UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION, CITIZENS EQUAL RIGHTS ALLIANCE, DAVID R. TOWNSEND, New York State Assemblyman, MICHAEL J. HENNESSY, Oneida County Legislator, JACK B. GARDNER, Oneida County Legislator, and MELVIN L. PHILLIPS, RICHARD TALLCOT, and JERRY TITUS

Plaintiffs,

v. Civil Action No.

DIRK KEMPTHORNE, Secretary of the Interior, in his official capacity, CARL J. ARTMAN, Associate Secretary of Indian Affairs, JAMES E. CASON, Associate Deputy, Secretary of Interior, FRANKLIN KEEL, Eastern Regional Director of the Bureau of Indian Affairs, and KURT G. CHANDLER, Eastern Regional Environmental Scientist,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Nature of Claim

1. Plaintiffs allege the following based on the recent decisions of *City of Sherrill v. Oneida Indian Nation*, 544 U. S. 197 (2005) and *Cayuga Indian Nation v. Pataki*, 413 F. 3d 266 (2nd Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 3949 (U.S., May 15, 2006) : The Bureau of Indian Affairs (BIA) is inadequately addressing the regulatory jurisdiction and mitigation of the impacts to each community where applications have been accepted to take “Indian owned”

lands into federal trust lands. The Oneida Indian Nation of New York was the first to file its fee to trust applications and has just released its Draft Environmental Impact Statement (EIS).

2. Plaintiffs assert under the Constitution of the United States that Defendants have no authority to create federal public domain land or federal Indian land in the State of New York, an original Colony, which retains its preemptive rights to all lands within its exterior boundaries. No lands in any of the 13 original colonies has ever been placed into federal trust status pursuant to 25 U.S.C. § 465.

3. Plaintiffs assert that the analysis in *Sherrill* may actually apply to **prohibit** the federal Defendants from accepting any lands in New York into federal trust status pursuant to 25 U.S.C. § 465. (Emphasis supplied.)

4. In *Sherrill*, the United States Supreme Court held, "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Sherrill* at 198. The court also recognized that there is no federal common law right in an Indian tribe or the United States to:

> "argue that because the Court in Oneida II recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels." *Sherrill* at 213.

5. Plaintiffs allege that the revised regulations implementing Section 465, 25 C.F.R. 151 et seq. (2004) that allow fee lands purchased by an Indian tribe within its aboriginal territory to be placed into federal trust status may be unconstitutional. These new regulations appear premised on the same "unification theory" described in *Sherrill.* However, the "unification theory" was expressly rejected by the court in *Sherrill*, as referenced above.

6. Whether the new regulations adequately address the "disruptive"effects to state and local jurisdiction described in *Sherrill* depends on how the proposed major federal action of permanently removing thousands of acres of land in nine New York Counties from state and local jurisdiction is addressed within the process required by the National Environmental Policy Act (NEPA).

7. Plaintiffs, therefore challenge, pursuant to NEPA, as enforced through the Administrative Procedures Act (APA), whether the Defendants, as a preliminary matter to accepting and granting fee to trust applications to Indian Tribes for lands in the State of New York, are required first to complete a Programmatic Environmental Impact Statement (PEIS) to assess the cumulative jurisdictional impacts from the disruption of "rekindling embers of sovereignty long ago grown cold."

II. Jurisdiction and Venue

8. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 5 U.S.C. §500 et seq (the APA) and 28 U.S.C. § 2201 et seq. (the Declaratory Judgment Act). The United States has waived its sovereign immunity from suit under 5 U.S.C. § 702 and 28 U.S.C. § 2209(a).

9. Venue is proper in this District under 28 U.S.C. §1391(e). Plaintiff's claim for relief arises under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq.

III. Parties

10. Plaintiff, Central New York Fair Business Association (CNYFBA), is a non-profit corporation incorporated under the laws of the State of New York having members that own homes and do business in and around the area of Sherrill, New York and included in the area claimed by the Oneida Indian Nation that is part of its trust application.

11. Plaintiff, Citizens Equal Rights Alliance (CERA), is a non-profit 501(c)(4) corporation incorporated in South Dakota. CERA has members in 22 states, including members throughout New York State. Three board members own property and reside in three different counties of New York.

12. Plaintiff, David Townsend, is a duly elected member of the New York State Assembly representing and residing in the area requested to be placed into trust by the Oneida Indian Nation.

13. Plaintiff, Michael J. Hennessy, is an Oneida County Legislator, member of the Oneida County Indian Affairs Committee and resident of the area subject to both of the Oneida applications.

14. Plaintiff, Jack B. Gardner, is an Oneida County Legislator, member of the Oneida County Indian Affairs Committee and resident of the area subject to both of the Oneida applications.

15. Plaintiff, Melvin L. Phillips, is a full blooded Oneida Indian residing in the Town of Vernon in Oneida County on untaxed state land where the Indian title has never been extinguished. None of the Oneida Indian Tribes have applied to place the lands where Plaintiff Phillips and other members of his family live into federal trust status. Plaintiff Phillips is a

direct descendant of the "Home Party"from the June 25, 1842 treaty with the Orchard Party, who chose not to leave the State of New York under the Treaty of Buffalo Creek in 1838 (Article XIII). Plaintiff Phillips contends that the Oneida Indian Nation federal fee to trust application will destroy the more than two hundred year old trust relationship between the remaining Oneida residents of state land and the State of New York.

16. Plaintiff Richard Tallcot is a board member of CERA working and residing in the area of the Cayuga Indian Tribes' fee to trust application.

17. Plaintiff Jerry Titus is a board member of CERA who resides and works in Cattaraugus County. The Seneca Tribe, pursuant to the Seneca Nation Settlement Act entered into in 1990, is currently engaged in purchasing state lands to expand its state reservation.

18. The Defendants are the United States Department of the Interior, Secretary of the Interior Dirk Kempthorne, the Assistant Secretary of the BIA, James E. Cason, the Deputy Secretary of Indian Affairs, Carl J. Artman and the BIA through its Eastern Regional Director, Franklin Keel and Regional Environmental Scientist, Kurt G. Chandler. The Department of the Interior and Secretary of the Interior Dirk Kempthorne are named as defendants in this action as a result of the actions and decisions of the Department of the Interior's subdivision for the NEPA process, and the BIA through its Eastern Regional Director Franklin Keel and Regional Environmental Scientist Kurt G. Chandler.

IV. Statement of Facts

19. Five federally recognized Indian tribes in New York (Oneida Indian Nation of New York, Wisconsin Oneidas, Cayuga Indian Nation, St. Regis Mohawks, Seneca Cayuga of

Oklahoma) have made fee to trust applications to the Defendants since the ruling in the *Sherrill* decision, including the Oneida Indian Nation (OIN), an actual party to the *Sherrill* case.

20. All five federally recognized Indian Tribes that have made trust applications are direct descendants “of the six nations of the Iroquois." *Id.* at 230.

21. At the birth of the United States, the Oneida Nation's aboriginal homeland comprised some six million acres in what is now central New York. *Ibid.; Oneida Indian Nation of N. Y.* v. *County of Oneida,* 414 U.S. 661, (1974) *(Oneida I).*

22. Paragraph one of the 1788 Treaty of Fort Stanwix (Fort Schuyler) ceded all of the Oneida lands to the State of New York. Paragraph two then established a state use right reservation for the cultivation, hunting and occupation of the Oneidas allowing them to rent the land for periods of not more than 21 years. In the 1794 Treaty of Canandaigua, the Federal Government acknowledged the state reservation. Article 2 states:

> “The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but of said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.”

Treaty of 1794.

23. As set forth in the Treaty of Fort Schuyler, for payments in money and kind, the Oneidas ceded to New York "all their lands." Of the vast area conveyed, "[t]he Oneidas retained a reservation of about 300,000 acres," *Oneida II,* 470 U.S., at 231. "for their own use and cultivation."

24. In 1790, Congress passed the first Indian Trade and Intercourse Act, commonly known as the Nonintercourse Act. Act of July 22, 1790, ch. 33, 1 Stat. 137. Periodically renewed, see *Oneida I*, 414 U.S., at 667-668, and n. 4, and remaining substantially in force today, see Rev. Stat. §2116, 25 U. S. C. §177, the Act bars sales of tribal land without the acquiescence of the Federal Government.

25. In 1794, in further pursuit of its protective policy, the United States entered into the Treaty of Canandaigua with the Six (Iroquois) Nations. Act of Nov. 11, 1794, 7 Stat. 44. That treaty both "acknowledge[d]" the Oneida Reservation as established by the Treaty of Fort Schuyler and guaranteed the Oneidas' "free use and enjoyment" of the reserved territory. *Id.*, at 45, Art. II. The Oneidas in turn agreed they would "never claim any other lands within the boundaries of the United States." *Id.*, at 45, Art. IV.

26. New York State nonetheless continued to purchase reservation land from the Oneidas. The Washington administration objected to New York's 1795 negotiations to buy 100,000 acres of the Oneidas' Reservation without federal supervision. *Oneida II*, 470 U.S., at 229, 232. Later administrations, however, "[made not] even a pretense of interfer[ing] with [the] State's attempts to negotiate treaties [with the Oneidas] for land cessions." *Oneida Nation of N. Y.* v. *United States*, 43 Ind. Cl. Comm'n 373, 385 (1978).

27. The Federal Government's policy soon veered away from protection of New York and other east coast reservations. In lieu of the commitment made in the Treaty of Canandaigua, the United States pursued a policy designed to open reservation lands to white settlers and to remove tribes westward.

28. As recounted by the Indian Claims Commission in 1978, early 19th-century federal Indian agents in New York State did not simply fail to check New York's land purchases, they "took an active role ... in encouraging the removal of the Oneidas ... to the west." *Oneida Nation of N. Y.*, 43 Ind. Cl. Comm'n, at 390; see *id.*, at 391 (noting that some federal agents were "deeply involved" in "plans ... to bring about removal of the [Oneidas]" and in the State's acquisition of Oneida land).

29. Beginning in 1817, the Federal Government accelerated its efforts to remove Indian tribes from their east coast homelands. F. Cohen Handbook of Federal Indian Law (1982 edition) 78-79, and n. 142 (herein after HANDBOOK). Pressured by the removal policy to leave their ancestral lands in New York, some 150 Oneidas, by 1825, had moved to Wisconsin.

30. In 1838, the Oneidas and the United States entered into the Treaty of Buffalo Creek, which envisioned removal of all remaining New York Indians, to Kansas. Act of Jan. 15, 1838, 7 Stat. 550. The United States eventually abandoned its efforts to remove the New York Indians to Kansas. In 1860, the Federal Government restored the Kansas lands to the public domain, and sold them thereafter. *New York Indians*, 170 U.S., at 24, 28-29, 31.

31. The Indians who stayed on in New York after the proclamation of the Buffalo Creek Treaty continued to diminish in number and, during the 1840's, sold most of their remaining lands to the State. *New York Indians* v. *United States*, 40 Ct. Cl. 448, 458, 469-471 (1905). The sale of lands to the State of New York continued through the 1890’s, all six of the New York Tribes retaining only small state land reservations.

32. Until the 1970's, the consistent policy of the United States was to allow the State of New York complete civil and criminal jurisdiction over the state land reservations of the Indian tribes. *See United States ex rel Kennedy v. Tyler,* 269 U.S. 13 (1925); 25 U.S.C. § 233.

33. Plaintiffs alleged significant environmental, aesthetic, and economic harms in their submitted comments against the fee to trust applications of the Oneida and St. Regis Mohawk Tribes. In addition, oral comments were submitted for the OIN application calling for a PEIS. Completion of a PEIS was specifically requested in the St.Regis written comments to assess the cumulative impacts of these separate fee to trust applications on the State of New York.

34. The Environmental Impact Statement Scoping Report of July 2006 prepared for the OIN application incorrectly rejects a PEIS. "Commentators suggested that the BIA prepare a **Programmatic EIS**, rather than an action specific EIS, asserting that the former will consider the Nation's application in light of other land-into-trust applications elsewhere in the state, particularly in the Catskills. (Emphasis supplied.) In response, the BIA's agent Malcolm Pirnie, Associates writes,

> "initiating a Programmatic EIS for other existing or proposed trust applications in New York State is beyond the scope of this specific Oneida trust land acquisition EIS. In addition, a Programmatic EIS is considered impractical due to the fact that land trust requests are tribe specific, highly variable in location, extent and filing periods, limiting the effectiveness of a collective assessment for planning of trust action decisions."

Draft Scoping Report Section 3.11 at 3-14

35. The BIA is acting arbitrarily and capriciously in violation of the Administrative Procedure Act ("APA") because the multiple simultaneous applications for fee to trust require

a Programmatic EIS as a preliminary matter under both the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370f, and implementing regulations of 25 U.S.C. § 465.

36. Under the *Sherrill* decision, the BIA is required to consider the surrounding community's interests', the "justifiable expectations" specifically discussed in *Sherrill* before taking land into trust. Here, the BIA not only is ignoring those interests, but also concluded that they are not protected under the law despite clear legal precedent to the contrary. The BIA in its site specific Draft EIS is ignoring all of the "disruptive" effects on the local community as addressed in the *Sherrill* opinion by defining the Purpose and Need of the Proposed Action in the site specific Draft EIS as:

> "to help address the Nation's need for cultural and social preservation, expression and identity, political self-determination, self-sufficiency, and economic growth by providing at least a portion of an adequate tribal land base and homeland that: is subject to tribal sovereignty; allows for a diversified and productive economic base to support the Nation's financial integrity and the employment and financial well-being of its members; provides for the location of government and administrative buildings, housing for Nation members, agriculture, hunting, fishing, recreation, cultural, social health and educational facilities and burial grounds; protects Oneida historical and cultural sites under Oneida sovereignty and control; assures the preservation of a homeland for those Nation members located elsewhere in New York State and throughout the U.S.; is restricted against future alienation and immune from New York State and local taxation and regulation; allows the Nation to avail itself of Federal laws that apply to lands held in trust status including the Indian Gaming Regulatory Act; and permits further growth and consolidation of Nation lands."
> Draft EIS at ES-2. See Attached.

37. The Defendant's, by administratively accepting and processing fee to trust applications by Tribes as being in the "public interest" to restore their sovereign rights to lands in New York, threaten a potential separation of powers confrontation by the Executive branch

against the Supreme Court, Congress and the State of New York in light of the *Sherrill* and *Cayuga* holdings.

38. In the site specific Draft EIS, no local community interests are considered under the regulations implementing 25 U.S.C. § 465 as contemplated by the *Sherrill* court. *Sherrill* at 220.

39. All regulatory and jurisdictional conflicts with the state and local governments contained in the site specific Draft EIS are treated as "mitigated." Draft EIS at Section 4.12. The Draft EIS continues:

> "The lands subject to trust conveyance under Alternatives A through F are all currently owned by the Nation and located within the exterior reservation boundary acknowledged by the 1794 Treaty of Canandaigua. All of these lands were purchased by the Nation on the open real estate market from willing sellers from 1987 through 2005."
> Draft EIS at ES-6.

V. Claim for Relief

40. The Indian Reorganization Act (IRA) requires in relevant part 25 USC § 465, that: "Title to any lands or rights acquired pursuant to this Act ... 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."

41. The plain meaning of Section 5 of the IRA was that only the acquisition methods, as enacted by Congress, were delegated to the Secretary of the Interior to accept lands into federal trust status for an Indian tribe. This does not include any delegation of authority for lands purchased by an Indian Tribe to become federal trust lands.

42. Until 1978, all lands restored to tribal sovereignty under the IRA were acquired by direct appropriation of Congress under the Property Clause, Art. IV, Sec. 3, Cl. 2.

43. Section 5 of the IRA is expressly limited to Congressional appropriations of no more than $2 million per year.

44. The IRA designates different requirements in Section 5 for acquired additional lands from Section 3 for "restored" lands either surplused or otherwise disestablished from a federal Indian reservation of federal public land reserved by treaty, Executive order or act of Congress.

45. Restored lands pursuant to Section 3 could only be returned to their tribal territorial status if it was deemed by the Secretary of the Interior to be in "the public interest."

46. As intended by Congress in passing the IRA, subjecting the purchase of lands to be restored to Indian Tribes to express Congressional appropriations was and is an express limitation on the discretion of the Secretary of the Interior required by the Property Clause that vests sole discretion in the management of property and acquisition of territory in the Congress.

47. The only other clause of the Constitution of the United States that allows the federal government to purchase land is the Enclave Clause, Art. I Sec. 8, Cl. 17.

48. Lands purchased under the Enclave Clause require the consent of the Governor of the State for federal jurisdiction to vest.

49. No other clauses exist in the Constitution for the federal government to acquire ownership of land.

50. Neither Section 5 of the IRA or 25 U.S.C. § 465 have been substantially amended by Congress since 1934. Only two minor amendments for specific Indian tribes have been added.

51. As currently defined, the federal regulation that asserts the discretion of the Secretary of the Interior to accept lands owned in fee by the Tribe into federal trust status is 25 C.F.R.§ 151.3:

> "Land acquisition policy. Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, shall be valid unless the acquisition is approved by the Secretary. (A) Subject to the provisions contained in the acts of Congress which authorize land acquisition, land may be acquired for a tribe in trust status: (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) When the tribe already owns an interest in the land; or (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing."

52. Expanding the methods by which lands can be conveyed into trust status violates the plain meaning of the appropriative restriction of Section 5 of the IRA.

53. Only Congress can extend the federal Indian trust to include lands purchased by or donated to an Indian tribe.

54. Other acts of Congress including 46 Stat. 1106, as amended by 82 Stat. 171, codified as 25 U.S.C. § 451 but not adopted as part of the Johnson-O'Malley Act or as part of the Indian Self-Determination and Education Assistance Act, cannot be interpreted by the Secretary of the Interior as authorizing an expansion of the Indian trust or his authority to accept donated or transferred Indian lands into trust status pursuant to 25 U.S.C. § 465.

55. Without the appropriative restriction of Section 5 of the IRA, the asserted authority of the Secretary of the Interior to accept lands into federal trust status as currently defined in 25 C.F.R. § 151.3 is unlimited.

56. Lands taken into federal trust that are not purchased pursuant to Section 5 of the IRA cannot restore tribal sovereignty unless the fee title to the lands and aboriginal title are assumed to become unified as described in the *Sherrill* decision.

57. In fact, without a direct act of Congress to appropriate land for a tribe and remove it from state jurisdiction, the Secretary has no authority under the IRA to remove lands from the State or local tax base. *See Hynes v. Grimes Packing Co*., 337 U.S. 86, 101-06 (1949), *See also Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157 (1973).

58. The assumption that federal Indian common law authorized the Secretary of the Interior to accept lands purchased by an Indian Tribe into federal trust status was in reality, unilaterally promulgated by the Secretary of the Interior, without the proper authorization from Congress. 25 C.F.R. § 120a (1980).

59. In fact, accepting fee land of the tribes into federal trust status was declared unconstitutional in *Department of the Interior v. South Dakota,* 519 U.S. 919 (1996). The full opinion was withdrawn at the request of the Clinton administration because it was based on challenging the delegation of authority contained in Sec.5 of the IRA to the Secretary of the Interior. It was based on the remand of this case that the new regulations under 25 C.F.R. Part 151 were drawn.

60. The new regulations for 25 U.S.C. § 465 were promulgated in 2004.

61. The *Sherrill* decision cites explicitly to 25 U.S.C.§ 465 as "Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stake in the area's governance and well-being." *Sherrill* at 220.

62. The *Sherrill* Court expressly cites to the 2004 regulations implementing § 465 as "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Sherrill* at 220-1. These jurisdictional concerns are not addressed by the defendant's limited Draft EIS.

63. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; the purposes for which the land will be used; the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and jurisdictional problems and potential conflicts of land use which may arise. Citing 25 C.F.R.§ 151.10 (2004). *Sherrill* at 221.

64. NEPA requires that "all agencies of the Federal Government shall…include in every recommendation or report on…major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." 42 U.S.C. § 4332(2)(c). When enacting NEPA, Congress:

> "recogniz(ed) the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognize(ed) further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, (and) declare(d) that it is the continuing policy of the Federal Government, in cooperation with the State and

> local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

42 U.S.C. § 4331(a).

65. Plaintiffs' interest in the environmental and economic well-being of the State of New York are among the interests to be considered under 25 C.F.R. § 151.10(f), 151.10 (h) before land is placed into trust. *See, e.g.,* TOMAC v. Norton, 193 F. Supp. 2d 182 (D.D.C. 2002) *aff'd,* 433 F.3d 852 (D.C.Cir. 2006*)* (holding that a community group had standing to challenge the BIA's decision to take land into trust for the construction of a casino under the Indian Gaming Regulatory Act and 25 C.F.R. § 151.10 (f), (h); *see also Citizens Exposing Truth About Casinos v. Norton,* 2004 U.S. Dist. LEXIS 27498, at *6 & n.3 (D.D.C. Apr. 23, 2004) (holding that a citizen's group had standing under the Indian Reorganization Act, found at 25 U.S. C. § 461-475, to challenge a trust acquisition because the Act's implementing regulations provide for consideration of land use conflicts and NEPA requirements). *Cf. City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197; 125 S. Ct. 1478, 1493; 161 L. Ed. 2d 386 (2005) ("If (the Tribe) may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.")

66. Under the Departmental Manual of the BIA for the application of NEPA in the fee to trust process, the BIA acts as "lead agency" for the completion of the NEPA documentation. The trust relationship between the BIA and the Tribal applicant presents an inherent conflict of interest in terms of producing a fair and unbiased report which takes into consideration the needs of the surrounding communities.

67. According to the BIA, they represent only the interests of the Indian tribe as defined by the Tribe submitting the fee to trust application.

68. This position of the BIA on NEPA is based on federal common law district court rulings that held that state and local governments did not have standing to sue against the fee to trust applications of Indian tribes because they were not within the "zone of interests" to be protected by the IRA and 25 U.S.C. § 465. See *City of Tacoma et al v. Andrus et al*, 458 F. Supp. 465 (D.D.C. 1978) and *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978).

69. The above district court opinions have been effectively overruled by *Sherrill* and the promulgation of the new regulations implementing 25 U.S.C. § 465. See 25 C.F.R .§ 151 et. seq. (2004).

70. As prepared, the Draft EIS for the fee to trust applications of the Oneida Indian Nation of New York does not address any of the factors deemed part of the "justifiable expectations" of the local non-Indian residents or state and local governments identified in the *Sherrill* decision as disruptive.

71. The BIA has not revised its internal regulations for meeting the requirements of NEPA for fee to trust cases since the *Sherrill* and *Cayuga* rulings.

72. Unlike most fee to trust applications that are for small parcels of land to be added to an existing federal Indian reservation, the Oneida Indian Nation of New York, Cayuga Indian Nation and St. Regis Mohawk fee to trust applications are for enormous amounts of lands that have been under continual state jurisdiction for almost two hundred years to be placed into federal trust status, essentially creating federal Indian reservations in New York that never existed.

73. All 6 million acres of lands reserved for Indian Tribes in New York established by the Treaty of Fort Schuyler were state reservations of Indian land that created only **use right reservations**. (Emphasis supplied.) See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2nd Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

74. The Oneida Indian Nation of New York has initially applied for 17,130 acres to be placed into federal trust status pursuant to 25 U.S.C. § 465.

75. Just as in the *Sherrill* case, the Oneidas of New York assert in the Draft EIS that several alternatives exist for allowing up to 35,000 acres of land that has been under state jurisdiction since before the Constitution of the United States went into effect to be placed into federal trust status.

76. The Oneidas of New York fee to trust application is essentially the same land claim advanced in the *Sherrill* case. The same is true of the Cayuga Indian Nation fee to trust application.

77. In the case of the *Cayuga*, their underlying land claim case was actually dismissed based on the *Sherrill* decision. See *Cayuga Indian Nation v. Pataki*, 423 F.3d 266 (2nd Cir. 2005), *cert. denied* 2006 U.S. LEXIS 3949 (U.S., May 15, 2006).

78. The *Cayuga* decision expanded upon the *Sherrill* ruling to include all types of possessory land claims as being subject to the equitable considerations enumerated in *Sherrill*.

79. The *Cayuga* majority concluded that the land claim of the Cayuga Indian Nation should be dismissed in its entirety and that the equitable considerations for the disruptive effects were also applicable against the United States as trustee of the Tribe.

80. The *Cayuga* majority concluded that the United States was bound to act on behalf of the private interest of the Cayuga Tribe and therefore it was not acting in its sovereign capacity to protect the public interest by asserting the land claim.

81. NEPA requires that the agency completing the process be neutral and capable of taking a "hard look" at all of the interests effected by the proposed major federal action.

82. Potentially placing thousands of acres of land that has always been under state jurisdiction into Indian territorial status by taking it into federal trust is major federal action..

83. The United States Department of the Interior and the Department of Justice have been thwarted in their attempts to restore lands to the New York Indian tribes in land claim cases that have been litigated for more than 30 years and have cost the taxpayers of New York millions of dollars to defend.

84. In the actual land claim case of the Oneida Tribes, 74 CIV 187, the Department of Justice has finally admitted it is attempting to develop a new policy with the BIA to deal with the *Sherrill* and *Cayuga* decisions. Letter attached.

85. This new policy is scheduled to first appear in the response to the Motion to Dismiss filed in the Oneidas land claim case on the same day the Draft EIS comment period begins, December 14, 2006.

86. It is completely unjust and inappropriate to place the state and local governments in the position of commenting on a site specific Draft EIS drawn under an old policy when a new policy is being presented in federal court at the same time.

87. As defined in 40 C.F.R. § 1508.18 (b)(3), adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive, is required to have a single EIS that encompasses the entire federal program simultaneously accepting and processing four separate fee to trust applications at the same time by the BIA within days of the *Sherrill* ruling when no fee to trust applications had ever been accepted before for lands in New York indicates that BIA has a common policy or scheme to "restore" federal Indian reservations in New York despite the dismissal of the land claim cases premised on the *Sherrill* and *Cayuga* rulings.

88. In order to prevent duplicative efforts to meet NEPA requirements, the site specific EIS process should be halted until the Programmatic EIS is completed pursuant to the tiering required in 40 C.F.R. § 1502.20. Agencies are encouraged to tier their environmental

impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. (§1508.28).

89. Only by requiring BIA to complete a Programmatic EIS, will the disruptive regulatory and cumulative jurisdictional impacts of removing thousands of acres from the sovereign control of state and local governments be addressed.

V. Prayer for Relief

1. Wherefore, plaintiffs pray for a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring:

A. That the BIA's failure to prepare a Programmatic Environmental Impact Statement as required to address the cumulative jurisdictional impacts of the proposed federal action to remove thousands of acres of land from the jurisdiction of the State of New York is arbitrary, capricious and not in accordance to law as violating the requirements of the National Environmental Policy Act.

B. That the BIA is required to complete a PEIS that assesses the jurisdictional issues and the disruptive impacts that acceptance of fee lands into federal trust would cause on the state and local communities.

C. That the site specific EIS be declared insufficient to meet the requirements of NEPA.

D. That the Secretary of the Interior has no authority to take fee lands into trust status in the State of New York for the private interest of Indian Tribes if it disrupts the state and local governance for the overwhelming majority of the People of New York.

2. Wherefore plaintiffs as a result of the wrongful conduct of Defendants alleged herein, Plaintiffs are entitled to a preliminary and permanent injunction to prevent great and irreparable injury resulting from the violation of their rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility of ascertaining the exact amount of injury and property damage Plaintiffs have and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages, and Plaintiffs are without an adequate remedy at law. Imposition of the requested equitable injunctive relief is therefore warranted.

3. Any and all other forms of relief the court deems just and proper.

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Respectfully submitted,

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