.3d at 1145-1147.

³¹ Land acquired in trust under the Act must be located in Maricopa, Pinal or Pima Counties, Arizona. Gila Bend Act § 6(d). Parcel 2 is wholly within Maricopa County.

³² The Gila Bend Act limits the Nation to selecting not more than three separate areas consisting of contiguous tracts, one of which areas has to be contiguous to San Lucy Village. *Id.* The Act, however, authorizes the Secretary to waive that requirement if she determines that additional areas are appropriate for acquisition. *Id.* As pointed out in the Field Solicitor Memo, the BIA Western Regional Director, acting under the authority of the Secretary, issued a waiver of the number of parcels restriction on May 31, 2000, that allows the Nation to purchase up to five separate areas of replacement lands and further waived the requirement that one of these areas be contiguous to the San Lucy Village. Field Solicitor Memo at 5, n.1. In any event, the Field Solicitor determined that since the Nation has only one parcel in trust, the BIA's waiver is not pertinent to our analysis.

³³ *Gila River Indian Cmty.*, 729 F.3d at 1147-48; Field Solicitor Memo, at 13-16.

³⁴ *Flagstaff Vending Co. v. City of Flagstaff*, 578 P.2d 985 (Ariz. 1978). In discussing the application of a privilege tax imposed by the City of Flagstaff, the court held that because the exterior boundary of Flagstaff completely surrounds Northern Arizona University, an argument that the university was not within the City of Flagstaff could not stand. However, the City had previously annexed the area where the university is located.

³⁵ *Sanderson Lincoln Mercury Inc. v. Ford Motor Co.*, 68 P.2d 428 (Ariz. 2003). In this case, the Arizona Supreme Court considered whether a proposed Ford dealership, which was located on a county island, was "within" the City of Phoenix. The term "corporate limits" does not appear anywhere in the case. Neither is the *Flagstaff Vending* case referenced. The court held, *inter alia*, that the phrase "'incorporated city' necessarily contemplates a locality defined by its metes and bounds. It follows that an area excluded from the defined area of incorporation is not part of the city, as is true of a county island." *Id.* at 431-32 (internal citation omitted). The Field Solicitor Memo notes that this case "suggests that 'despite its location within the [City's] exterior boundaries' the new Ford dealership was not 'within' the City of Phoenix, which holding rests entirely on a jurisdictional concept based on the municipal corporation." Field Solicitor Memo, at 15.

³⁶ *Speros v. Yu*, 83 P.3d 1094 (Ariz. 2004). Addressing a question similar to that raised in the *Sanderson Lincoln Mercury* matter, the Arizona Supreme Court stated that "it is possible for property to be within the exterior boundary of a city yet not be part of the city. This happens when the city does not annex an entire area, but only enough land to completely surround other lands. In such a situation there is a boundary between the lands that are within the jurisdiction of the city and those that are not included within that jurisdiction that is entirely within the exterior boundary of the city. Although 'interior boundary' may not be an artful term for such a dividing line, we conclude that an exterior boundary of an area of land is not necessarily the same as a boundary." *Id.* at 1100 (internal citations omitted).

³⁷ See Field Solicitor Memo, at 14-16. We note that *Sanderson* (2003) and *Speros* (2004) both postdate the enactment of the Gila Bend Act (1986). Thus, in addition to the fact that we are interpreting Federal law, not state law, Congress could not have been aware of the Arizona courts' interpretations in those cases at the time it passed the Act. While the Field Solicitor's Memorandum evaluated these cases in the context of determining whether the Act had "plain meaning," we find that consideration of these cases is not necessary for purposes of making a reasonable interpretation of an ambiguous Federal law.

In the absence of more pointed authority on the meaning of “within the corporate limits,” we are guided by Congress’s aim to promote the Nation’s economic self-sufficiency and provide the Nation with the ability to select lands outside of its reservation that offer potential for economic growth, particularly in non-agricultural areas (subject to limited restrictions provided in the Act). Notably, Congress limited the area of the Nation’s acquisitions to three of Arizona’s most populous counties³⁸ and at the same time set in place acquisition restrictions relating to not only towns but also cities, demonstrating that Congress envisioned that Nation land could be in close proximity to other local governments. In this context, we find that it is most reasonable to interpret the phrase “within the corporate limits” as turning on the word “corporate” and whether the Nation’s lands are part of the incorporated lands of a municipality or fall on the unincorporated side of its boundary line.

In our view, land is not “within the corporate limits” under the Act if it is not part of the area that has been incorporated by a municipality. Lands that have been incorporated are areas where a municipality exercises its jurisdiction, exerting its authority to apply and enforce ordinances and generate tax revenues.³⁹ Recognizing that these are the areas where municipalities govern, our reading gives significant effect to Congress’s apparent interest in ensuring that the Nation’s acquisitions under the Act do not intrude upon the governance of Arizona municipalities. Moreover, we reach this conclusion without unnecessarily restricting the Nation’s opportunities for economic growth and well-being promised by the Act and its legislative history.

Our reading of “within the corporate limits” protects the status quo for Arizona municipalities, ensuring that their incorporated lands and the zoning, taxation, and other regulatory schemes that they have enacted are not altered under the Act by the Nation.⁴⁰ Such local laws are generally preempted when land previously subject to the local governing authority is acquired in trust by the United States for a tribe.⁴¹

Our focus on the corporate status of the land is far more meaningful than the simplistic geographical interpretation (*i.e.* whether the parcel sits physically surrounded by the corporate limits) advanced by the commenters. We find that such an interpretation, which hinges solely on land’s location, is too facile. We believe Congress must have intended to provide the Nation the opportunity to acquire lands in close vicinity to cities and towns; otherwise, it would not have included the qualifying language that attempts to place a marker between neighboring trust land and municipalities. Thus, whether the trust lands physically are surrounded by a municipality’s land is not determinative. Given the Act’s goals, the more reasonable interpretation of “within

³⁸ The U.S. Census Bureau estimates that in 1986, Maricopa (pop. 1,905,504), Pima (pop. 621,586), and Pinal (pop. 107,816) had the three largest populations in Arizona. See U.S. Bureau of the Census, Intercensal Estimates of the Resident Population of States and Counties 1980-1989, available at <https://www.census.gov/popest/data/counties/totals/1980s/tables/e8089co.txt>.

³⁹ See, e.g., Ariz. Rev. Stat. § 9-104(A) (when county territory is included within the boundaries of a newly incorporated city or town, the county laws relating to zoning, building, plumbing, mechanical, electrical and health and sanitation in such areas are superseded by those of city or town).

⁴⁰ As discussed further below, we are not persuaded by the commenters that our view should be different because Ariz. Rev. Stat. § 11-814(G) requires counties to use as a guideline for county islands the adopted general plans and standards of the surrounding city or town.

⁴¹ See generally Cohen’s Handbook of Federal Indian Law § 6.03.

the corporate limits” is that the phrase restricts the Nation’s ability to acquire trust land when the proposed acquisition intrudes upon the governing authority of a municipality over its incorporated territory. Based on our agency expertise, this interpretation best meets the various goals of the statute and accords with sensible public policy. This approach ensures that the Gila Bend Act will address concerns that Arizona municipalities undoubtedly care about – maintaining their zoning, taxation, and other regulatory authority over their incorporated lands. By contrast, the reading of “within the corporate limits” advanced by commenters, which is based on location alone, may or may not be significant to the affected municipality, but alone, is not conclusive. It could depend largely on the proposed acquisition’s size, location,⁴² intended use, jurisdictional status, or even other factors. Accordingly, we believe we can most meaningfully honor the “within the corporate limits” restriction set forth by Congress by prohibiting the Nation from acquiring a municipality’s incorporated lands.

Our reading also ensures that the Act is not read in a way that unnecessarily restricts the Nation’s ability to put land in trust within populated areas for non-agricultural purposes and to benefit from those acquisitions. Reading the Gila Bend Act as the commenters propose potentially hinders a key goal of the Act – promoting the Nation’s economic self-sufficiency in areas that are not rural.⁴³ Given that county islands are bounded on all sides by a municipality’s borders, such lands have an increased likelihood of being close to a significant population base, which opens the door for significant economic development opportunities across a range of industries. Likewise, the commenters’ reading limits the Act’s ability to provide the Nation maximum flexibility in selecting land for trust acquisition except where expressly limited by the Act. As noted in the Congressional testimony of former Nation Chairman Moore quoted above, that latitude is an important feature of the Act.⁴⁴ We reject the commenters’ proposed reading, particularly when our interpretation of “within the corporate limits” gives real and meaningful effect to Congress’s words and significant protection to municipalities’ incorporated lands.

The commenters’ interpretation prohibits the Nation from selecting incorporated parcels that are part of the municipality as well as county islands like Parcel 2 that are not. There is no evidence that Congress intended that section 6(d) be read that broadly. Without more guidance in the Act’s text and legislative history, we cannot conclude that Congress was aiming at county islands like Parcel 2 when it wrote that the Nation could not under the Act acquire parcels “within the corporate limits of any city or town.” Had Congress had such a focus in mind, it certainly knew how to address the issue. Indeed, Congress did address various other issues concerning the Nation’s land selection in the Act in significant detail.⁴⁵ In any event, based on our agency expertise, we reject the notion that the language covers unincorporated “county islands.”

⁴² The size or location of an acquisition could vary even within the total acreage restriction in section 6(c) and the county restriction in section 6(d) of the Act.

⁴³ See H.R. Rep. No. 99-851 at 3-4, 7 (1986) (noting that Congress intended to facilitate “replacement of Gila Bend Indian Reservation land with land suitable for sustained economic use which is not principally farming and does not require Federal outlays for construction, to promote the economic self-sufficiency of the O’odham Indian people” and explaining that “[s]ignificant opportunities for employment or economic development in the town of Gila Bend (population 1600), simply do not exist.”).

⁴⁴ See discussion *supra* at 7 & n.28.

⁴⁵ See, e.g., Gila Bend Act §§ 4(c) (addressing limitations on groundwater well capacity), 7 (requiring payments in lieu of taxes), and 8 (specifying water delivery rates). Note also that, in other circumstances, Congress has explicitly legislated in a manner as the commenters would have us now read into the Gila Bend Act. See, e.g., 16 U.S.C. § 485

Our interpretation of “within the corporate limits” also ensures consistent treatment of unincorporated parcels regardless of where they are located relative to a municipality’s corporate limits. It is undisputed that Parcel 2 has never been annexed by Glendale, and remains unincorporated land under the jurisdiction of Maricopa County.⁴⁶ Although physically surrounded by Glendale’s corporate limits, Parcel 2 has the same unincorporated status as land that is geographically located outside of but immediately adjacent to Glendale’s exterior boundaries; none of it has been incorporated by Glendale.⁴⁷ No party argues that acquisition of the latter category of land under the Gila Bend Act is barred.⁴⁸ It would be anomalous and somewhat arbitrary to say that similarly situated parcels like unincorporated county islands should be barred from selection by the Nation merely because they sit bounded by both exterior and interior boundaries that define Glendale’s corporate limits. We do not believe Congress intended such inconsistent treatment, or that it accords with sensible public policy. There is no evidence in the Gila Bend Act that such a result was desired.

While we believe the more reasonable reading of section 6(d) is that Congress intended to prohibit the Nation’s acquisition of any incorporated land, the Ninth Circuit has acknowledged that “within the corporate limits” *could* have a geographical interpretation.⁴⁹ But even with this reading, Parcel 2 remains outside the corporate limits of Glendale, despite the commenters’ arguments to the contrary. Their analysis falls short because it fails to account for the interior boundary that separates Glendale’s incorporated land from Parcel 2. The Nation explains: “[w]here a city surrounds a county island, there are two relevant boundaries: the city’s exterior boundary and the interior boundary between the city and the county island. Both are ‘corporate limits’ because both divide land that is part of the incorporated city from land that is not. Only land that is *between* those two boundaries – *i.e.*, land that has actually been incorporated into the city – is in the interior part of (or ‘within’) a city’s ‘corporate limits.’”⁵⁰ Recognizing Glendale’s exterior boundary takes the analysis only halfway. It is not complete unless the boundary line that creates the county island is acknowledged as well. Because county islands like Parcel 2 do not physically sit inside the area between those two boundaries, *i.e.* within the area of incorporated land, they are not geographically “within the corporate limits of any city or town.”

Though not necessary to our conclusion, our interpretation is also consistent with the Indian canon of construction. The basic Indian canon of construction requires that treaties, agreements,

(Secretary of Agriculture may accept “title to any lands within the exterior boundaries of the national forests”); 25 U.S.C. § 465 (certain funds may not be “used to acquire additional lands outside of the exterior boundaries of Navajo Indian Reservation”).

⁴⁶ Field Solicitor Memo, at 13.

⁴⁷ Just as unincorporated county islands completely surrounded by Glendale’s corporate limits like Parcel 2 and lands geographically outside but immediately adjacent to Glendale’s corporate limits are not under Glendale’s jurisdiction, Arizona law would permit Glendale to exercise some jurisdiction over both types of parcels as long as they are within 3 miles of the city’s borders. Ariz. Rev. Stat. § 9-461.11(A).

⁴⁸ Indeed, the Ninth Circuit acknowledged that “nothing would prevent the Nation from acquiring land in trust immediately adjacent to a city’s outermost boundary or even land that was almost, but not entirely encircled by corporate land.” *Gila River Indian Cmty.*, 729 F.3d at 1152.

⁴⁹ 729 F.3d at 1148.

⁵⁰ Letter Submission from Seth Waxman Regarding The City of Glendale’s and the State of Arizona’s September 11, 2013 Submission Regarding the Remand of Tohono O’odham’s Fee-to-Trust Application (September 30, 2013) [Nation Submission] at 2-3.

statutes, and executive orders enacted for the benefit of Indians be liberally construed in favor of the Indians, and that all ambiguities are to be resolved in favor of the Indians.⁵¹ Here, the Gila Bend Act was enacted for the benefit of and to remedy the impaired rights of one tribe: the Tohono O’odham Nation. Our interpretation of “within the corporate limits” helps to ensure that the Nation – the intended beneficiary of the Act – receives the intended benefits.

In sum, we conclude that land is not “within the corporate limits of any city or town” if it has not been incorporated by a city or town. This interpretation comports with the goals of the Gila Bend Act to further the Nation’s self-sufficiency and self-determination through the acquisition in trust of replacement lands in more populated areas suitable for non-agricultural economic development, while ensuring that the acquisitions do not interfere with the governance of Arizona cities or towns.

C. Commenters’ Views on “Within the Corporate Limits”

In offering their interpretation of “within the corporate limits,” the commenters make arguments focused on avoiding land use conflicts and interference with Glendale’s planning authority. For example, Salt River and Gila River argue that “[a]llowing reservations to be created on county islands threatens orderly municipal development,” and “[p]rohibiting county islands from being taken into trust under the Gila Bend Act avoids land-use conflicts between local governments and the Nation, thus fulfilling the congressional purpose behind Section 6(d).”⁵² In addition, Salt River and Gila River focus on Arizona statutes that give municipalities some degree of control over county islands that they do not have over unincorporated lands geographically outside their boundaries. They cite to Arizona Revised Statutes section 11-814(G), which provides that “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 prescribed in the subdivision and zoning ordinances of the city or town after April 10, 1986.” They point out that under Arizona law, the city or town surrounding a county island is the only municipality that can annex the land within that island.⁵³ The State and Glendale also claim that Glendale’s general plan and zoning ordinance “guide the zoning and subdivision of the county islands within its corporate limits.”⁵⁴ They note that Glendale provides police and fire service on county

⁵¹ See, e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (“statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943) (“[T]reaties are construed more liberally than private agreements... Especially is this true in interpreting treaties and agreements with the Indians [which are to be construed]... ‘in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians].’” (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942))); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (“in the Government’s dealings with the Indians . . . [t]he construction [of treaties] is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [the Indians]”); *Worcester v. Georgia*, 31 U.S. 515, 551-57 (1832) (interpreting the Treaty of Hopewell in light of congressional policy to “treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate”), *abrogated in part on other grounds as recognized in Williams v. Lee*, 358 U.S. 217, 219-20 (1959).

⁵² Salt River Submission, at 7, 12.

⁵³ *Id.* at 7 (citing Ariz. Rev. Stat. § 9-471(A)(1), (H); Submission from State of Arizona and City of Glendale to the Assistant Secretary, at 7 (Sept. 11, 2013) [hereinafter State and Glendale Submission] (citing *Carefree Improvement Ass’n v. City of Scottsdale*, 649 P.2d 985, 987 (Ariz. Ct. App. 1982) (discussing notice provisions of Arizona’s open meeting law in a case involving a contested annexation ordinance)).

⁵⁴ State and Glendale Submission, at 7.

islands,⁵⁵ and, citing two Arizona statutes, that “the State of Arizona permits the City to exercise the fundamental power of arrest notwithstanding the fact that Glendale has not yet annexed the area.”⁵⁶

Despite these contentions, Arizona law is clear that Glendale does not have actual zoning authority over county islands like Parcel 2.⁵⁷ The statute that commenters cite to argue that county islands are subject to city zoning and land use ordinances does not confer actual zoning authority on Glendale, but rather provides only that municipalities’ general plans are “guideline[s].”⁵⁸ Section 11-814(H) states that a county can find it is “not practicable” to follow municipalities’ general plans.⁵⁹ Even Maricopa County’s comprehensive plan, cited by Salt River and Gila River in support of their argument, provides only that the County will “take into consideration” a municipalities’ general plan, and even then only in certain circumstances.⁶⁰ Regarding the commenters’ annexation argument, even if Glendale wanted to annex unincorporated territory, as a general matter, it could do so only with the consent of a majority of the owners of the land and the owners of a majority of the property by value.⁶¹ With respect to the argument that the State permits Glendale to “exercise the fundamental power of arrest,” we fail to see the relevance of the two statutes cited, which do not mention county islands, annexation, or any specific jurisdiction of the city, and simply identify the circumstances in which a peace officer may arrest a person without a warrant generally. Finally, with respect to commenters’ arguments regarding the provision of fire and emergency medical services, we note that the statute itself refers to county islands “outside [a city’s] corporate limits.”⁶² In addition, cities and towns are authorized to provide fire and emergency medical services, but are not required to do so. The mere fact a local government can choose to provide fire and emergency services to a county island does not amount to a land use conflict and, even if it did, it does not convince us that Congress’ paramount concern was to avoid *any* land use conflict, particularly given the clear language in the legislative history supporting the goals of promoting the Nation’s economic self-sufficiency and providing for flexibility in the Nation’s land selection.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing Ariz. Rev. Stat. §§ 13-3871, 13-3883(A)(1)-(4)).

⁵⁷ See Ariz. Rev. Stat. §§ 11-813, 11-814(H).

⁵⁸ *Id.* § 11-814(G)-(H).

⁵⁹ *Id.* § 11-814(H)

⁶⁰ Maricopa County Comprehensive Plan, at 29 (1997, revised 2002), available at <http://www.maricopa.gov/planning/Resources/Plans/docs/pdf/Comprehensive%20Plan.pdf>.

⁶¹ See Ariz. Rev. Stat. § 9-471(A)(4). Interestingly, the Nation notes that efforts by Glendale and the State to annex Parcel 2 have been rebuffed in the courts. Nation Submission, at 3 n.5 (citation omitted). These efforts suggest that Glendale recognizes the need for the land to be annexed in order for Glendale to exert jurisdiction over the land. Glendale stipulated to the Arizona district court that they would not annex the land through the pendency of the appeal with the Ninth Circuit and they have not annexed the property since the Ninth Circuit issued its decision. Salt River and Gila River also note that “[f]or decades, Arizona has implemented policies aimed at bringing existing county islands under municipal control and halting the creation of new ones,” citing a statute blocking annexation of territory if it would create a county island. Salt River Submission, at 7. However, the fact remains that Glendale has not annexed Parcel 2 (thus leaving it outside municipal control). In 1977, Glendale did annex a strip of land surrounding Parcel 2 and other unincorporated areas, which commenters argue under Arizona law, would vest Glendale with the exclusive right to annex the county island. See Salt River Submission at 7-8 (citing Ariz. Rev. Stat. § 9-471(A)(1), (H)). As noted above, however, Glendale has not successfully annexed the county island.

⁶² Ariz. Rev. Stat. § 9-500.23.

In sum, the commenters' arguments do not support a conclusion that Glendale exerts jurisdiction over county islands like Parcel 2 as it does over incorporated lands. Nor do their arguments compel a conclusion that Congress wanted the avoidance of any potential land use conflicts to govern our reading of "within the corporate limits." There is no evidence of this intent in the Act's text or legislative history, both of which instead focus on the need for non-agricultural replacement lands to further economic development and tribal self-determination. Without more, it is hard to accept that Congress was so focused on prohibiting the acquisition of parcels like county islands when there is no evidence that Congress intended to do so. To the extent Congress was worried about land use conflicts, as explained above, our interpretation minimizes such conflicts through barring the acquisition of incorporated lands, *i.e.*, lands over which municipalities exercise jurisdiction.

The Arizona law indicating that county islands and land surrounding a municipality's borders may be treated alike also supports our view. Arizona Revised Statutes section 9-461.11 states:

In any county not having a county planning agency with jurisdiction in the unincorporated territory, the legislative body of any municipality may exercise the planning powers granted in this article both to territory within its corporate limits and to that which extends a distance of three contiguous miles in all directions of its corporate limits and is not located in a municipality.⁶³

This statute expands a municipality's potential reach not only to county islands, but also up to 3 miles of contiguous land located geographically beyond a municipality's exterior boundaries.⁶⁴ Thus, county islands are not the only type of unincorporated land over which a city may exercise some jurisdiction in the absence of the county doing so. Taking the commenters' argument to its logical end, they would presumably argue that lands within 3 miles outside municipal boundaries should likewise not be acquired under the Gila Bend Act as the acquisition potentially interferes with the authority that a municipality *could* exert over the land. However, nothing in the language of the Act or its legislative history, contemplates such a result.

Finally, in the face of land use conflict arguments and points about authority that Glendale or other Arizona cities and towns *could* have over county parcels, the fact remains that Glendale has not annexed Parcel 2; the land remains unincorporated and under the jurisdiction of Maricopa County. In this regard, our interpretation is reasonable given that it minimizes the likelihood of intrusion into Glendale's existing scope of governmental authority on its incorporated lands and, likewise, permits the Nation to select lands that are beyond a municipality's incorporated boundaries within Maricopa County. While trust land contiguous to a municipality can generate much opposition and angst, Congress did not identify controversy or intergovernmental conflict as a basis for restricting the Nation's economic development opportunities.

⁶³ Ariz. Rev. Stat. § 9-461.11(A).

⁶⁴ *Id.*

D. Commenters' Views on the Indian Canon of Construction

The Indian canon of construction requires that treaties, agreements, statutes, and executive orders enacted for the benefit of Indians be liberally construed in favor of the Indians, and that all ambiguities are to be resolved in favor of the Indians.⁶⁵ While the Gila Bend Act was enacted for the benefit of the Nation, the commenters argue that the canon should not be invoked here to read the Act favorably for the Nation as doing so would allegedly harm the interests of neighboring tribes. Recognizing the difference of opinion between the Nation and Gila River on whether the Indian canon applies when there are competing tribal interests, the Ninth Circuit found that “the application of the Indian canon [when there are competing tribal interests] is unsettled.”⁶⁶ The Ninth Circuit’s decision states that “the Secretary is best positioned to take stock initially of whether and how to weigh the competing interests.”⁶⁷

Although not necessary to our conclusion, application of the Indian canon is proper here and supports our reading of “within the corporate limits.” As stated above, the Gila Bend Act was enacted for the benefit of and to remedy the rights of one tribe: the Tohono O’odham Nation. No other tribe was mentioned in the statute. Accordingly, we construe this statute as Congress intended for the Nation’s benefit. The fact that our interpretation of the Act may have an incidental effect on other tribes does not demand that we avoid construing the Act as we propose, particularly where the Act was intended to make the Nation whole. Although Salt River and Gila River argue that the canon cannot be applied when “invoked against another Indian tribe,”⁶⁸ the cases they cite are clearly distinguishable from the present circumstances.⁶⁹

Salt River and Gila River cite *Confederated Tribes of Chehalis Indian Reservation v. Washington*,⁷⁰ which involved claims by two tribes to off-reservation fishing rights. In that case, the Chehalis and Shoalwater Bay Tribes argued that they held implied fishing rights and that they were entitled to the treaty fishing rights of another tribe, the Quinault.⁷¹ The Ninth Circuit found that the Indian canon of construction could not be applied to support the two tribes’ claim to Quinault’s fishing rights given that Quinault had an interest in its own fishing rights.⁷² No tribe has any interest in or has been provided any rights under the Gila Bend Act other than the Nation.

Glendale and the State also cite to *Hoopa Valley Tribe v. Christie*,⁷³ arguing that the Bureau of Indian Affairs owes a fiduciary obligation to all tribes and thus cannot apply the canon in favor of the Nation’s reading of the Gila Bend Act. That case, however, is very different than the facts here. Hoopa raised treaty rights and due process claims in challenging a BIA decision to move offices away from the Hoopa Valley Reservation to Redding, California, in order to provide

⁶⁵ See discussion *supra* at 11-12 & n.51.

⁶⁶ *Gila River Indian Cmty.*, 729 F.3d at 1151 n.12.

⁶⁷ *Id.*

⁶⁸ Salt River Submission, at 17.

⁶⁹ *Id.* at 17-18.

⁷⁰ *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996).

⁷¹ *Id.* at 337.

⁷² *Id.* at 340.

⁷³ *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1986).

services to more tribes.⁷⁴ The court found that an unratified Hoopa treaty did not create a tribal property right in a BIA office and that no legally enforceable guidelines had been violated.⁷⁵ The court concluded that no treaty right or law was violated, and that BIA acted with “attention to the various needs of all the Indian groups involved.”⁷⁶ Further, the *Hoopa* case has nothing to do with whether to interpret an ambiguous statute in a certain way given the Indian interests at stake. It thus has little application here. The Gila Bend Act is far different, as it clearly articulates the right and need of the Nation to purchase land to be held in trust, subject to certain restrictions which do not include the exclusion of areas that other tribes would find objectionable for their own reasons. Nor are other tribes claiming any interest in the lands at issue.

Glendale and the State also cite *Utah v. Babbitt*,⁷⁷ in which the Tenth Circuit declined to apply the Indian canon to interpret a royalty-sharing provision in favor of the Navajo Nation. That case involved a Federal law that added certain lands to the Navajo Reservation, and required that a portion of oil and gas royalties from “tribal leases” on those lands would be paid to the State of Utah to be used for the benefit of certain Navajo tribal members.⁷⁸ At issue on appeal was whether an “operating agreement” between the Tribe and a private company required payment to the State of Utah, or the Tribe instead.⁷⁹ The Tribe argued the Indian canon required the latter outcome, that the operating agreement was free of the royalty-sharing provision. The court found the canon inapplicable “because the interests at stake both involve Native Americans.”⁸⁰ In reaching that conclusion, the Tenth Circuit relied on the U.S. Supreme Court’s decision in *Northern Cheyenne Tribe v. Hollowbreast*.⁸¹ In *Hollowbreast*, a tribe challenged allottees’ rights in mineral deposits on allotted lands. Both *Babbitt* and *Hollowbreast* declined to apply the canon to interpret the statutes at issue because the conflicting interpretations implicated the rights shared within one tribe, pitting the tribal entity versus its members.⁸² By contrast, the Gila Bend Act contemplates the interests of the Nation only and the conflicting interpretation of the Act is offered by parties outside of the Tribe, whose rights are not implicated in the Act.⁸³

⁷⁴ *Id.* at 1100-01.

⁷⁵ *Id.* at 1102-03.

⁷⁶ *Id.* at 1103.

⁷⁷ *Utah v. Babbitt*, 53 F.3d 1145 (10th Cir. 1995).

⁷⁸ *Id.* at 1147.

⁷⁹ *Id.* at 1147-48.

⁸⁰ *Id.* at 1150 (citing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) (“[This] canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members.”)).

⁸¹ *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

⁸² See *Utah v. Babbitt*, 53 F.3d at 1150; *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. at 655 n.7.

⁸³ The State and Glendale also cite an August 24, 2011 letter from National Indian Gaming Commission to the Nation claiming that “[t]he NIGC explained that the Canon is ‘not applicable’ where it would cause harm to another tribe – Gila River.” State and Glendale Submission, at 15. However, the NIGC letter did not address the question before us today and is not binding on us. It declines to apply the Indian canon to the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* [hereinafter IGRA], not the Gila Bend Act. The Gila Bend Act, however, was passed to remedy specific harms to the Nation and, in keeping with this purpose, must be interpreted to benefit the Nation, rather than other tribes. Nothing about this decision deprives Gila River, Salt River, or any other tribe from participating in gaming activity or other economic enterprise. Further, any change that the acquisition of Parcel 2 could potentially create in gaming market exclusivity at some point in the future (a consideration that is premature) is not a legal prohibition to the acquisition and should not factor into this analysis.

When viewed in light of the clear purpose of the Gila Bend Act, the argument is incorrect that the canon prevents the interpretation we make today because of a speculative incidental economic effect on other tribes from the Nation's potential future use of Parcel 2. As explained in the Act's findings, as well as the discussion of the legislative history above, the Gila Bend Act was enacted to address the serious economic needs of the Nation. The Act was not intended to benefit Gila River, Salt River, or the other Arizona tribes. Neither the Act nor its legislative history mentions the interests of other tribes. Thus, we see no competing interests in the Act that would support a conclusion that the Indian canon prevents the ambiguous term "within the corporate limits" from being interpreted as we interpret it today. To the contrary, as noted above, our interpretation is consistent with the canon as it interprets the statute in a manner that benefits the tribe that the statute was intended to benefit.

That is not to say that the views of Gila River, Salt River, and other tribes should be ignored. Their representatives have spoken loudly and clearly about potential harms to their commercial interests. Their views have been carefully considered in making the legal and policy determination that is reflected herein.

E. Clear Statement Rule

The other canon of construction discussed in the Ninth Circuit's decision is the Federalism canon, or "Clear Statement Rule."⁸⁴ Also known as the "plain statement rule,"⁸⁵ the Clear Statement Rule establishes that only clear and manifest directives from Congress can infringe on traditional state regulation.⁸⁶ The statement by Congress must be "clear and manifest."⁸⁷

The Ninth Circuit rejected the Clear Statement Rule's application here, but did leave open the door for us to decide to apply it on remand.⁸⁸ Having thoroughly considered the commenters' arguments, and largely for the same reasons articulated by the Ninth Circuit, we do not believe the Clear Statement Rule controls. As the Ninth Circuit explained, Congress enjoys plenary power to legislate in the field of Indian affairs, and exercised that power in enacting the Gila Bend Act.⁸⁹ The United States noted in its brief responding to petitions for rehearing/rehearing *en banc* that "it is entirely unexceptionable that the Federal Government may acquire private land in a state for Federal purposes."⁹⁰ State sovereignty interests are not implicated here merely

⁸⁴ *Gila River Indian Cmty.*, 729 F.3d at 1151-53.

⁸⁵ See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

⁸⁶ See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

⁸⁷ *Id.*

⁸⁸ 729 F.3d at 1152-53.

⁸⁹ *Id.* at 1153. City of Glendale and Arizona also rely on *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* [hereinafter *SWANCC*], where the Supreme Court struck down the Migratory Bird Rule, which would have extended the Clean Water Act to include "an abandoned sand and gravel pit" in the scope of "navigable waters." 531 U.S. 159 (2001). The Court stated that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. The Ninth Circuit's decision differentiates *SWANCC* from the case at hand, and quotes *SWANCC* for the proposition that "[t]his circumstance is not one in which an administrative interpretation of a statute invokes the outer limits of Congress' power." *Gila River Indian Cmty.*, 729 F.3d at 1152.

⁹⁰ Brief for Defendant-Appellees at 16, *Gila River Indian Cmty. v. United States*, 729 F.3d 1139 (9th Cir. 2013) (Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642).

because the proposed trust acquisition could have incidental economic effects on Glendale if the parcel is developed as a casino.⁹¹

Likewise, we do not believe that Glendale's expectations regarding control over Parcel 2's development amount to a state sovereign interest. If Glendale's rationale were adopted, the Clear Statement Rule would always apply to any circumstance where Federal action could lead to the most minor of impacts on state interests, which in effect would allow states and local governments a back door means of limiting Congress's Indian affairs authority. Moreover, as discussed above, in this case Glendale has not demonstrated any authority beyond its incorporated limits that would be unduly infringed upon by the approved land acquisition here. Applying the Clear Statement Rule would encourage states to provide authority to municipalities after a Congressional enactment in order to limit the scope of a Federal statute. Thus, we do not believe the Clear Statement Rule applies in this context. Even assuming some impact on state sovereignty by the proposed acquisition, we see no difference in impact for a county island verses unincorporated land immediately adjacent to Glendale's outermost boundary. Accordingly, we see no basis for using the Clear Statement Rule in our interpretation of the phrase "within the corporate limits."

F. Conclusion

After reviewing the court's instructions for the Department's consideration of issues on remand, the Field Solicitor Memo, the Act and its legislative history, and the various submissions from interested parties received by the Department following the remand, we conclude that Parcel 2 is not "within the corporate limits" of the City of Glendale.⁹²

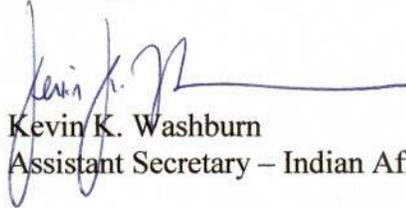
⁹¹ As the Ninth Circuit noted, "[a]t this stage, no one knows whether a casino will be approved." *Gila River Indian Cmty.*, 729 F.3d at 1152.

⁹² The Ninth Circuit explained that deference to the Agency's decision, beyond providing a reasoned explanation, would be supported by consideration of the practical and policy issues that motivate the interpretation of "within the corporate limits." *See id.* at 1150-51. The commenters raise a number of environmental, economic, and social concerns that they argue compel a reading of the Act that would foreclose the acquisition of any county islands by the Nation under the Act. Their submissions also mention the possibility that the Nation might continue to acquire lands in the Phoenix metropolitan area with intent to pursue gaming. However, gaming concerns and questions surrounding compact negotiations are not relevant to the narrow land acquisition question presented by the Ninth Circuit's remand. The Department will consider whether Parcel 2 is eligible for gaming under IGRA when and if the Nation submits documentation that triggers an IGRA gaming eligibility decision. In any event, Congress did not make the intended land use a factor for the Secretary to consider when contemplating whether to acquire lands in trust pursuant to the Gila Bend Act. Accordingly, we give such concerns no import.

DECISION

Our evaluation of the Nation's request indicates that the legal requirements under the Gila Bend Act for acquiring Parcel 2 in trust have been satisfied. The Regional Director, Western Region, will be authorized to approve the conveyance document accepting the property in trust for the Nation upon compliance with the requirements of the BIA's April 2012 Memorandum, "Updated Guidance on Processing Mandatory Trust Acquisitions," as supplemented on January 14, 2014.⁹³

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin K. Washburn", with a long horizontal line extending to the right.

Kevin K. Washburn
Assistant Secretary – Indian Affairs

⁹³ Memorandum from Larry Echo Hawk, Assistant Secretary, to Regional Directors, Updated Guidance on Processing Mandatory Trust Acquisitions (Apr. 6, 2012); Memorandum from Mike Black, BIA Director, to Regional Directors, Supplement to April 6, 2012 Updated Guidance on Processing Mandatory Trust Acquisitions (Jan. 14, 2014).