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 TOWN OF VERNON, NEW YORK, TOWN OF VERONA, ABRAHAM ACEE AND ARTHUR STRIFE

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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.

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INTRODUCTION

This case (*Town of Vernon, et al. v. Salazar*, No.: 15-1726) is an appeal from a final judgment of the Northern District of New York. For purposes of appeal and by order of this Court, it has been consolidated with another closely related case (*Upstate Citizens for Equality v. Jewell*, Case No. 15-1688) decided the same day. Both cases involve a challenge to the decision by the U.S. Secretary of the Interior (the "Secretary") to take over 13,000 acres of land in central New York State into trust on behalf of the Oneida Indian Nation of New York ("OIN") pursuant to § 5 of the Indian Reorganization Act ("IRA"), codified at 25 U.S.C. § 465. The District Court upheld the Secretary's decision in both cases and the Plaintiffs in both cases have appealed.

Appellants in this specific appeal (Case No. 15-1726) are the Towns of Vernon and Verona, located within the County of Oneida, New York, and two citizen-taxpayers who reside within those Towns. While there were a multitude of issues addressed below, the Towns will limit their appeal to two overarching issues: (1) whether the Indian Commerce Clause of the U.S. Constitution is so expansive that § 465 can, consistent with the Tenth

Amendment, be invoked by the Secretary to unilaterally acquire land within the State of New York and diminish the State's sovereign authority notwithstanding that it was one of the original thirteen colonies that became part of our Nation at the time of its independence in 1776, and (2) whether § 465 can be applied in New York State given that it was meant to reverse a policy known as "allotment" that had never been and could not have been applied to Indian tribes or Indian individuals within the State.

The Appellant Towns and citizen taxpayers were and will be adversely affected by the challenged trust acquisition. The Towns have been stripped of two of their most fundamental powers – the authority to zone and otherwise regulate land use within their borders and their authority to tax said land, shifting a substantial tax burden onto non-Indian land owners within the Towns. Tribal interests operating businesses on trust land that no longer must pay local taxes or comply with local zoning and land use restrictions now enjoy a significant competitive advantage *vis-à-vis* other businesses owned by citizen-taxpayers operating on non-trust land that is subject to both land use regulation and taxation.

As for the adverse impact upon the State and Counties, see *Comments on the Oneida Indian Nation's Land in Trust Application* submitted on behalf

of the Governor of New York [A. 1138-1205][1] and *Jurisdictional and Economic Impacts of Granting the Oneida Indian Nation's Application to Take Lands Into Trust in Oneida and Madison County*, submitted on behalf of Madison and Oneida Counties [A. 1208-1267].

While, to be sure, there have been many court decisions holding that Congress has "plenary" power under the Indian Commerce Clause to enact laws that purport to affect "commerce" (however broadly defined) with Indian tribes, there remain serious legal questions whether that Clause is so elastic that Congress can pass any such law even if it has the effect of eliminating a State's sovereign authority over land within its borders, especially one which, as is here the case, was part of the original thirteen colonies. *See Adoptive Couple v. Baby Girl*, 570 U.S. _____; 133 S.Ct. 2552 (2013) (Thomas J., concurring). *See also* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U.L. Rev. 201 (2007); Prakash, *Against Tribal Fungability*, 89 Cornell L. Rev. 95 (2007); Ablavsky, *Beyond the Indian*

[1] References to numbers in parentheses preceded by "SPA" refer to the numbered pages of the Special Appendix and numbers in parentheses preceded by "A" refer to the numbered pages of the Joint Appendix.

Commerce Clause, 124 Yale L. Jour. 1012 (2015); Matal, *A Revisionist History of Indian Country*, 14 Alaska Law Rev. 283 (1997) [A. 185-253].

STATEMENT OF JURISDICTION

The District Court had jurisdiction of this case pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201, and 28 U.S.C. § 1331, to review the final determination by the Secretary of the Interior to take land into trust for the OIN. On September 29, 2009, the District Court granted both the Secretary's motion to dismiss Appellants' 10th Amendment challenge to the taking of the land into trust and the Secretary's motion for partial summary judgment that the OIN was eligible for land into trust treatment because it did meet the definition of an "Indian tribe" under 25 U.S.C. § 2201. *Town of Verona and Vernon, et al. v. Salazar* (SPA at 21-47). On March 26, 2015, the District Court disposed of the rest of the issues in this case, by granting the Secretary's Motion for Summary Judgment and denying Appellants' Cross-Motion for Summary Judgment. It held, *inter alia*, that (1) the OIN was a recognized Indian tribe as of 1934 and therefore eligible for land into trust treatment, and (2) that the Secretary's determination to take land into trust was not arbitrary and capricious and that the Secretary had properly considered all the relevant

statutory factors in reaching that determination [SPA 48-66]. Appellants filed their Notice of Appeal on May 22, 2015 [A. 2036]. This Court has jurisdiction over said appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Indian Commerce Clause of the U.S. Constitution (Art. I, § 8) give the Federal Government (via the Secretary of the Interior) the unilateral power to acquire land within one of the original thirteen colonial states (New York) and hold it in trust for the benefit of an Indian tribe pursuant to Section 5 of the Indian Reorganization Act (25 U.S.C. 465) such that New York and its local governmental authorities no longer have any sovereignty or jurisdictional authority over that land?

2. Does § 465 apply to states like New York whose Indian inhabitants were never subject to the repudiated policy of "allotment" that § 465 was designed to redress?

STATEMENT OF THE CASE

This chronology begins with an explanation of the circumstances that prompted the OIN to seek land into trust status from the Secretary of the Interior pursuant to 25 U.S.C. § 465, which is being challenged in this

litigation. In 1993, the OIN signed a Tribal-State Compact with Mario Cuomo, the Governor of the State of New York at the time. *Peterman v. Pataki*, 4 Misc.3d 1028(A); 798 N.Y.S.2d 347 (N.Y. Sup. Ct., Oneida Cty. 2004). The Compact purported to authorize the Tribe to conduct "Class III" gambling pursuant to the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) ("IGRA"). "Class III" gaming under IGRA relates to the type of commercial casino gambling that occurs in major gambling venues like Las Vegas. *See Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 809; *cert den.* 540 U.S. 1017 (2003) ("*Saratoga County Chamber*").

Under IGRA, a tribe may operate such a casino only on "Indian land," which is defined as including "reservation" land (25 U.S.C. § 2703[4][A]), provided, however, that a Tribe must also have "jurisdiction" over that land. 25 U.S.C. § 2710(d)(1)(A). *Citizens Against Casino Gambling v. Chaudhuri*, ____ F.3d ____ (2d Cir., Case No.: 11-5171, decided September 15, 2015; Case No. 11-5171, Dkt. 253-1 at 37). IGRA further requires that a tribe must also enter into a compact with the State where the gambling is to occur. 25 U.S.C. § 2710(d)(1)(C).

After the aforementioned Compact was entered into between the OIN and Governor Cuomo, its validity was immediately challenged in a case

brought in New York State Supreme Court, Oneida County (*Peterman, et al. v. Pataki*, 4 Misc.3d 1028[A], 2014 N.Y. Misc. LEXIS 1583 (June 25, 2004). The State Supreme Court invalidated the Compact, ruling that the Governor lacked the authority to unilaterally enter into the Compact without legislative authorization. *Id.* The Court cited the earlier decision to the same effort handed down by the New York State Court of Appeals in the *Saratoga County Chamber* case invalidating a tribal-state gambling compact between Governor Cuomo and the St. Regis Mohawk tribe. The Appellate Division of the State Supreme Court subsequently affirmed *Peterman v. Pataki*, 21 A.D.3d 1387 (4th Dep't, 2005), and thereafter, the same Court denied leave to appeal to the New York State Court of Appeals, the State's highest court. 24 A.D.3d 1328 (4th Dep't 2005). Subsequently, the U.S. Supreme Court denied a petition for certiorari. 549 U.S. 1077 (2006).

The OIN, however, continued to operate the casino, notwithstanding the State Court's decision and the U.S. Supreme Court's denial of a petition for certiorari. The OIN claimed that it was not bound by a such a decision in a case in which it was not a party, even though it had unsuccessfully petitioned the Supreme Court for a writ of certiorari, despite the fact that it had consciously stayed out of the underlying litigation on the grounds of sovereign

immunity. It nevertheless maintained that it was an "indispensable" party to the litigation and had attempted to make only a "special appearance" to protest the Court's jurisdiction.

In the meantime, however, the Tribe's continued operation of the casino faced another threat as a direct result of the U.S. Supreme Court's landmark decision in *City of Sherrill v. Oneida Indian Nation*, 544. U.S. 197 (2005). There the tribe claimed that it was exempt from paying property taxes on land it owned in fee simple within the City of Sherrill, the smallest city in New York State. The Tribe argued it had reacquired sovereignty over the land when it repurchased the land on the open market in the late 20th century, which had once been part of its historic reservation some two centuries earlier. *Id.* at 202. The Supreme Court, after a lengthy analysis of the history of the Tribe's connection to the land, concluded that the Tribe had long since relinquished sovereignty over such land and that it could not reacquire same by virtue of an open-market purchase. *Id.* at 219-220.

The ruling in *Sherrill* had ominous implications for the Tribe's continued operation of its Turning Stone casino, which was located on land in the nearby town of Verona that also had only been recently reacquired and which had also once been part of its historic reservation. Indeed, the Federal

Government had warned the Tribe when it approved the Tribal-State Compact authorizing it to conduct Class III gaming on Indian land that such approval was not to be construed as a specific approval of gambling at the Turning Stone site because no determination had been made that Turning Stone itself was on "Indian land," a prerequisite for gambling under IGRA [A. 1017-1018]. Since such gambling could be conducted under IGRA only on land in which the Tribe had jurisdiction (25 U.S.C. § 2710[d][1][A]), the determination by the Supreme Court on March 29, 2005 in *City of Sherrill* made it obvious that Turning Stone was not a legal venue for such gambling.

Less than a week after the decision in *City of Sherrill*, on April 4, 2005, the Tribe filed its request with the Secretary of the Interior to have over 17,000 acres of land taken into trust pursuant to 25 U.S.C. § 465, including the land on which Turning Stone was situated [A. 555]. If granted, the Tribe would then have jurisdiction over the land to the "exclusion of state and local governments" as the Secretary later confirmed in making the decision to acquire 13,000 acres in trust [A. 561, 604]. As such, the Turning Stone land would then be gambling-eligible under IGRA as it would then possess the requisite jurisdiction over the land required by IGRA. 25 U.S.C. §§ 2703(4)(B) and 2710(d)(1)(A)(i).

On May 20, 2008, the Secretary rendered a decision to acquire slightly over 13,000 acres in trust out of the 17,000+ acres that the OIN had originally requested. See Record of Decision [A. 551-621]. This included land on which the Turning Stone Casino was located [A. 586]. The Secretary also noted that the Decision would help the OIN "permanently reestablish a sovereign homeland for its members and their families" and give it the "ability to exercise governmental authority over the land and its uses" [A. 585]. The Secretary also concluded that the OIN had "been lawfully conducting Class III gaming at Turning Stone under IGRA [A. 557-558] while ignoring the State Court decision in *Peterman v. Pataki*, 4 Misc.3d 1028[A], *aff'd* 21 A.D.3d 1387 (4th Dep't 2005), *cert denied* 549 U.S. 1077 (2006), which held that the Compact had not been validly entered into.[2]

Thereafter, several lawsuits were filed in the Northern District of New York challenging the determination, the most notable being the one filed jointly by the State of New York and the Counties of Oneida and Madison, where the vast bulk of land taken into trust was situated. *State et al. v. Salazar*

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[2] *See also, Pueblo of Santa Ana v. Kelly*, 101 F.3d 1546 (10th Cir. 1997), *cert denied*, 522 U.S. 807 (1997) (question of who on behalf of a State can enter into a Tribal-State Compact under IGRA is strictly a matter of state law).

(Case No. 6:08-CV-00644 [N.D.N.Y.]) [A. 1680 *et seq.*]. See also Declaration of David Tennant, Esq., counsel for Oneida and Madison County, objecting to the authority of the Secretary to acquire an "unprecedented" amount of land into trust and the devastating impact it would have on the state and counties, and the fact that the land into trust statute was not intended to address issues affecting New York Indians [A. 1759 *et seq.*]. The Appellants in this litigation, the Towns of Vernon and Verona and their citizen taxpayers, also filed suit, challenging (1) the Secretary's constitutional authority to take land into trust, (2) the eligibility of the OIN for land into trust treatment, and (3) the failure of the Secretary to properly assess the impact his decision would have on the Town and its citizens [A. 915 *et seq.*].

Thereafter, the Secretary moved to dismiss the Towns' constitutional claim and the Towns cross-moved for summary judgment on the grounds that the Tribe did not meet the definition of an Indian tribe under the Indian Land Consolidation Act (25 U.S.C. § 2201[1]) and that the Secretary had erroneously concluded that the Tribe's operation of the Turning Stone Casino was legal.

By Decision dated September 29, 2009 [SPA 27-47], the District Court granted the State's Motion to Dismiss the Towns' constitutional claim that the

Indian Commerce Clause could not be construed as authorizing the Secretary to take any action in derogation of a State's sovereignty. The District Court held that the Indian Commerce Clause gave Congress "plenary" authority to legislate in matters affecting Indian affairs [SPA 32]. It rejected the argument that the provisions of the Indian Reorganization Act ("IRA") authorizing the Secretary to take lands into trust applied only to those states where federal land had been reserved from the states at the time of their admission, opining that all states had been admitted on "equal footing" to the Union [SPA 33]. The Court also ruled that the Tribe's operation of Turning Stone was legal and that the Tribe had the requisite "jurisdiction" over the land [SPA 33-39]. The Court also ruled although the OIN had voted not to be governed by the IRA after its enactment [SPA 42], that was nevertheless irrelevant because the subsequent enactment of the Indian Land Consolidation Act allowed tribes to qualify for such treatment, notwithstanding such a vote. *See* 25 U.S.C. § 2201 [SPA 42]. The Court further held that the OIN was satisfied by the definition of an "Indian tribe" under the Indian Land Consolidation Act despite the language in the statute defining "Indian tribe" as "any Indian tribe, band, group, pueblo, ***or community for which, or for members of which, the United States holds land into trust***" (emphasis supplied). 25 U.S.C. § 2201(1).

While, prior to the action taken in this case, there was no trust land in New York State, the District Court nevertheless ruled that the italicized language quoted above applied only to the word "community" because it was the so-called "last antecedent" in the phrase, and, therefore, the qualifier that the U.S. must hold land into trust applied only to a "community" and none of the other nouns preceding it in § 2201(1). [SPA 44-45]

In the meantime, the U.S. Supreme Court handed down another decision in a different case (*Carcieri v. Salazar*, 555 U.S. 379 [2009]) involving a Rhode Island Indian tribe. It held that the provisions of the Indian Reorganization Act applied only to tribes that were "under Federal jurisdiction" at the time of the statute's enactment in 1934. In rendering its decision in this case in May 2008 to take land into trust, the Secretary had not addressed the question whether the OIN was, in fact, under Federal jurisdiction as of the date of the enactment of the Indian Reorganization Act. Accordingly, by Decision dated September 24, 2012, the District Court, noting the Supreme Court's decision in *Carcieri*, remanded this case to the Secretary to "establish a record and determination in the first instance whether OIN was under Federal jurisdiction in 1934" [A. 754].

Following remand, the Secretary amended its prior May 2008 Decision to include a determination that the OIN had, in fact, been "under Federal jurisdiction" in 1934.

The parties thereafter filed their Cross-Motions for Summary Judgment. In the meantime, however, in May 2013, the State of New York and the counties settled their lawsuit with the Secretary [A. 1788-1807]. The State and Counties agreed to drop their challenge to the Secretary's Land Into Trust determination in exchange for the Tribes' agreeing to support a proposed amendment to the State Constitution, championed by Governor Andrew Cuomo, which was scheduled to be voted on in the November 2013 statewide election. The proposed Amendment would legalize casino gambling in the State, elsewhere than on "Indian land" with the understanding that the OIN would enjoy an exclusive territorial monopoly in the ten county areas surrounding the Casino [A. 1866 *et seq.*].

In final decisions, both dated March 26, 2015, the District Court disposed of all the remaining issues in favor of the Secretary in both this case [SPA 48-66] and in *Upstate Citizens for Equality v. Jewell* [SPA 1-24], which had been consolidated with this case for purposes of appeal. The Court ruled that the Secretary had properly determined that the OIN was under Federal

jurisdiction as of 1934 [SPA 10-12] and that the Indian Reorganization Act did indeed apply to land in New York State [SPA 57] and that the Secretary had not acted arbitrarily or capriciously and had properly assessed all the relevant criteria in deciding to take the land into trust.

This appeal ensued.

STANDARD OF REVIEW

Review by the District Court under the Administrative Procedure Act ("APA") is "narrow" and limited to examining the record to determine whether the action taken was based on irrelevant factors or where there has been a clear error of judgment. *National Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 96-97 (2d Cir. 2001). On appeal from a grant of summary judgment involving a challenge under the APA, the Circuit Court reviews the administrative record and the District Court's decision *de novo*. *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 77 (2d Cir. 2006). *See also City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994).

SUMMARY OF ARGUMENT

The Indian Commerce Clause, while giving broad authority to Congress to legislate in the arena of Indian affairs, is not without limitation.

It cannot be invoked, as it was here, in such a manner as to deprive a state of sovereign jurisdiction that state has exercised over land for the past 200 years simply by acquiring land into trust pursuant to 25 U.S.C. § 465. It is clear that the District Court misunderstood the extent of the loss of sovereignty by the State of New York that would result from land into trust acquisition, incorrectly concluding that the State had also retained some concurrent jurisdiction. However, this Court has made it abundantly clear only very recently that where there is "tribal jurisdiction," State jurisdiction disappears altogether. *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, ____ F.3d _____ (Case No. 11-5171, decided September 15, 2015). In fact, the Court's opinion below reflects that it misunderstood what the Secretary of the Interior and the U.S. Department of the Interior believed was the ultimate result of taking land into trust. There is no question that the Federal Government meant to eliminate State jurisdiction altogether [A. 561, 604]. The extent to which Congress may do that with respect to land that heretofore was under jurisdiction of the State of New York for over two centuries raises serious and profound Constitutional questions. The doctrine of Constitutional avoidance dictates that such a construction not be imparted to the statute (25

U.S.C. § 465). *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009).

The legislative history and historical context also make it clear that 25 U.S.C. § 465, enacted as part of the Indian Reorganization Act of 1934, was never intended to apply to New York State.

The Court below also minimized the drastic effects that the acquisition of land into trust and the attendant loss of control of land uses would have on local government. *See City of Sherrill*, 544 U.S. 197, 220 (2005). This was a major concern to the U.S Supreme Court. There is nothing more disruptive than the loss of a local government's ability to govern the use of its land. *See also Cayuga Indian Nation v. Village of Union Springs*, 390 F.Supp.2d 203, ____ (N.D.N.Y. 2006). *See also Wallach v. Town of Dryden*, 23 N.Y.2d 728 (2014) ("… local regulation of land use among the most important powers and duties granted to a town government").

For all the foregoing reasons hereinafter elaborated upon, the determination of the District Court upholding the determination of the Secretary to place land into trust in Central New York should be reversed and the determination annulled.

ARGUMENT

POINT I

The Indian Commerce Clause Does Not Give the Secretary of the Interior Authority to Acquire Land Within a State and Divest It of Its Sovereign Jurisdiction Over That Land

The Commerce Clause (Article I, § 8, clause 3 of the U.S. Constitution) gives Congress the authority "… to regulate Commerce with foreign Nations and among the several States, and with Indian tribes." There is little question that this clause would not empower the Federal Government to acquire land within an existing State and divest that State of sovereign jurisdiction under the guise of regulating commerce with foreign nations and/or among the several States. Here, however, the Government contends that it may do so in the context of regulating commerce with Indian tribes, despite the fact that there is nothing in the wording of the Commerce Clause that differentiates "commerce" with Indians from commerce with foreign nations or among the States. Aside from the well-accepted canon of interpretation that the same word used in the same sentence modifying two different objects should not be given two different meanings (*Reno v. Bossier Parish School Board*, 528 U.S. 320, 329-330 [2000]), the Government's aggressive interpretation here would threaten the sovereignty over land within the territorial limits of any state and

upset one of the bedrock principles of our Nation's constitutional blueprint, *i.e.*, dual and co-equal sovereignty between the States and the Federal Government. *See Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002), *citing Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Upon ratification of the Constitution, states, including New York, entered the Union with their sovereignty intact. *Id.* Congress may not subsequently unilaterally diminish that sovereignty. *See also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). *Printz v. United States*, 521 U.S. 898, 918-919 (1999); *New York v. United States*, 505 U.S. 144, 156-159 (1992).

State sovereignty, therefore, is as much a part of our Constitution as the Congress' power to regulate commerce. Thus, both concepts (state sovereignty and Congressional power to regulate commerce) must be reconciled. *See National Federation of Independent Businesses v. Sibelius*, _____ U.S. _____, 132 S.Ct. 2566 (2012). The mere fact that Congress can regulate commerce with Indian tribes does not give it the power to abrogate State sovereignty in the process. The best example is the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), where the Seminole Tribe sought to sue the State of Florida to compel the State to

negotiate a Tribal-State Compact to allow the Tribe to engage in gambling pursuant to a provision in the Indian Gaming Regulatory Act. That provision purported to permit a Tribe to sue a State in Federal Court whenever a State refused to negotiate in good faith. The Supreme Court dismissed the case on jurisdictional grounds, however, after the State successfully invoked one of the attributes of its inherent sovereignty – immunity from suits. The Court held that while Congress could legislate in the area of gambling by tribes under the Interstate Commerce Clause, it could not use that power to abrogate an attribute of State sovereignty. *Id.* at 61-62.

While it is true that the Court relied upon the 11th Amendment to the U.S. Constitution barring suits against states by states or citizens of other states in Federal Court, it also held that the 11th Amendment was simply meant to confirm that which was already true even before its adoption – namely, that one of the inherent attributes of sovereignty is that a state cannot be sued. *Id.* at 54. State sovereignty and power under the Commerce Clause co-exist and there are, therefore, limits to what Congress may do in the name of regulating commerce with the Indian tribes.

In another landmark case involving the Commerce Clause and New York State (*New York v. United States*, 505 U.S. 144 [1992]), the Supreme

Court held that notwithstanding Congress' power under the Commerce Clause to regulate the interstate market in the disposal of low-level radioactive waste, that did not give it the authority to force New York State to take title to such waste within its borders and to thereafter supervise its disposal. The Court held that imposing such an obligation upon the State would "invade the province of State sovereignty reserved by the 10th Amendment." *Id.* at 156, *citing Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985) (Congress may not employ its delegated powers to displace state territorial integrity).

These precedents teach that the so-called "plenary" power that courts frequently use to describe the breadth of Congress' power under the Indian Commerce Clause does not extend so far as to enable it, in the exercise of such power, to abrogate a state's sovereignty.[3] In this particular case, there is no question that prior to the land into trust acquisition, the State of New York had full sovereignty over the acreage to be placed into trust. The Supreme

[3] For a through historical and scholarly analysis of the so-called "plenary" power of Congress to regulate Indian affairs, see Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. Jour. 1012 (2015). Professor Ablavsky concludes that the theory rests on "unstable foundations."

Court removed any doubt about that. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

There is a way for Congress to remove a State's sovereign authority over land; but that is provided for in the so-called "Enclaves Clause" of the U.S. Constitution found in Article I, § 8, clause 17. It provides:

> The Congress shall have Power To ... exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Here, however, the Federal Government has not invoked the Enclaves Clause as a source of power to divest the State of jurisdiction, nor could it, as the Record is devoid of any evidence whatsoever of a formal cession of land by the State nor acceptance of same by the United States. The absence of a formal acceptance constitutes a "conclusive presumption" that jurisdiction has not been transferred. *See* 40 U.S.C. § 3112(c). In addition, the acquisition of the land in this case was not for the erection of forts, magazines, arsenals, dockyards, or other needful buildings. Moreover, jurisdiction may not be

acquired by mere occupancy or the tacit consent of the state. *See Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 538-539 (1885).

The District Court below, however, rendered a decision that gave short shrift – too short – to the Towns' arguments. It cited to the familiar line of cases holding that "Congress possesses plenary power to legislate in matters involving Indians" [SPA 32], describing that power as both "plenary" and "exclusive" without engaging in any analysis of the tension between the Indian Commerce Clause and state sovereignty. In addition, the Court rejected the Enclaves Clause argument because it found that the Tribe's jurisdiction was not "exclusive," and that the State had retained some jurisdiction, without describing, however, exactly what that was. The District Court cited *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) for that proposition.

The District Court, however, clearly misapprehended the full implications of Tribal jurisdiction that would result from the land into trust acquisition. Indeed, in the decision to take the land into trust, the Secretary made no pretense about what the effect of the trust acquisition would be on the State's sovereign jurisdiction. The Secretary stated:

> "Basic features of trust status include immunization of the land against state and local taxation and the

> exercise of tribal sovereignty and jurisdiction over the land to the ***exclusion*** of state and local governments" (emphasis supplied) [A. 561].

Indeed, this Court has reached the same conclusion as the Secretary and in direct contradiction to what the District Court held. Only recently, this Court ruled that the term "tribal jurisdiction" is a "combination of tribal and federal jurisdiction over land, to the ***exclusion*** of the jurisdiction of the State." *Citizens Against Casino Gambling v. Chaudhuri*, ____ F.3d ____; Case No.: 11-5171, Dkt. No. 253-1 at 37-38, decided September 15, 2015. *See also* the U.S. Department of Interior regulations implementing the land into trust statute. 25 C.F.R. 1.4(a) provides that no "laws, ordinances, codes, resolutions, rules, or other regulations of any state or political subdivision thereof limiting, zoning, or otherwise governing regulating or controlling the use or development of real or personal property … shall be applicable … to any property … held in trust by the United States."

For all the foregoing reasons, it is clear that whatever may be the "plenary" power Congress can exercise under the Indian Commerce Clause, it is not so expansive that it would allow it to unilaterally abrogate State sovereignty as it has attempted to do here. The District Court failed to apprehend the full consequences of the acquisition operating under the

erroneous belief that the State of New York retained jurisdiction. Thus, the application of 25 U.S.C. § 465 to New York State is unconstitutional. For the reasons hereinafter set forth in Point II, that does not render the statute unconstitutional in its entirety. It may be applied to states admitted to the Union where, at the time of admission, the statutory language included provisions that certain public lands within the State boundaries were to be "reserved" for Indians. That is simply not the case here, however.

POINT II

Section 5 of the Indian Reorganization Act Authorizing the Secretary of the Interior to Acquire Land for the Benefit of Indian Tribes Was Not Intended to Apply to New York State

The Towns do not suggest that Section 5 of the Indian Reorganization Act ("IRA"), codified at 25 U.S.C. 465, authorizing the Secretary to acquire lands on behalf of Indian tribes, is necessarily unconstitutional in all circumstances. There are, for example, many instances where, at the time of admission of states to the Union, long before the enactment of the IRA, part of the territory within the borders of the states admitted was expressly "excepted out" for the benefit of Indian tribes *See The Kansas Indians*, 72 U.S. 737, 740-741 (1866). *See also Draper v. United States*, 164 U.S. 240, 243 (1896) ("Whenever, upon admission of a state into the Union, Congress is intended to except out of it an Indian reservation, for the sole and exclusive jurisdiction over that reservation, it has done so by express words").[4] *See also*

[4] See, e.g., Montana, North Dakota, South Dakota and Washington, Enabling Act, 25 Stat. 676 (1889) ("Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States"); Idaho, Idaho Const., art. XXI, § 19 (1890) ("All Indian lands within the State 'remain under the absolute jurisdiction and control of the Congress of the United States'"); Utah, 28 Stat. 107 (1894) ("Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States"); Oklahoma, 34

Matal, *A Revisionist History of Indian Country*, 14 Alaska Law R. 283, 293 (1997) [A. 195]. Application of § 465 to land in these states would not affect their sovereignty as they never had it to begin with. However, no such exceptions apply to the original thirteen colonial states. The District Court nevertheless summarily rejected that argument on the theory that all states entered the Union "on equal footing" [SPA 33]. This failure by the District Court to consider historical context was a fatal error.

A. Introduction

Statutory interpretation requires consideration of a statute as a whole in the context in which it occurs, not just an isolated provision or phrase. Issues relating to Indian law cannot be considered outside of their historical context. *See Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 147 (8th Cir.), *cert. denied*,

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Stat. 267 (1906) ("All lands … owned or held by any Indian, tribe or nation … shall be and remain subject to the jurisdiction, disposal, and control of the United States"); Arizona and New Mexico, 36 Stat. 557 (1910) ("All lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty … shall be and remain … under the absolute jurisdiction and control of the Congress of the United States"); Alaska, Alaska Statehood Act, 72 Stat. 339 (1958) ("Any lands … the right or title to which may be held by any Indians, Eskimos, or Aleuts … or as held by the United States in trust for said Natives … shall be and remain under the absolute jurisdiction and control of the United States").

439 U.S. 955 (1978) ("Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored.") (quotations omitted). Thus, in interpreting a statute, the language should be construed in the sense that is most in accord with context and ordinary usage, and also most compatible with the surrounding body of law and historical context in which in arises. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); *Citizens Against Gambling in Erie County v. Hogen*, 2008 U.S. Dist. LEXIS 52395, *173-74 (W.D.N.Y. 2008).

Applying these principles here, the IRA does not apply to tribes, like the OIN, which affirmatively opted out of the IRA and which were not, in any event, ever subject to the federal policy of "allotment," as hereinafter discussed. While the ILCA extended the reach of the IRA to eligible tribes regardless of such an election, ILCA did not extend the Section 5 land-into-trust process to tribes, such as the OIN, for which the United States holds no land in trust and to which the IRA does not otherwise apply. Thus, the Secretary lacks authority to take land into trust for the Oneidas under Section 5 of the IRA.

B. Congress Intended the IRA to Remediate the Harm to Tribes from the Allotment Policy under the Dawes Act

1. The IRA and its Repudiation of the Federal Policy of Allotment

Prior to 1871, the federal government supported the right of Indian tribes to maintain treaty lands and to determine, on the tribal level, the political and social practices that would govern on those lands. By 1871, however, the United States had abandoned formal treaty-making with Indians and was moving toward a policy of allotment and assimilation. The federal policy of assimilation culminated in 1887 with the General Allotment Act, also known as the Dawes Act. 24 Stat. 388, §§ 1-3 (formerly codified at 25 U.S.C. §§ 331-333).

The Dawes Act authorized Congress or the President, "in any reservation created for [Indian] use," to "allot the lands in said reservation in severalty to any Indian located thereon." 49 Cong. Ch. 119 (emphasis added); 24 Stat. 388. The allotment policy effectively forced Indian tribal members to surrender their undivided interest in tribally owned common estates. Cohen's Handbook of Federal Indian Law § 16.03(2)(a) and (b) (Matthew Bender, 2005 ed.). After a period of time (typically 25 years), the Indians could sell their Indian lands to non-Indians. 49 Cong. Ch. 119, 24 Stat. 390;

see also Cohen's Handbook of Federal Indian Law § 16.03(4)(b)(ii) (Matthew Bender, 2005 ed.).

During the allotment period, non-Indians acquired two-thirds of the former Indian lands. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). In 1928, a report to the Interior Department on the Problem of Indian Administration, known as the Meriam Report, sharply criticized the federal policy of assimilation and allotment. Not only had the policy failed, the Meriam Report argued, but it had actually contributed to desperate conditions in health, economics, and education among the Indians who had been subjected to it. This criticism, coupled with the wholesale loss of tribal land during the period of assimilation, caused a paradigm shift in federal Indian policy and ignited calls for a federal response. *See* Hearings on H.R. 7902 before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 16 (1934). In 1934, Congress took up consideration of the IRA with the specific aim of ending allotments and undoing its effects.[5]

[5] *See* H. Rep 1804, 73d Congress, 2d Session (May 28, 1934) ("The bill now under consideration definitely puts an end to the allotment system through the operation of which the Indians have parted ways with 90,000,000 acres of their land in the last 50 years. . . . To make many of the now pauperized,

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.*, also known as the Wheeler-Howard Act, to address some of the issues that the Meriam Report had identified. As Indian Commissioner John Collier,[6] explained:

> The Wheeler-Howard Act . . . endeavors to provide the means, statutory and financial, to repair as far as possible, the incalculable damage done by the allotment policy and its corollaries.

Annual Report of the Secretary of the Interior, 1934, 78-83. Collier continued:

> The result of the allotment system brings about the forced sale of Indian heirship lands, usually to white

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landless Indians self-supporting, it authorizes a long term program of purchasing land for them."); S. Rep 1080, 73d Congress, 2d Session (May 10, 1934) ("Under the operations of allotment, the land holdings of Indians have steadily dwindled and a considerable number of Indians have become entirely landless. By section 1 of [this] bill, future allotment in severalty to Indians is prohibited . . .").

[6] John Collier, in addition to serving as Commissioner of Indian Affairs, was "a principal author of the [IRA]," *Carcieri v. Salazar*, --- U.S. ---, 129 S. Ct. 1058, 1065 n.5 (2009) (quoting *United States v. Mitchell*, 463 U.S. 206, 221, n.21 (1983)), and responsible for the insertion of the words "now under Federal jurisdiction" into what is now 25 U.S.C. § 479. Thus, the Supreme Court recognized in *Carcieri*, Collier's responsibilities in implementing the IRA "make him an unusually persuasive source as to the meaning of the relevant statutory language." *Carcieri*, 129 S.Ct. at 1065 n. 5.

> buyers. . . . [The] Wheeler-Howard Act is taking the first hesitant step toward the solution of this problem.

Id. IRA thus was directed at tribes (unlike the Oneidas) that had been subject to the policy of allotment under the Dawes Act. Collier also testified before Congress that the IRA was not intended to apply to New York [Brief of Appellant Upstate Citizens for Equality at 6, dated October 7, 2015, in Case No. 15-1726).

When Congress enacted the IRA, as Defendants here agree (Dkt. No. 27-2 ¶ 8), the Dawes Act and the policy of allotment that it embodied, had not been applied in New York. *See* Hauptman, *The Iroquois and the New Deal* 22 (Syracuse Univ. Press 1981). The General Allotment Act contained an exception for the Seneca Nation of Indians from the application of the Act, *see* 25 U.S.C. § 339, which at the time was the only the only tribe in New York with any significant land holdings [A. 1645].

To the extent that the IRA's purpose was to remediate losses caused by the allotment policy, this purpose militates against applying the IRA to tribes, like the Oneidas, situated in New York and other colonial states, which were

not subject to the federal allotment policies.[7] At the time of the IRA, the Dawes Act had not been applied in New York. All this is extensively documented and acknowledged by David Tennant, Esq., counsel for the Counties of Oneida and Madison, who submitted a lengthy declaration with exhibits [A. 1759-1785]. By reference to contemporary documents, Tennant confirms that New York Indians "never suffered from the federal allotment policy" [A. 1761] and that there was no trust lands in New York for that very reason. With the repudiation of the Dawes Act, the policy of allotment would no longer affect any other tribes. Hence, there would have been no reason to include such tribes within the ambit of the statute. Such a limitation is consistent with the IRA's dual purposes -- to remedy the impact of allotment on existing lands and redress the adverse impact of the policy on existing

[7] It should be remembered that the original 13 colonial States, unlike many other States admitted after 1789, joined the Union with no reservation of their lands to the federal government. Thus, while the United States could subsequently pass laws affecting Indians on lands within the boundaries, but not the sovereignty, of later-admitted States, this was not true of States like New York. This explains why, as the Secretary conceded, there are no trust lands in New York for the benefit of the Oneidas. *See Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F.Supp.2d 128, 145 (N.D.N.Y. 2004) ("'there are no Indian lands held in federal trust in the State of New York'") (citing letter dated November 4, 2003 from Franklin Keel, Director of the Eastern Regional Office of the Bureau of Indian Affairs).

Indian tribes -- and the plain language of the IRA, as the Supreme Court construed it in *Carcieri*.[8]

2. The Indian Land Consolidation Act ("ILCA") Does Not Bring "All Tribes" Within Section 5 of the IRA

The Government argues that Congress, through the Indian Land Consolidation Act ("ILCA") -- which states that Section 5 of the IRA "shall apply to all tribes notwithstanding the provisions of section 18" -- brought "all tribes" within the authority of Section 5 of the IRA. In *Carcieri*, however, the Supreme Court expressly considered this argument and rejected it.

The Court expressly held that ILCA does not expand the authority or grant independent authority under the IRA for the Secretary to take land into trust. The "plain language of § 2202," the Court held, "requires that the

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[8] In *Carcieri*, the Court took it as a given that the Narragansett tribe was not under federal jurisdiction in 1934. Thus, it did not consider the contours of what it meant to be a recognized tribe under federal jurisdiction in 1934. Here, there is a serious question, although not one that is essential to the resolution of this case, whether the Oneida Indian Nation of New York was a recognized tribe under federal jurisdiction in 1934. *See* Cohen's Handbook of Federal Indian Law § 22(2) at 421 (U.S. Dept. of Int. 1941) (observing that the Oneidas as a tribe were no longer present in New York, and they had no reservation in New York, at the time of the enactment of the IRA); *see also Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 173 (2d Cir. 2003) (Van Graafeiland, J., dissenting) ("The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846.") (quoting 1901 Annual Reports of the Department of the Interior).

Secretary take land into trust only 'for the purpose of providing land for Indians.'" This refers back to the term "Indian," which is defined in § 479 and "is limited to members of tribes that were under federal jurisdiction in 1934." *Id.* at ---, 129 S. Ct. at 1067-68. Thus, contrary to the Secretary's position here, ILCA does not expand the reach of Section 5, but only provides "additional protections to those who satisfied the definition of "Indian" in § 479 at the time of the IRA's enactment, but opted out of the IRA shortly thereafter. *Id.*

C. The Court's Grammatical Argument that 25 U.S.C. § 2201(1) Makes the OIN Eligible for Land Into Trust Treatment Would Lead to an Absurd Result at Variance with the Supreme Court's Opinion in Carcieri

The term "tribe" as used in ILCA, enacted after the IRA, has a limited meaning -- that is, one "for which . . . the United States holds land in trust," 25 U.S.C. § 2201(1) -- and the Oneidas do not fit this definition. Lacking support in the language or historical context of the ILCA, or in Supreme Court precedent, the Government resorts to the grammatical rule of the last antecedent, *i.e.*, the notion that the placement of a comma between a list of antecedents and a qualifying phrase provides evidence that the qualifier refers to all of the antecedents, instead of just the immediately preceding one. It

contends that the final prepositional phrase of 25 U.S.C. § 2201(1) -- "for which, or for the members of which, the United States holds lands in trust" -- modifies only the noun which it follows, that is, "community," and not "tribe," "band," "group," or "pueblo." Thus, the Government argues, the ILCA made the OIN subject to the IRA. The District Court agreed [A. 1113-1118]. This conclusion was clearly wrong.

The legislative history of the ILCA reflects that Congress intended the land-in-trust requirement to apply to all Indian "tribes," just as it does to an Indian "community." According to the House Report, the "bill would allow any *tribe* for whom the United States holds land in trust to consolidate land ownership within the reservation in order to maximize utilization of the reservation's land base." H. Rep. No. 97-908, 11, 1982 U.S.C.C.A.N. 4415, 4421 (1982) (emphasis added). The terms "tribe," "band," "group," "pueblo" and "community" are, for all intents and purposes, synonymous. They appear in the statute in the form of an inclusive list. There is no apparent reason to treat these terms differently, requiring trust land for the application of ILCA to a "community" of Indians, but not to a "tribe," "band," "group," or "pueblo." Notably, the Secretary offers no justification for such an absurd and counter-intuitive interpretation.

"When a statute is clear as a glass slipper and fits without strain, courts should not approve an interpretation that requires a shoehorn." *See, e.g.*, *Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000) (holding that the doctrine of the last antecedent will not control if it creates an "absurd result"). Recently, in *United States v. Hayes*, --- U.S. ---, 129 S. Ct. 1079 (2009), the Supreme Court rejected the application of the rule of the last antecedent where, as here, it would give rise to an "unlikely" result. The case involved the misdemeanor crime of domestic violence, which the statute defines as an "offense that," among other things, "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person with a specified domestic relationship with the victim. Under a strict application of the rule of the last antecedent, the phrase "committed by" would modify only its immediate antecedent, that is, "the threatened use of a deadly weapon," and not the entire phrase "use or attempted use of physical force, or the threatened use of a deadly weapon." The Court rejected this construction, and the application of the rule of the last antecedent which would have produced it, because that construction would have been implausible and one which Congress clearly could not have intended. *Id.* at ---, 129 S. Ct at 1085.

In other similar contexts, where Congress has eschewed the use of a comma in defining the term "Indian tribe," the Secretary has understood qualifying language to relate to each term in the list, and not just to the "last antecedent." In 25 U.S.C. § 479a, for example, Congress defined the term "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." As in ILCA, there is no comma after the word "community." Applying the rule of the last antecedent, the qualifying language "that the Secretary of the Interior acknowledges to exist as an Indian tribe" would modify only "community," and not "tribe," "band," "nation," "pueblo," or "village." Yet such an interpretation -- which would allow the Secretary to place a "tribe," "band," "nation," "pueblo," or "village" on the federally recognized list without a secretarial determination that it exists as an Indian tribe, yet requiring such a determination for a "community" -- would be nonsensical. The Secretary does not apply the rule of the last antecedent in this context, instead applying the "acknowledgement" requirement to every term in the list, not merely "community." *See* "List of Indian "Tribal Entities" Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 47 Fed. Reg. 53,130 (1982) (including all "Indian tribes,

bands, villages, communities and pueblos as well as Eskimos and Aleuts" which the Secretary recognizes as having a special relationship with the United States).

Similarly, in the context of the Indian Gaming Regulatory Act, Congress defined the term "Indian tribe" as:

> any Indian tribe, band, nation, or other organized group or community of Indians which--(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.

25 U.S.C. § 2703(5). There is no comma after the phrase "or other organized group or community of Indians" to separate it from the qualifying language. Under the Government's fuzzy logic, this definition of Indian tribe would require only an "other organized group or community of Indians" to receive secretarial recognition and to possess the powers of self government before being eligible for the benefits or limitations of the IGRA, while any self-proclaimed Indian "tribe," "band," or "nation" would not be subject to thee limitations. Such a result would be contrary to the statutory intent, and the

Secretary has never adopted such a construction.[9]

The rule of the last antecedent is subject to the rule of common sense. *See, e.g., Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000) (holding that the doctrine of the last antecedent will not control if it creates an "absurd result"). In urging its application here, the Secretary appears to have taken leave of his senses. The presence or absence of a comma in the definition of the term "Indian tribe" is the thinnest of reeds. It is far too insubstantial a basis upon which to premise the Secretary's proposed acquisition of 13,003.89 acres of land in trust for the Oneidas.

In conclusion, the practice of alienating land through the policy of allotment was never in effect in New York [A. 1781]. Consequently, the Oneidas were not subjected to and did not suffer harm as a result of that policy. Congress intended the IRA to remedy the effects of allotment. Inasmuch as the Oneidas were not affected by the policy of allotment, it follows that Congress did not intend the IRA to apply to the Oneidas. While the ILCA

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[9] *See, e.g., United States v. Chavez*, 290 U.S. 357, 364 (1933) (holding that "pueblo" Indians fit within the term "community" as so used in a criminal statute defining Indian tribe); *United States v. Zephier*, 916 F.2d 1368, 1370 n.1 (8th Cir. 1990) ("In reference to Indian affairs, Congress predominantly employs the term 'community' to denote federally-recognized Indian tribes.").

extended the reach of the IRA to eligible tribes regardless of such an election, ILCA does not extend the Section 5 land-into-trust process to a tribe to which the IRA does not apply.

CONCLUSION

The decision by the District Court upholding the determination by the Secretary of the Interior to take the subject land into trust for the benefit of the Oneida Indian Nation of New York should be reversed and the judgment to that effect should be vacated with directions to enter a new judgment granting Appellant's cross-motion for summary judgment, declaring that the trust acquisition was illegal, null and void.

DATED: October 8, 2015

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 9010 words. This word count excludes table of contents, table of authorities, and signatures and certificates of counsel.

DATED: October 8, 2015

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