# 15-1688(L), 15-1726(CON)

## United States Court of Appeals

*for the*

## Second Circuit

UPSTATE CITIZENS FOR EQUALITY, INC., DAVID BROWN VICKERS, RICHARD TALLCOT, SCOTT PETERMAN, DANIEL T. WARREN, TOWN OF VERNON, NEW YORK, TOWN OF VERONA, ABRAHAM ACEE, ARTHUR STRIFE,

*Plaintiffs-Appellants,*

– v. –

UNITED STATES OF AMERICA, individually, and as trustee of the goods, credits and chattels of the federally recognized Indian nations and tribes situated in the State of New York,

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF FOR PLAINTIFFS-APPELLANTS UPSTATE CITIZENS FOR EQUALITY, INC., DAVID BROWN VICKERS, RICHARD TALLCOT, SCOTT PETERMAN AND DANIEL T. WARREN IN OPPOSITION TO THE ONEIDA INDIAN NATION OF NEW YORK'S MOTION FOR LEAVE TO FILE AN AMICUS BRIEF**

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SALLY M.R. JEWELL, in his official capacity as Secretary of the U.S. Department of the Interior, MICHAEL L. CONNOR, in her official capacity as Deputy Secretary of the U.S. Department of the Interior and exercising her delegated authority as Assistant Secretary of the Interior for Indian Affairs, ELIZABETH J. KLEIN, in his official capacity as the Associate Deputy Secretary of the U.S. Department of the Interior and exercising his delegated authority as Assistant Secretary of the Interior for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR,

*Defendants-Appellees,*

PHILIP H. HOGEN, in his capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, MICHAEL B. MUKASEY, in his capacity as Attorney General of the United States,

*Defendants.*

**CORPORATE DISCLOSURE STATEMENT**
**PURSUANT TO RULE 26.1 OF THE**
**FEDERAL RULES OF APPELLATE PROCEDURE**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Upstate Citizens for Equality, Inc., Plaintiffs-Appellants in this action, state that they do not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of either company's stock.

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## THE ONEIDA INDIAN NATION'S MOTION SHOULD BE DENIED

The purported Oneida Indian Nation of New York's (hereinafter "OIN") motion for leave to file an amicus brief in this appeal should be denied because the OIN is an interested party that is seeking, in effect, intervenor not amicus status, and because OIN's brief is not useful to the court. Additionally, The Oneida Indian Tribe long ago rescinded any authority for Arthur Raymond Halbritter to speak on its behalf or to act on its behalf and the current amicus brief is the result of Arthur Raymond Halbritter's direction and allocation of resources.

The OIN states in its motion that it "has an obvious interest in the Secretary's decision. The Nation is the applicant for the trust land decision under review, the owner and transferor of the land in issue and thus a party to the challenged property transaction, and the beneficiary of the trust created by transfer." The OIN goes on to state: "The outcome of these appeals will directly and significantly affect the rights and interests of the Oneida Nation."

However, the OIN has never appeared, as either an intervenor or amicus, in the cases currently before the Court on this appeal in the District Court despite these actions being commenced in 2008.

Appellants UCE has not consented to the filing of an amicus brief by the OIN. In Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970) it was held that absent joint consent of the parties, acceptance of an intervenor as amicus curiae

should be allowed only sparingly, unless the amicus has a special interest, or unless the Court feels that existing counsel need assistance. In this case Appellees are adequately representing the interests of the OIN by defending their decision as well as their authority to make the decision being challenged here and the OIN does not assert otherwise.

An amicus curiae is meant to be, as the name indicates, a friend of the court. While an amicus need not be totally disinterested, there are limits to the availability of amicus status, with a "bright line distinction between amicus curiae and named parties/real parties in interest." Siam Food Products Pub. Co., Ltd. v. United States, 22 CIT 826, 830, 24 F. Supp. 2d 276, 280 (1998) (quoting United States v. Michigan, 940 F.2d at 165).

Judge Posner concisely described the circumstances under which an amicus brief is desirable in Ryan v. Commodity Futures Trading Comm'n:

> An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.
>
> 125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted).

Amicus participation goes beyond its proper role if the submission is used to present wholly new issues not raised by the parties. Onondaga Indian Nation, 1997 U.S. Dist. LEXIS 9168 at *8-9 (quoting Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993)); Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 83 (Em. App. 1981) (absent exceptional circumstances, amicus curiae cannot implicate issues not presented by the parties). Furthermore, "an amicus curiae is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case." NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005) (citing United States v. Michigan, 940 F.2d 143, 163-4 (6th Cir. 1991)). By submission of its' proposed brief the OIN seeks to insert a new issue namely the purported "historic settlement of all disputes between the Oneida Nation and the State of New York, Madison County and Oneida County." This Court's consideration of any argument relating to this purported settlement is improper on this appeal as will be addressed in detail below.

Amicus standing "should not become a substitute for intervention." Stewart-Warner Corp. v. United States, 4 CIT 141, 142 (1982) (not reported in F. Supp.). Movants here seek not so much to be a friend of the court as to compensate for a failure to timely intervene in the District Court in these cases as it did in New York v. Jewell, 6:08-CV-0644 (LEK/DEP), United States District Court For The

Northern District of New York. Accordingly, granting them amicus standing is inappropriate.

## THE DESIRABILITY OF THE OIN AS AN AMICUS CURIAE

A brief benefits the court when it "assist[s] the judge[] by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." Voices for Choices v. Illinois Bell Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003).

This is an action under the Administrative Procedure Act. In deciding an APA case, the scope of review is generally limited to the Administrative Record that was before the agency decision-maker. Florida Power & Light v. Lorion, 470 U.S. 729, 743, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). The function of the reviewing court is not to resolve any disputed issues of fact; rather the court is to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Id. at 769. When reviewing agency action under the APA, "this court must render an independent decision on the basis of the same administrative record as that before the district court." United States v. Massey, 380 F.3d 437, 440 (8th Cir. 2004).

The proposed amicus brief attempts to supply a new rationale for Appellees' decision that is not articulated therein rather than illuminating the original record (Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 82 (2d Cir. Conn. 2006))

The OIN's proposed amicus brief seeks to introduce matters not within the administrative record, specifically the purported "historic settlement." There is absolutely no mention of this settlement agreement in the Amendment to the May 20, 2048 Record of Decision for Oneida Indian Nation of New York Fee-to-Trust Request dated December 23, 2013 (hereinafter "Amended ROD") (A-803-A-844). Therefore, this issue is improperly raised by the OIN as a grounds for affirming the District Court's judgment in these cases. A Court "may not properly affirm an administrative action on grounds different from those considered by the agency." Forest Watch, 410 f.3d at 119 quoting Melville v. Apfel, 198 f.3d 45, 52 (2d Cir. 1999)); see also SEC v. Chenery Corp., 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 284, 211 U.S. App. D.C. 313 (D.C. Cir. 1981) ("It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made … not some new record completed initially in the reviewing court.").

There is no mention or discussion of this "historic agreement" in the decision by the District Court in rendering judgment in favor of Appellees (Upstate Citizens for Equal., Inc. v. Jewell, 2015 U.S. Dist. LEXIS 38101 (N.D.N.Y Mar. 26, 2015)). As this "historic settlement" was properly not raised in the District

Court as it was outside the administrative record in the District Court in Appellants case #08-cv-00633

It is not by accident that there is no mention of the "historic settlement" in the Amended ROD. It was at the time merely a proposed settlement. In a letter dated February 10, 2014 and filed with the District Court in New York v. Jewell the New York Attorney General referred to this "historic settlement" as the "pending settlement agreement". Attached hereto and marked as Exhibit "A" is a true copy of this letter. The very terms of "historic settlement" in section II(D) provided that it not be effective until: "the date on which the United States District Court for the Northern District of New York enters an order in State of New York, et al. v. Salazar, et al., 6:08-cv-644 (LEK), approving this Agreement and dismissing that litigation as provided in Section VI(A)(1)(a) of this Agreement." The order approving the agreement and dismissing that litigation was March 4, 2014.

Whatever significance this purported agreement has it has no bearing on this litigation. None of the parties in the matter before this Court are parties to that agreement. In the order approving that settlement agreement the District Court held that "The Settlement Agreement provides for dismissal of this case. It does not affect the four related cases challenging the 2008 ROD: Upstate Citizens for Equality v. United States, No. 08-CV-0633 (N.D.N.Y. filed June 16, 2008); Town

of Verona v. Jewell, No. 08-CV-0647 (N.D.N.Y. filed June 19, 2008); City of Oneida v. Jewell, No. 08-CV-0648 (N.D.N.Y. filed June 19, 2008); and Cent. N.Y. Fair Bus. Ass'n v. Jewell, No. 08-CV-0660 (N.D.N.Y. filed June 21, 2008)." The court also held that "nothing in the Settlement Agreement binds the DOI as to the ultimate determination of the OIN's applications. The United States is not a signatory to the Settlement Agreement. That the United States does not object to the dismissal of Plaintiffs' claims does not somehow imply its consent to an agreement that it has not signed and that does not purport to have any binding effect on it. . . . Therefore, no entity can invoke the terms of the Settlement Agreement to force the DOI to decide trust applications in a certain way." New York v. Jewell, 2014 U.S. Dist. LEXIS 27042 (N.D.N.Y Mar. 4, 2014). The OIN was a party not only to this purported agreement but also to the litigation that resulted in this order. Attached hereto and marked as Exhibit "B" is a true copy of the order granting their motion to intervene as a party defendant in New York v. Jewell. Therefore, the OIN is bound by the holdings in New York v. Jewell and cannot argue before this or any other court that the settlement agreement it hangs its hat on has any further reach than set forth in the decision approving the settlement (New York v. Jewell, 2014 U.S. Dist. LEXIS 27042 (N.D.N.Y Mar. 4, 2014)).

The OIN is asserting that this "historic settlement" is somehow binding or relevant to the instant appeal is belied by the terms of the settlement. The settlement provides in section VIII(G) that "The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims that have been made in any litigation covered by this agreement. ***This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions.*** The settlement of the litigation covered by this agreement is limited to the circumstances in those actions alone and shall not be given effect beyond the specific provisions stipulated to. ***This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future.***"

While the proposed amicus brief sought to be filed in this case contain a few additional citations not found in the parties' briefs and slightly more analysis on some points, essentially they cover the same ground the appellees, in whose support they wish to file, do.

## THE OIN AMICUS BRIEF IS NOT AUTHORIZED BY THE ONEIDA INDIAN TRIBE

The Amicus Brief before the Court was submitted by attorneys who are known to represent the interests of Arthur Raymond Halbritter. The appellants have asserted that Arthur Raymond Halbritter does not have the proper authority to speak on behalf of the Oneida people (*See* UCE Br. At 44-46). Rather than contest this assertion, the appellees have taken the position that UCE is not properly situated to argue with the BIA's designation of executive branch agency recognition of Mr. Halbritter. The *Shenandoah v. Dep't of Interior,* 159 F.3rd 708 (2nd Cir. 1998) case was a clear articulation of the Oneida peoples' position regarding Mr. Halbritter's usurpation of the Oneida's traditional form of government. Since then, members of the traditional Haudenosaunee (Iroquois) Indians have repeatedly expressed their frustration over the ability that Mr. Halbritter has to manipulate US federal agencies, for example:

> "anyone who knows anything about the Haudenosaunee and the current state of New York – Iroquois relations could have easily predicted that the governor would concentrate on breaking the Iroquois by attacking its weakest link. In this case it was the Oneida Nation of New York, (which did not exist until 1993) a pariah among the Iroquois for its dictatorial control, its documented

human rights abuses and its refusal to allow any democratic reforms on its homelands." (*See* http://www.indianz.com/News. 5/20/2013. Article written by Doug George-Kanentiio. Last visited Feb. 3, 2016).

The United States federal government, through both the executive branch agencies and the courts have systematically ignored the wishes and the decisions of the traditionally structured Haudenosaunee, who are opposed to selling land, having what they consider "their" land taken into trust, and gambling itself. Instead, the federal government, aided by the courts, has sought to impose process rules on the traditional tribal structures with the full knowledge that tribes will not honor these process requirements, leaving usurpers such as Mr, Halbritter in positions of power while lacking traditional authority to exercise it. This conduct is reprehensible and will certainly be scrutinized by future generations as merely a page in the very long book of abuses against Indian tribes who take stances that the federal government doesn't approve of. This amicus brief, while certainly not dramatically useful in any way, simply stands as another example that usurpers of traditional Indian "sovereignty" have more credibility within the U.S. federal government than do actual Indian Tribes and their legitimate governmental structures and institutions.

Wherefore, the OIN's motion for leave to file an amicus brief in this appeal should be denied in its entirety and its' proposed brief should be stricken from the record and not considered by the Court on this appeal because the OIN is an interested party that is seeking, in effect, intervenor not amicus status, and because purported OIN's proposed brief is not useful to the court.

Dated February 5, 2016
Fayetteville, New York

/S/ David B. Vickers
David B. Vickers, Esq.
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 2,457 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated February 5, 2016
Fayetteville, New York

/S/ David B. Vickers

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# EXHIBIT "A"


**STATE OF NEW YORK**
**OFFICE OF THE ATTORNEY GENERAL**

ERIC T. SCHNEIDERMAN
Attorney General

STATE COUNSEL DIVISION
Litigation Bureau

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February 10, 2014

**Via CM/ECF**
Hon. Lawrence E. Kahn
Senior United States District Judge
United States District Court
Northern District of New York

Re: State of New York, et al. v. Jewell, et al.,
No. 08-cv-0644 (LEK/DEP)

Dear Judge Kahn:

The federal defendants filed the Amended Record of Decision (Dkt. No. 334) in this matter on February 5, 2014. Pursuant to the Court's September 24, 2012 Memorandum-Decision and Order (Dkt. No. 276), motions for summary judgment would now have to be re-filed by March 7, 2014.

The plaintiffs have conferred with the federal defendants as well as defendant-intervenor Oneida Nation of New York and all sides agree that renewed summary judgment motions should be deferred in light of the pending settlement agreement and proposed stipulation/order of dismissal (Dkt. No. 319 - submitted to the Court on December 12, 2013). Accordingly, all parties to this case jointly request that the March 7, 2014 deadline for re-filing summary judgment motions be held in abeyance pending action by the Court on the settlement.

Thank you for the Court's attention to this request. We await the Court's direction in this regard.

Respectfully submitted,
*/s/ Aaron M. Baldwin*
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Bar Roll #510175

cc: All Counsel of Record (via CM/ECF)

# EXHIBIT "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK; DAVID A. PATERSON, in his capacity as Governor of the State of New York; ANDREW M. CUOMO, in his capacity as Attorney General of the State of New York; MADISON COUNTY, NEW YORK; and ONEIDA COUNTY, NEW YORK,

Plaintiffs,

-v.

6:08-CV-00644 (LEK/GJD)

DIRK KEMPTHORNE, Secretary, United States Department of the Interior; JAMES E. CASON, Associate Deputy Secretary of the Interior; P. LYNN SCARLETT, Deputy Secretary of the Interior; FRANKLIN KEEL, Eastern Regional Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA,

Defendants.

**ORDER**

Presently before the Court is a Motion filed by the Oneida Nation of New York, requesting permissive intervention as a Defendant in the above named action, pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure. Motion (Dkt. No. 37). In support of its motion, the Oneida Nation has included a declaration through its counsel, indicating that an attorney for Oneida Nation has contacted the Plaintiffs and Defendants in this matter, and that neither party opposes the permissive intervention of the Oneida Nation. Carmen Decl. at 1 (Dkt. No. 37, Attach. 2).

However, Plaintiffs have filed a response (Dkt No. 38) to the Motion to intervene, in which Plaintiffs ask the Court to deny the Motion until the Oneida Nation submits an answer, pursuant to the requirement in Fed. R. Civ. P. 24(c) that a "motion [to intervene] must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

Oneida Nation has included a proposed Motion to dismiss along with its Motion to intervene. Dkt. No. 37, Attach. 3. A Motion to dismiss is not a pleading within the Federal Rules. See Fed. R. Civ. P. 7(a). Thus, Oneida Nation has not met the requirements of Fed. R. Civ. P. 24(c). However, the proposed Motion to dismiss does set out the Oneida Nation's "defense for which intervention is sought." Fed. R. Civ. P. 24(c). Therefore, due to the pendency of the Rule 16 conference with Magistrate Judge Gustave J. DiBianco and the legitimate stake that the Oneida Nation has in this matter, the Court will conditionally grant Oneida Nation's Motion to intervene. If Oneida Nation fails to promptly file an answer, the Court may reconsider its ruling.

Therefore, based on the foregoing, it is hereby

**ORDERED**, that the Proposed Intervenor's (Oneida Nation of New York) Motion to intervene (Dkt. No. 37) is **GRANTED**; and it is further

**ORDERED**, that the Clerk serve a copy of this order on all parties.

**IT IS SO ORDERED.**

DATED: November 05, 2008
Albany, New York

Lawrence E. Kahn
U.S. District Judge