15-1688-cv(L), 15-1726-cv(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. –

(For Continuation of Caption See Inside Cover)

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS UPSTATE CITIZENS FOR EQUALITY, INC., DAVID BROWN VICKERS, RICHARD TALLCOT, SCOTT PETERMAN AND DANIEL T. WARREN

DAVID BROWN VICKERS, ESQ.
Attorney for Plaintiffs-Appellants
Upstate Citizens for Equality, Inc.,
David Brown Vickers, Richard Tallcot,
Scott Peterman and Daniel T. Warren
244 Salt Springs Street
Fayetteville, New York 13066
(315) 637-5130

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, 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.

RULE 26.1 STATEMENT

Appellant Upstate Citizens for Equality, Inc. is organized as a not-for-profit corporation. Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs bring this action under, inter alia, the Administrative Procedure Act (APA), 5 U. S. C. § 551 et. seq.; Indian Reorganization Act of 1934 (IRA), 25 .U.S.C. § 471, et seq.; Indian Land Consolidation Act of 1983 (ILCA), 25 U.S.C. §§ 2201–2219; and Article I, Section 1 of the United States Constitution; Article 1, § 8, Clause 3 of the United States Constitution (Indian Commerce Clause); 5th and 10th Amendments to the United States Constitution. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1361.

The final judgment of the District Court was entered on March 26, 2015 (SPA- 1-46) and a timely notice of appeal was filed on May 25, 2015 (A-913).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

ISSUE ONE

Whether or not the executive branch agencies of the federal government (BIA / DOI) exceeded their authority take New York State land "into trust" for the Oneida Indian Nation of New York (OINNY) pursuant to their perceived authority to do so based on 25 U.S.C. § 465.

Phrased another way, is the federal government, through its executive branch agencies, exercising land acquisition power that it really does not have

when it relies on 25 U.S.C. § 465 to "regulate Indian Tribe Commerce" pursuant to the US Constitution, Art. I, § 8, cl 3?

Phrased still another way, is 25 U.S.C. § 465, as put into practice here, a violation of the limits placed on the legislative branch of the federal government by Art. I, § 8, cl.3?

ISSUE TWO

Is the Oneida Indian of New York (OINNY) properly positioned to be the beneficiary of any federal government benefits?

STANDARD OF REVIEW

Since this issue was addressed in the context of a motion to dismiss and/or in the context of a motion for summary judgment the standard of review is de novo. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-250 (2d Cir. 2006). See also, *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 547 (2d Cir 2007) (question of statutory interpretation is subject to de novo review). All allegations in the complaint must be accepted as true and all inferences drawn in Plaintiffs' favor. *Allaire Corp.,* 433 F.3d at 249-250; *Caiola v. Citibank, N.A.*, 295 F.3d 312, 321 (2d Cir. 2002). This Court reviews a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the nonmoving party, here being Appellant. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir.1999).

This action seeks review of Defendants-Appellees' administrative action of taking land in trust for the Oneida Indian Nation of New York. A reviewing court may not uphold an agency decision based on reasons not articulated by the agency in its decision. *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 87 L. Ed. 626, 63 S. Ct. 454 (1943).

Argument

INTRODUCTION

In the decision below, the Court said, "Plaintiffs are effectively making an argument under the Tenth Amendment, which provides that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"(Document 84 in 5:08-cv-633 at page 13) (SPA-13)

With all due respect to the Court below, the Plaintiffs below (the Appellants here) have made a far more detailed argument than simply asserting that the subject land acquisition by the federal government is a 'violation of the Tenth Amendment' – *Please see* *New York v. United States*, 505 U.S. 144, 155 (1992)

The Appellants, however, do continue to assert that the subject land acquisition is clearly a violation of the Tenth Amendment (as well as the Enclaves Clause and the Commerce Clause) because said land acquisition and the attendant

ouster of New York State jurisdiction over the subject 13,000 acres is not an action that is authorized by the Constitution. Therefore, this land acquisition and attendant ouster of New York jurisdiction is a clear violation of the Tenth Amendment, but much more than that. Should this decision stand, the result will be that the federal government's power to eliminate the jurisdiction, sovereignty and very existence of a State will be limited only by the availability of an Indian tribe to make such a request.

25 U.S.C. § 465 DOES NOT APPLY TO THE LAND IN QUESTION

25 U.S.C. § 465 was intended to apply only to land that had been under federal jurisdiction; the subject land at the center of this action at bar has never been under any federal jurisdiction what-so-ever.

THE DAWES ACT DID NOT APPLY TO THIS LAND.

In 1934, the U.S. Congress passed a comprehensive series of measures designed to reverse the ill effects of the 1887 "Dawes Act" (25 U.S.C. §§ 331, et seq.) (A-47). The "Dawes Act" did not apply to New York Indians or New York Indian tribes (25 U.S.C. § 339) (A-47). (For a thorough discussion of the Dawes Act and its background, *see* F. Prucha, *The Great Father: The United States Government and the American Indians*, Lincoln: University of Nebraska Press, 1984). Regardless of what modern thinkers may hold true about the motives for the Dawes Act and its wisdom (or lack thereof), the Act was focused exclusively

on land that was already under federal jurisdiction. Sections 2 and 3 of the Act mention the role that federal land agents will play in determining the lots to be awarded to qualifying individual Indians. No such land agents had any authority in New York State. Section 4 allows for Indians not connected to a reservation to still be eligible for an allotment of "lands of the United States, not otherwise appropriated." This is a clear indication that the Dawes Act only applied to lands under federal jurisdiction in 1887. Section 5 establishes the rule that if any land not allotted to Individual Indians is the subject of a proposed sale from a tribe to the federal government, that sale must be ratified by an act of Congress. This rule echoes early Indian Trade and Intercourse Acts passed by Congresses in 1790 and 1793 (*See* 1790 Act and 1793 Act, now codified as 25 U.S.C. § 177). Section 5 also specifically states, "[I]f any religious society or organization is now occupying any of the public lands to which this act is applicable, …. The Secretary of the Interior is hereby authorized to confirm such occupation … ." This provides conclusive evidence that the land in question; ie the "applicable" land that was the subject of the Dawes Act was land already under federal jurisdiction. Section 8 of the Dawes Act names specific tribes that the Act did not apply to. Among those tribes was the Senecas of New York. This is because the Senecas were, by the time the Dawes Act was passed, under New York State jurisdiction just like the Onondagas, the Cayugas, and the Oneidas had always been. For scholarly support

of the theory that the Dawes Act did not apply in New York, see *Laurence M. Hauptman, "The Iroquois and the New Deal." (1981) at p. 22* ("In New York, where the Dawes Act had not been applied …")

THE DAWES ACT "FIX" DID NOT APPLY TO THIS LAND.

Since the "Dawes Act" did not apply to New York Indians, neither was the "fix" to Dawes Act intended to apply to New York Indians. (A-47, 48). Commissioner of Indian Affairs John Collier stated, "None of the provisions of this Act [ie: IRA of 1934], except the provisions of Title II relating to Indian education, shall apply to the Indians of New York State." (Hearings before the Committee on Indian Affairs, House of Representatives (H.R. 7902) parts 1 to 9, February 22, 23, 26, 27, March 5, May 1,2,4, and 8, 1934, pp. 1-506). See also (A-60, 61).

25. U.S.C. § 2201 RENDERS 25 U.S.C. § 465 INAPPLICABLE TO THIS LAND

The Court below states that 25 U.S.C. § 465 does apply to New York Indians, despite the clear intent of the legislature, because of the passage of the Indian Land Consolidation Act, or 96 Stat. 2517 (now 25 U.S.C. §§ 2201, et seq.) (SPA-15). This assertion is in error. The Indian Land Consolidation Act made 25 U.S.C. § 465 applicable to tribes who had "opted out" of the applicability of the IRA provisions in previous years (The Oneidas being among the tribes that opted

not to be bound by the provisions of the IRA of 1934) (A-49). However, that Act defined Indians as being connected in some way to tribes that had some of their land held in "trust" by the federal government (25 U.S.C. § 2201(1)). No land in New York has ever been held in "trust" for any New York tribe. Indian lands in New York are held in "restricted fee", not "trust." (A-48). The Court simply concludes that these arguments are wrong; hence an appeal.

THE ENCLAVES CLAUSE IS THE ONLY APPROPRIATE WAY FOR THE FEDERAL GOVERNMENT TO ACQUIRE LAND IN NEW YORK STATE

In order for the federal government to acquire sovereign State land and ouster New York State sovereignty and jurisdiction, the federal government must follow the Constitutionally provided for "Enclaves Clause" (U.S. Constitution Art. I, Sec. 8, cl. 17) process and procedure, not 25 U.S.C. § 465. (A-61)

The Enclaves Clause is provided for here in its entirety:

> "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, dockyards, and other needful buildings."

A federal "enclave" exists as a result of State action in which the land in question is located. The State must "cede" the land in question. Congress must accept the land cession. The purpose underpinning the land cession and Congressional acceptance must be tied to the erection of forts, magazines, arsenals, dockyards, or other needful buildings.

THE FEDERAL GOVERNMENT HAS CREATED A DE-FACTO ENCLAVE

Here, the federal government through its Department of Interior and Bureau of Indian Affairs, is attempting to create a de-facto federal enclave in which all meaningful New York State sovereignty and jurisdiction will be ousted. The executive branch agencies are relying on a 1934 Congressional Act (25 U.S.C. § 465). As argued above, the application of 25 U.S.C. § 465 to this subject land is unconstitutional and the agency action to acquire it is also unconstitutional.

In this case, the result looks very much like a federal "enclave." However, the events leading up to this result have not resembled anything like what the Enclaves Clause would require prior to the establishment of a true federal "enclave." The State of New York did not properly "cede" the land; the Congress never properly "accepted" the land cession; the land being acquired is for the economic advancement of an entity that manages a gambling casino, golf courses, convenience stores, gas stations and the like. There has been no erection of forts, magazines, arsenals, dockyards or any needful buildings whatsoever. A quasi-

private corporation, known as the Oneida Indian Nation of New York, is benefitting from having a land base taken out of New York jurisdiction solely for its own financial benefit. There are no public benefits such as are required by Enclaves Clause jurisprudence.

The federal government and the Court below have asserted that the land acquisition at the heart of this controversy will NOT result in a federal "enclave" for two very fundamental reasons:

i.) The United States will not be acquiring "exclusive jurisdiction over the state property." (SPA-16);
ii.) An "Indian reservation [is] an example of land that is not an enclave." (SPA-16)

These assertions beg careful analysis. The Court below cites to several cases to establish that the State of New York will retain some jurisdiction and therefore, the land must not be a federal enclave by strict definition. A true federal enclave, the Court assumes, won't permit any state jurisdiction at all. This is not historically true. Also, the Court is assuming that the only "jurisdiction" in question would be either that of the State or of the federal government.

i.) NO EXCLUSIVE JURISDICTION?

The Court cites to *United States v. Johnson*, 994 F.2d 980, 984 (2d Cir. 1993) ("The federal government can only acquire jurisdiction over property [within a state] … if both state and federal governments agree to the transfer.").

The Court relies on this snippet from the cited case to reinforce the notion that since some remnant of state jurisdiction remains, the land acquisition itself need not be subject to either Enclaves Clause scrutiny, nor otherwise applicable New York State laws (NY State Law Sec. 50). (SPA-16). The Court below seems to be ignoring that what is being established here is not "federal exclusive legislation or jurisdiction with a minor remnant of State control" but rather a blend of newly introduced tribal legislation and law enforcement in addition to both State and federal jurisdiction, something *United States v. Johnson* never mentions nor contemplates. What is being created by federal government agency action and what is apparently being blessed by the federal courts is a murky new and thoroughly unconstitutional scenario in which US and NY citizens are stripped of their representative powers to hold lawmakers accountable to them for laws made, laws enforced and how the benefits and obligations of citizenship are carved up into slices that end up separating benefits from obligations. No Court should bless this new and murky territory.

The Court below cites to *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."). (SPA-14). The Court below simply states that there is no "grave constitutional concerns" because here, the State of New York retains some remnant of jurisdiction. (SPA-

14). Again, the Court seems to be paying virtually no attention to the introduction of a third law making body: the tribe, which has been granted the power of deputization to enforce not only some State laws, but also (presumably) tribal laws that are not open for inspection, review, or challenge.

The other case that the Court below references is *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). The Court below cites to this case as further "proof" that an Indian reservation is not a true federal enclave. (SPA-16,17). When one looks at the *Surplus Trading Co. v. Cook* case in its proper context, which appellants have done (See A 209-210, et al.), one can quite easily determine that very early in US history, courts were wrestling with legislative initiatives made by both States and the federal government as those initiatives triggered conflicting jurisdictional disputes (*See* Act of March 3, 1817, ch. 92, 3 Stat. 383). As early as 1819, federal judges were recognizing that federal land acquisition and attendant jurisdiction had to be tied to the Enclaves Clause. Mere acquisition of land by the federal government would not ouster State jurisdiction; rather, the State had to properly cede the land before "exclusive legislation" would rest with the federal government. (See *United States v. Cornell*, 25 F.Cas. 646 (C.C.D.R.I. 1819) (No. 14,867)). As any careful reading of *Surplus Trading Co.* will reveal, the land in question was a military camp and the issue was whether or not personal property (ie: woolen blankets) located on the camp's grounds was subject to State

taxation even though the land upon which the personal property was located **was** a federal "enclave." The Court in *Surplus Trading Co*. used an Indian reservation as an example of land that was under both federal and State jurisdiction, and therefore unlike the land in question in the *Surplus Trading Co*. case. What is ironic about the Court's citation of Surplus Trading Co. to stand for the proposition that Indian reservations are **not** federal enclaves is that this reference is a perfect window into an intellectually honest exploration about how courts did see some Indian reservations, but not all, as federal enclaves.

Surplus Trading Co. quoted *U.S. v. Cornell* when the court said "When this [State's proper cession of property] occurs, the land, by the very terms of the constitution, ipso facto falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted." (A - 195). This law (Act of March 3, 1817, ch. 92, 3 Stat. 383) and the subsequent court history led directly to the notion that the federal government had "exclusive jurisdiction" in the absence of any State authority (ie: land west of the Mississippi that was as of yet not divided into States). (*See United States v. Rogers*, 45 U.S. (6 How.) 567 (1846) (A - 196). This line of inquiry leads directly to the notion that Indian reservations outside of the jurisdiction of States were just like federal enclaves (*See Cramer v. United States*, 261 U.S. 219, 228 (1922) (A at p. 197). It wasn't until comparatively recent Supreme Court cases that court created 'doctrine' started blending all Indian land

as if it had always been under just one category, not two: Indian land outside of State jurisdiction and Indian land surrounded by and therefore under State jurisdiction (*See* a detailed discussion of this melting of two categories into one as it is handled in A at pp. 196 et al of Joseph D. Matal, "*A Revisionist History of Indian Country."*).

The Supreme Court has weighed in on this very issue. "The legislative power acquired [by Congress pursuant to Art. I, Sec. 8, Cl. 17] may range from exclusive federal jurisdiction with no residual state police power, to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority." *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976). *See Also Pacific Coast Dairy, Inc. v. Department of Agriculture*, 318 U.S. 285, 299-300: "[i]n early days … it was assumed that federal exclusiveness was a fact rather than a potentiality, … this notion never became law, and has now been formally repudiated." When the allowable federal activity ends (such as the US decides it no longer needs a military base on the lands in question),the US becomes a mere proprietor of the land, possessing the rights of ownership like any other fee owner (Ie: the US would have to pay property and school taxes on the land). *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 527 (1885). See also *United States v. Johnson*, 994 F.2d 980, 986 (2nd Cir. 1993) (under New York cession statute, exclusive federal jurisdiction over Brooklyn Navy yard can be exercised only so

long as Navy uses property for stated military purpose; upon ending that use jurisdiction reverts to the State). Here, establishing a casino and gas stations and convenience stores is not an allowable purpose to trigger an Enclaves Clause land grab.

The theory being advanced by the Appellees and the Court below is curious to say the least. It would seem that the federal government executive branch agencies as well as the Court below want the taxpaying residents of the State of New York to accept the following reasoning: "You, the taxpayers of the State of New York, must continue to accept the burdens that a sovereign entity has to its citizens, (infrastructure maintenance, education of all citizens, sewer, water, and fire protection service, the obligation to prosecute criminal conduct and civil infractions under 25 U.S.C. §§ 232, 233), but you must no longer expect any meaningful power that comes with such sovereignty (zoning regulation, employment protection, environmental protection, taxation on property and sales). You must also accept that a new law-making 'sovereign' is being created and you may be subject to laws and regulations that you have no say (representative or otherwise) in creating, reviewing or challenging."

This is a far cry from the bargain contemplated under the Enclaves Clause, which is best summarized as follows: "You, the taxpaying residents of the State of New York, will give up the advantages of the land being acquired by the federal

government (geographical importance, tax revenue, zoning enforcement, etc.), but the federal government will not only use that land for the benefit of the residents of the State, but the federal government will also accept all duties and obligations associated with land ownership (prosecution of crimes committed on said land, infrastructure maintenance, etc.). You will also continue to have a representative accountable for the conduct and policies created on and for that parcel of land."

The Court below apparently reasons that this rather dramatic shift in land acquisition procedure and policy causes no legitimate worries for citizens of the State of New York. Appellants disagree.

ii.) INDIAN RESERVATION NOT AN ENCLAVE?

The federal government and the Court below continue to advance the idea that the land in question is part of a "non-disestablished" Indian Reservation (SPA-10,11).

How the Court reaches this desired conclusion is a good example of history taking a back seat to "court precedent." The Court below reasons that since several court cases (*United States v. Boylan*, 265 F.165 (2d Cir. 1920), *Oneida Indian Nation of NY v. Oneida County, NY*, 414 U.S. 661 (1974), *Oneida Indian Nation of New York v. City of Sherrill, NY*, 337 F.3d 139, 165 (2d Cir. 2003)) say there is a federal Oneida Indian reservation somewhere in upstate New York, there must be one. At the heart of this erroneous conclusion is a misinterpretation of the Treaty

of Canandaigua of 1794 coupled with a willful ignorance of the Treaty of Fort Schuyler of 1788.

An honest analysis of the history in this instance clearly establishes what some judges don't want to admit – that sometimes litigants and, therefore, judges get history wrong.

At the 1788 Treaty of Fort Schuyler, the Oneida Indians ceded all their lands to the State of New York. New York State then set apart for their use and occupancy some 250,000 acres until such time as they may want. Specifically in its "First" article, the 1788 Treaty states: "The Oneidas do cede and grant all their lands to the people of the State of New York forever." In the "Second" article, New York set apart for the Oneidas a tract from "the said ceded lands" that was "reserved for . . . several uses." The effect of this plain and unambiguous treaty language was to convey all of the Oneidas' land to New York and thereby extinguish aboriginal title. (See *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203-207 (2005) for a rather extensive historical overview) (A-43, 44). For an even more and complete review of the history of this era, see *Tribes and the American Constitution* by Francis G. Hutchins (ISBN 0-935100-07-5), 2000, pp.107-167).

Then, in 1794, the federal government acknowledged that the State of New York had an existing pre-Constitutional treaty with the Oneidas. This treaty, the

Treaty of Canandaigua, in no way created out of thin air any federal reservation. There is no language that suggests this; there is no subsequent history to support this; there is no intellectually honest reason to believe this. However, the Court below accepts this: "[T]he land 'acknowledged' as 'reserved to the Oneida' in the Treaty of Canandaigua was under the jurisdiction of federal law and not state law." (SPA-11).

The Court below looks only to cherry picked case history (*United States v. Boylan*, 265 F. 165 (2d Cir. 1920), *Oneida Indian Nation v. City of Sherrill,* 337 F.3d 139, 165, *Oneida II*, 414 U.S. 661,667 (1974)) upon which to make such a monumental decision and error (SPA-11). This is the nature of lower federal courts, to be sure. It is, therefore, the necessary and proper role of appellate courts to look not only to prior cherry picked court history, but also to a more extensively researched and intellectually honest treatment of actual and real history, not that which by accident or the limitations of litigants makes its way into court controversies. (See Francis G.Hutchins, above (A-45), *Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm'n, 373, 385 (1978) (A-45), *A Revisionist History of Indian Country* by Joseph D. Matal Alaska Law Review, Vol. 14:2, pp. 283-351 (A-185-253). See also *New York Indians v. United States*, 40 Ct. Cl. 448 (1905), *New York Indians v. U.S.* , 170 U.S. 614 (1898).

An intellectually honest conclusion determines that there is no "dis-established federal Indian reservation" anywhere in New York State, despite the very strong desire to impose this false reality on the landscape. If it is true that there is no federal land 'hook' upon which to hang the current case, then the only argument available to the Defendants is to promote a very elastic definition of the Indian Commerce Clause.

In fact, what this attempted land acquisition does is to create a de-facto federal enclave. The resultant land "in trust" is subject only to remnants of State jurisdiction that the federal government "allows." All meaningful State jurisdiction is ousted. And, since federal policy has been to allow tribes to create and to enforce their own laws on "land in trust," not only does the State have no meaningful jurisdiction, the federal policy has created a situation in which State residents and citizens are subject to a set of laws that they have no representation in creating, reviewing or challenging. To say that the land in "trust" is not really a federal enclave because of some technical reading of prior case history is an affront to both common sense and history as well as an action that holds the Constitution in contempt.

FEDERAL LEGISLATIVE POWER OVER INDIAN AFFAIRS IS NOT PLENARY.

Congress has power to regulate commerce with the Indian tribes, however, that power is neither "exclusive" nor "plenary." It has limits. Here, the federal government is arguing that by relying on 25 U.S.C. § 465 to acquire fee simple title to land "in trust" for an Indian tribe, the federal government ousts the State's jurisdiction to an extent that the federal government determines to be appropriate (ie: not ousting the State completely so as to avoid running afoul of its own contrived Enclaves Clause 'scrutiny', but ousting the State to the degree that the federal government's executive branch agencies (through the CFR) unilaterally determine to be appropriate).

The Defendants below argue, and the Court below agreed, that Congress has "plenary" power over all Indian affairs. The analysis means that Congress, and only Congress, can write any law it chooses to write – regardless of the limits inherent in the Indian Commerce Clause. The Court below cites to several cases in order to attempt to attach legitimacy to the concept that **only** the federal government can 'act' concerning matters of Indian tribal matters: (1) *United States v. Boylan*, 265 F. 165 (2d Cir. 1920); (2) *Oneida Indian Nation*, 337 F.3d 139, 2d Cir. (2003); (3) *Oneida Indian Nation of N.Y. v. Oneida County, N.Y. ("Oneida II")*, 414 U.S. 661 (1974); (4) *United States v. Lara*, 541 U.S. 193, 200 (2004); (5) *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); (6) *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); (7) *Morton v. Mancari*,

417 U.S. 535, 551-52 (1974). (SPA-13). As extensive as this (selectively cited and quoted) recitation of case history is, it no more captures the essence and the history of the relationships between the States, the tribes and the federal government than would be the mere listing of several 2015 makes and models of cars would capture the essence and history of the automobile.

This notion of federal exclusivity, one aspect of what is referred to as "plenary power," of Indian affairs was certainly not generally believed to be true at the time the Constitution was ratified, nor was it recognized by the early Supreme Court. In fact, in early disputes, it was the State that was empowered to "act" and the role of the federal government was merely to grant its "consent" to the State's power to act.

EARLY COURT CASES

In *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1) (1824), a case that is a law school standard, generally is meant to stand for the proposition that the power of the federal government to legislate in the field of "commerce" is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Ibid* at 196. This rather vague language, but language that suggests near total federal power, is red meat for law professors who want to advance an agenda that seems to establish nearly unlimited power to the federal government to legislate in areas that involve any commerce what-so-

ever. This notion, naturally, is absurd. What Chief Justice Marshall said in the ruling itself was this: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." *Ibid*. at 194-195. This means that anything that is entirely within the borders of any one State is the subject for State legislation only. If an Indian tribe is entirely within the borders of one single state, any and all commerce between that tribe and others is subject to the State's legislation, and no other.

In fact, the *Gibbons* controversy arose only because the State had already legislated in a field determined to be a field of commerce (navigation on a waterway). The only reason why *Gibbons v. Ogden* ever became part of Supreme Court folklore in the first place is because two States, New York and New Jersey, had gotten into a jurisdictional fight and there was a federal statute to boot (Second Congress, Session II, February 18, 1793, "An Act for Enrolling and Licensing Ships and Vessels to be Employed in the Coasting Trade and Fisheries, and for Regulating Same.") It is beyond dispute that States could and did legislate in the field of interstate commerce; the role of the federal government was to provide a resolution if those laws conflicted with federal legislation.

In *New York v. Miln*, 36 U.S. 102 (11 Pet. 102) (1837), New York legislation was again before the Supreme Court. Not only did New York, once again, emerge victorious in that New York could certainly legislate in arenas that were also

subject to federal legislation, but in this case, New York's act (which required ships to report on all passengers disembarking) directly affected interstate commerce. It slowed it way down and it added regulatory measures to people engaging in commerce. The Supreme Court recognized that New York could legislate in this fashion under New York's police power, even if that police power affected interstate commerce. Also, the Supreme reaffirmed that passengers (ie: people) were not "commerce" and therefore not the proper subject for federal legislation under the commerce clause. Ibid. at p. 136.

In *Willson v.Blackbird Creek*, 27 U.S. 245 (2 Pet. 245) (1829), a State law (Delaware) had authorized a private company to build a dam inside of the State limits. Said dam was intended to eliminate a health hazard within the State of Delaware. The dam also clearly affected interstate commerce as it completely obliterated a then existing waterway that had been open to interstate travel. The Supreme Court ruled that the State law was valid because it was not legislating on commerce, but rather health. There was no existing federal law that brought this waterway directly under the scope of federal legislation. Therefore, the State law was not in conflict with any federal statute, and was therefore a valid exercise of State sovereignty. Improving a health hazard is not "commerce."

Another early dispute over federal vs. State jurisdiction broke out over land referred to as "Fort Niagara." This dispute became captured in the text of *People*

vs. Godfrey, 17 Johns 225 (1819) in the Supreme Court of Judicature of New York. In this case, a crime took place on land that was for all intents and purposes a national fort. The issue was whether or not the land was ever actually ceded to the national government by the State of New York. It was not. Important to note in that case is the following language of the ruling: "In the treaty of 1783, Great Britain treated with the US, as sovereign and independent. That Treaty contains no words of grant or cession, but merely recognizes the boundaries of this State [i.e.: New York] as an independent State. The Article of Confederation expressly reserve the sovereignty of each State. When Great Britain … surrendered the possession of the Forts which she held within the boundaries of this State, they became, of course, vested in the State." (17 Johns. 225; 1819 NY Lexis 146, 2-3). Central to that case was criminal jurisdiction, but the Court went on to say, "[T]he Indians have never been recognized as the absolute owners of the soil, or as a source of title to lands in this State [New York]. Their right to the use of the lands occupied by them has been admitted. But these very Six Nations of Indians [Haudenosaunee, a.k.a. Iroquois] has before ceded their rights to Great Britain; and so; in truth, they had nothing to grant to the U.S. There can be no source of title to land acknowledged, but what is derived from the State." (17 Johns. 225; 1819 N.Y. Lexis 146, 9).

New York was one of the States in which different categories of tribes existed: tribes that were wholly under New York's ordinary jurisdiction (like the Oneidas) and tribes that were not wholly under New York's ordinary jurisdiction (like the Senecas). This distinction is the subject of a comprehensive study on the differing categories of tribes, called "Against Tribal Fungibility" by Saikrishna Prakash (89 Cornell Law Review 1070, 2003 -2004). Prakash argues that federal judges did make and continue to make errors with respect to Indian tribes and how the Constitution applies to them. In some cases, argues Prakash, Congress may have what is very close to plenary power over tribal affairs (See Id at. P. 1072, citing to tribes that have possessory land-holdings on US property and territories), while having no such power with respect to Indians within State borders (See Id. at p. 1074). Prakash rightly argues that "[g]iven the fact-intensive nature of [each individual case], one simply cannot make blanket claims about the scope of federal power regarding Indian tribes." (See Id. at p. 1073). Yet this is precisely what the Court below does when it makes its brief recitation of case history as noted above. In the Court's dismissive decision, the Court cites only to comparatively recent cases and concludes that Congress has virtually unlimited power to pass laws that result in the federal government acquiring undisputed title to and jurisdiction over land. Case closed.

The case is not closed.

Early in the history of the Union, the Supreme Court wrestled with how title to land passed from tribes to either States or the general government. *Fletcher v. Peck*, 10 U.S. 87 (1810), 6 Cranch 87 was a case that helped establish how Indian title was to be seen when disputes came before the federal Courts that involved the same. Chief Justice Marshall wrote for the majority opinion the following: "The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, … but is not conceived to amount to an alteration of the boundaries of the colony. .. The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by all courts, … is not such as to be absolutely repugnant to seisin in fee on the part of the State." 10 U.S. 87, 142, 143. Justice William Johnson wrote a separate opinion. Johnson acknowledged that Indian tribes were, as Prakash notes, "very various" in nature. "The correctness of this opinion (ie: *Fletcher v. Peck*) will depend on a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the States:" (such as the Oneidas who ceded all their land to the State of New York in 1788) "… others retain a limited sovereignty." *Fletcher v. Peck*, 10 U.S. 87, 146.

This case illustrates how, at the founding, the federal courts, the framers of the Constitution, the various State legislatures and how the general society itself viewed "Indian title" and the relationships between tribes, States and the general government. There was what scholars have dubbed the "roving hunter" theory of Indian title and the "sovereign nation" theory of Indian title. Under the "roving hunter" theory, Indians only had possessory rights to land and could not inherit land or alienate land. As soon as tribes either signed treaties that ceded land rights to the States, "sold" them to the States, or simply stopped occupying any given area of land, any rights what-so-ever combined with all the other legal rights and interests in the land that the State already had, assuming that the State could exercise its ordinary jurisdiction over the land in question, and became fee simple absolute. Under the "sovereign nation" theory, tribes could sell to whomever they wished and what they sold became vested in fee simple absolute to the purchaser for value. (*For a detailed discussion of this topic, see "Tribes and the American Constitution" by Francis G. Hutchins (ISBN 0-935100-07-5, (2000)), p.p. 218-239.)* Chief Justice Marshall attempted to synthesize these competing theories in his famous *Johnson v. McIntosh*, 21 U.S. 543, 8 Wheat. 543 decision.

Marshall rejected both the strict "roving hunter" theory as well as the strict "sovereign nation" theory. *Johnson v. McIntosh* did not over-rule *Fletcher v. Peck*. Rather, *Johnson v. McIntosh* further sculpted what was becoming court made law

concerning Indian land title interests. "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives." *Johnson v. McIntosh*, 21 U.S. 543, 574. "France and Great Britain … settled in the year 1763 … the treaty of Paris. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain … surrendered to France all her pretensions to the country west of the Mississippi. [A]ny after attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France." *Ibid.,* pp. 583-584. So far, this reasoning supports the "roving hunter" theory in that the only interest that tribes ever had in land was that of occupancy, but Marshall also reasoned that Indians didn't lose their occupancy "title" or rights to mere squatters who came along and pushed them out; there was a role for the government to play between the extinguishing of Indian title and the granting of fee simple absolute to the next "owner."

Marshall was not yet finished. "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim to … the proprietary and territorial rights. [T]he powers of government, and the right to soil, … passed

definitively to these States." *Ibid.* p. 584. "All our institutions recognize the absolute title of the Crown [which passed to the States], subject only to the Indian right of occupancy, and recognize the absolute title of the Crown [ie. State] to extinguish that right." *Ibid,* p. 588. The real controversy at the time of *Johnson v. McIntosh* (1823) was whether or not "agriculturalists, merchants, and manufacturers had any right to expel Indian hunters from the land or to contract with Indians to leave the land. Marshall explicitly sidesteps that controversy at *Ibid.*, p. 588. Once Indians abandoned a right, it could be argued that the State's interest merged into fee simple absolute without the need for any formal document to show that occupancy rights have been ceded or waived, but it was the State that had title, not existing squatters or investors , who had purchased land "futures" in the hope that they would acquire title to Indian land when the Indians would abandon some land in favor of less disputed land west of the Mississippi.

STATE POWER OVER INTERNAL INDIAN TRIBES

With the ratification of the Constitution in 1789, all powers to wage war and the treat with tribes passed to the general government, exclusively. This meant that although any given State had the "right" to obtain Indian land holdings and /or occupancy rights, that given State was now powerless to bring about that right by two of the most common ways one entity acquires land rights from another: military conquest and treaty. This explains the flurry of treaties in New York State

in 1788 and early 1789. New York understood that unless all Indian interests in land were firmly secured in the State of New York prior to the adoption and ratification of the U.S. constitution, acquiring such undisputed land rights may be more complicated in the post-ratification era.

Perhaps the best portrayal in the congressional records of the relationship between the tribes and the United States up until 1826 is provided by a debate of March 10, 1826 concerning the Indians in the State of New York. Congressman John Forsyth of Georgia remarked:

> "The situation of the Indian tribes within the United States was known to everyone to be peculiar. The Government of the United States had, from the very beginning, been governed by contradictory principles in its conduct towards them. In some of the States the Indians are considered as part of the population, and are governed by the State laws as dependents or citizens. In other States they seem to be subjected to a mixed authority, consisting in part of the authority of the United States, and partly of that of the State; while in other States, the whole authority over them is usurped by the United States. New York is considered of the second class; the new States and the Territories as forming the third; and all the other States containing the Indians except those blessed with the presence of Creeks and Cherokees, as the first. …
>
> The present inquiry relates to those Indians who are placed under a mixed government, made of that of the United States, and that of the State of New York. (Gales & Seaton's Register of Debates in Congress, March 10, 1826, 19th Congress, 1st Session, "Indians in the State of New York," p. 1598)."

Elaborating on the distinctions between tribes that Prakash acknowledges clearly exist, we see that New York was passing relevant and binding and federally unchallenged legislation regarding the Oneidas in New York's early history. The most compelling example is New York's Act of April 18, 1843 (when New York State was only 66 years old). In that Act, (New York Legislature 1843: 244-245), NY legislated that Oneida Indians could sell land to which they held title to willing purchasers and the land would vest in the purchaser an inalienable estate in fee simple. There was no call for federal oversight, as there had been no call for federal oversight on previous NY State legislative prerogatives. New York had more than concurrent legislative power over the Oneidas; NY had exclusive legislative power over the Oneidas. This power was recognized under the Articles of Confederation, Art. IX.

Here and now, though, it is important for the Defendants to assert that Congress has plenary power, because if Congress has plenary power (defined broadly to mean both exclusive and total power), then Congress may "act" (here, by passing a law codified at 25 U.S.C. § 465) without the "consent" of New York State. Not only has the original power paradigm been turned upside down, but, according to the Defendants, the power paradigm has allegedly vanished altogether! Congress does **not** have and never did have plenary power (neither exclusive nor absolute power) to pass laws that extend federal power beyond the

limits of the Commerce Clause. At the very least, the consent of New York State is necessary before any land can be ceded from New York to the federal government. This is a requirement under Enclaves Clause jurisprudence (explained and argued above) and must be followed here as well. Because 25 U.S.C. § 465 does not acknowledge that a State, such as New York in this case, must grant its consent, 25 U.S.C. § 465 must fail as constitutionally forbidden as applied to this case.

STATE CONSENT FOR FEDERAL ACTION

At the time of the issuance of the ROD on May 20, 2008, the State of New York had not consented to any of its land being taken into trust. In fact, the State of New York actively opposed this land being taken into trust and even initiated an action challenging the Defendants' action in taking the subject land into trust. There is no finding in the amended ROD issued on December 23, 2013 that the State of New York had consented to this land being taken into trust or that its consent is not needed. Therefore, this decision, as amended, cannot be defended on any purported consent of the State of New York to take the subject land into trust. This is because a reviewing court must generally confine itself to the administrative record, as "after-the-fact rationalization for agency action is disfavored." *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81 (2d Cir. 2006). A Court "may not properly affirm an administrative action on grounds different from those considered by the agency." *Forest Watch v. United States Forest Serv.*, 410

F.3d 115 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.").

THE TEXAS EXAMPLE

A clear example of the lack of Congressional plenary power (both exclusive and absolute) over the Indian tribes is the relationship between the State of Texas, Indian tribes within its borders, and the federal government as described by the federal Commissioner of Indian Affairs, Orlando Brown, in his report of November 30, 1849. In his report, he states:

> "Texas, on coming into the Union, retained control and jurisdiction over all her public domain; so that none of the laws or regulations of our (ie: the federal government) Indian system are in force within her (Texas') limits. The department has, therefore, no power to prevent intrusions into the country occupied by the Indians, or any trade or intercourse with them, of however improper a character they may be, or however likely to excite jealousy on the part of the Indians, and collisions and difficulties between them and our citizens."

Texas fashioned itself after the pattern that was in place in New York State, not after the pattern that was in place for "new" States, admitted to the Union by way of enabling acts that granted federal control over existing Indian occupied lands. Supreme Court cases from the years closely proximate to Texas' admission to the Union illustrate a uniformity of opinion about the lack of federal power in "Indian Country" if that "Indian Country" was under State jurisdiction and sovereign control. In *The Kansas Indians*, 72 U.S. 737 (1866), the Supreme Court acknowledged that the Kansas Statehood Act of 1861 provided that the territory reserved to tribes by treaty shall be excepted out of the boundaries (of the State of Kansas) and constitute no part of the State of Kansas. *See* 12 Stat. 126, 127, Chapter 20. In *The Kansas Indians*, federal exclusivity was never questioned as the land that eventually became Kansas was first federal territory and a condition for Statehood was that any lands occupied by Indians would remain under federal jurisdiction, and not under state jurisdiction. No such "provision" was ever in place in New York. For similar decisions, *see Draper v. United States,* 164 U.S. 240 in which the Supreme Court said, "[w]henever, upon admission of a state into the Union, congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words." *Draper* 164 U.S. at 243 quoting *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

RECENT COURT ERRORS

In the arena of "plenary power and concurrent power," The Defendants below and the Court below agree that early court cases ought to be ignored in favor of more recent court cases that establish "judicial precedent" and that allow for the federal government to exercise unchallenged "plenary power" (meaning both exclusive and absolute) over all "Indian affairs." Like in other arenas of law, this preference to rely on SCOTUS cases and decisions made in recent times, while ignoring cases decided closer to the founding of the United States, but which have not been specifically over-ruled, reflects a bias in the federal judiciary in favor of expanding federal power. This practice heaps error upon error. Naturally, if a case from, say, the 1970's is wrongly decided (i.e.: Oneida I, 1974) and represents a corruption of early concepts of concurrent power over Indian activity within the ordinary jurisdiction of the State, then all subsequent decisions that rely on that initial error will also be in error. Both the Defendants herein and the various courts that have looked at the relationships between states, tribes and the federal government have strayed away from the intent of the framers of the US Constitution as well as the express language of the Constitution. They have also and have strayed away from early SCOTUS cases involving these very questions.

Although this danger exists in all areas of law, it is especially dangerous in the arena of "commerce" and Indian Affairs. (See Prentice and Egan (1898) pp. 14., See also, A Revisionist History of Indian County, Joseph D. Matal, Alaska Law Review, Vol. 14:2, pp. 283- 351, (1997)) Court decisions have been all over the spectrum: Early cases (see Matal article and cases cited therein) ruled that Indian matters were entirely State matters UNLESS the tribe held property that straddled two or more states, or unless the tribe held property in what was land claimed by a state, but outside of its "ordinary jurisdiction.," or unless the tribe in question resided on land that was at one point federally owned land (such as the northwest territory or the Louisiana purchase).

Later cases dropped the distinctions raised above and asserted that Indian matters were entirely under the scope of the federal government; ie: the cases cited by the Court below (*U.S. v Lara*, 541 US 193, 200 (2004); *SD v. Yankton Sioux Tribe*, 522 U.S. 329,343 (1998); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 US 535, 551-52 (1974) .), regardless of whether the land in question was always under a state's ordinary jurisdiction or not. It is exclusively these later cases which the current court both cites and upon which it relies to achieve its desired result. Relying on cases that departed from sound principles will only yield more unsound decisions.

This shift was **not** prompted by changing the Constitution or by including the States in the shift away from State control and toward federal control; it was achieved by mere judicial fiat at a time in history when the prevailing elite political consensus was that the best way to handle tribes (or remnants of tribes) would be by federal policy – irrespective of State concerns. (Note here that in the present Court's decision, the Court cites to Felix Cohen's namesake treatise: Handbook of Indian law (decision at p. 2. Felix Cohen was a partisan in the FDR administration who favored and advanced a specific policy agenda regarding federal / tribal matters and is now cited as an unbiased authority in the field; no citations are attributed to earlier scholars or treatises that have superior credentials as unbiased and superior credentials as historically accurate. i.e. Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 2d. Ed. 1836; Paul Lester Ford, ed., Essays on the Constitution of the United States Published During Its Discussion by the People 1787-88 (1892); 2 Indian Affairs: Laws and treaties (Charles J. Kappler, ed., 1904); Prentice and Egan, (1898). This judicially created shift has no constitutional authenticity. Current Courts continue to rely on recent precedent and claim to be bound only by cases that seem to support the desired "results driven" conclusion. Courts today, with the notable exception of the US Supreme Court in *Sherrill*, continue to ignore history and ignore virtually all scholarship prior to Felix Cohen. Only a select few SCOTUS

Justices have attempted to peel back layers of judicial activism and reveal what the original intent of the Constitution was and is. Absent appropriate amendments to that original structure and that original document, the State of New York did have and still does have concurrent power over Indian "commerce" and Indian tribal matters when the tribe's (or remnant of a tribe's) land holdings are wholly within the State of New York, as is the alleged tribal land in question is here.

The Court below is of the opinion that it is in the purview of the federal government as expressed by an Act of Congress to take land into trust – not by way of the Constitutionally permitted Enclaves Clause process, but rather by the mechanism outlined in 25 U.S.C. § 465 and then (or simultaneously) and unilaterally decide just what sort of jurisdiction follows its land grab by means of the executive branch agency and CFR procedures. The Court seems to think that the federal government by way of executive branch agency rule-making can exert exclusive jurisdiction or partial jurisdiction or whatever sort of blended jurisdiction it deems most appropriate under the circumstances of any particular land acquisition. What the Court below has failed to consider in depth is whether or not the **purpose** for allowing this sort of land acquisition on land that has always been State land, (never federal land) under 25 U.S.C. § 465 is Constitutionally valid or not. The proper test is not a self-serving and partial analysis of Enclaves Clause litigation, woven into a case involving 25 U.S.C. § 465; the proper test has to be a

new one. The new test has to determine whether or not 25 U.S.C. § 465, as applied in specific cases, obliterates any limits that the Indian Commerce Clause may have established or not. Relevant factors would be the nature of the land in question and whether or not it was under federal jurisdiction from the beginning or not. Applying 25 U.S.C. § 465 in a "one-size-fits-all" manner that provides no protections to States under any circumstances and effectively renders the language of the Indian Commerce Clause meaningless and puts no limits on Congressional power or on executive branch agencies that have been delegated Congressional power through rule making.

Naturally, if the restrictions built into the Enclaves Clause (such as the requirement that the land to be acquired is to be used for forts, magazines, arsenals, dock-yards and other needful buildings) could be negated or avoided by simply stripping the State of virtually all jurisdiction except for the ability to set speed limits on county roads, then the federal government by and through its executive branch agencies could acquire land without the consent of the State and the Enclaves Clause would be gutted of any meaning or substance. The *Kleppe* Court and the *Pacific Coast Dairy* Court recognized this danger and quelled it. It seems that the Defendants herein and the Court below are attempting to circumvent those earlier precedents.

"REGULATION" OF COMMERCE DOES NOT INCLUDE FEDERAL LAND ACQUISITION

Assuming that, on appeal, the Court agrees that this is not the creation of an "Enclave," then the only issue before the Court is, in this specific controversy, whether or not Appellees acted under 25 U.S.C. § 465 in an unconstitutional manner in violation of the Indian Commerce Clause or is 25 U.S.C. § 465 itself unconstitutional. (See *United States v. John*, 437 US 634,652 (1978) : "the power given to Congress to regulate Commerce with the Indian Tribes cannot provide a basis for federal jurisdiction.").

The United States is acquiring the land in question via 25 U.S.C. § 465, which is now in front of this court and is under question as to its Constitutionality as applied to facts and circumstances herein. That the US by and through its executive branch agencies can extinguish virtually all significant sovereign powers of NYS, yet leave remnants of sovereignty intact, and thus not to be accused of violating the Constitutionally mandated process for acquiring land, while at the same time re-defining land acquisition (or here, all significant land rights acquisition) as being essentially a matter of "regulating" Indian affairs and not land acquisition at all, despite the nomenclature of 25 U.SC. § 465 ("Acquisition of Land, Water Rights or Surface Rights; Appropriation; Title to Lands; Tax Exemption") is an affront to justice and reason.

Once again, the Appellants need to go back to basics and back to the era of the framers and early courts. "Regulation" was a narrowly defined term. In 1824, Chief Justice Marshall defined "regulation" as the power to prescribe the rule by which commerce is to be governed (*See* Gibbons v. Ogden, 22 US (9 Wheat.) 1, 196 (1824) and the commentary above.) Acquiring land has nothing to do with establishing the rules of commerce. Chief Justice Melvin Fuller reiterated this in 1895 (*United States v. E. C. Knight Co.*, 156 U.S. 1, 12. (1895): "The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed." It has been a staple throughout Constitutional analysis that "regulate" means making rules, not acquiring land.

Many scholars, who have done extensive research into this question, have also weighed in on the narrow definition of "regulate." For an expansive treatment of this subject, we turn to Professor Randy Barnett (The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, etc.) (See also Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce, Robert H. Bork and Daniel E. Troy, April 10, 2002, available at http:/www.constitution.org/cmt/belz/lcfl.htm. last visited April 4, 2015). Congress's power to govern certain rules of trade simply cannot translate into a wholesale acquisition of land and the attendant land rights of wide swaths of State land wholly under State jurisdiction. When 25 U.S.C. § 465was being challenged

on non-delegation grounds in South Dakota (*South Dakota v. United States DOI*, 69 F.3d 878), the language of the statute was interpreted to be so broad as to "permit the Secretary [of the DOI] to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be 'for Indians.'" Appellants herein agree that 25 U.S.C. § 465 is a violation of the non-delegation doctrine, but cite this language for an altogether different purpose. Assuming that this "intelligible principle" is a hook substantial enough upon which to hang delegation authority (which appellants believe it is not), it also illustrates how broadly we are now defining certain legal terms. Should this land acquisition be allowed to stand, must we now define "regulation" in such a way as to allow the federal government to possess virtually unlimited power to acquire any interest or asset that any State may have, so long as that interest or asset is acquired as part of a "regulatory scheme" that would benefit "an Indian?"

"COMMERCE" IS NOT DEFINED AS LAND ACQUISITION

Commerce is not defined so broadly as to mean "taking land."

Just as "regulation" cannot mean acquiring land or substantial interests in land, so too must the term "commerce" be limited to exclude acquiring either land

or substantial interests in it. "Commerce initially and originally meant "trade and means of trade."

Randy E. Barnett has written extensively on the definitions of words in early texts and how they are meant to be interpreted today. The two most relevant for this case are "*The Original Meaning of the Commerce Clause,"* 68 U. Chi. L. Rev. 101-147 (2001); "*New Evidence of the Original Meaning of the Commerce Clause,"* 55 Ark. L. Rev. 847-899 (2003). Barnett concludes, succinctly, that commerce is synonymous with trade.

Robert G. Natelson has also written extensively on how "commerce" was defined then and how it should be understood today. See "*The Original Understanding of the Indian Commerce Clause,"* Denver University Law Review, Vol. 85:2, pp. 201-266 (2007). Natelson concludes that "commerce" did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life." Ibid. p. 214-215. Far from what the Defendants want to argue, "commerce" is not broadly defined as "Indian affairs."

Just as Congress has no authority to take land under the guise of "regulating" commerce, neither does Congress have the power to take land under the guise regulating "commerce." No matter which word is emphasized, Congress does not have the Constitutional authority to legislate a process by which land is taken from

a sovereign State and rendered federal land, not subject to State taxing authority, or other State jurisdictional controls. The Supreme Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (A-65) that Congress cannot use the Indian Commerce Clause to infringe on an attribute of State sovereignty embodied in the Constitution. Justice Thomas wrote in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) (A-65) that "[a] straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions – 'commerce' – taking place with established Indian communities – 'tribes.' That power is far from 'plenary.'" *Ibid*. at 2552. To further narrow the scope of the Indian Commerce Clause, Thomas observed, "At the time of the founding, the Clause was understood to reserve to the States general police powers with respect to Indians who were citizens of the several States. The Clause instead conferred on Congress the much narrower power to regulate trade with Indian tribes – that is, Indians who had not been incorporated into the body-politic of any State." *Ibid* at p. 2567.

This land acquisition, which is a de-facto creation of a quasi federal-tribal enclave infringes on the State's sovereignty and far exceeds the definition of "commerce" as contemplated by the Constitutional limit. (See also *Alden v. Maine*, 527 U.S. 706 (1999): "States possess a residuary and inviolable sovereignty." *Ibid.* at p. 715. Also, "The States form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general

authority than the general authority is subject to them, within its own sphere." *Ibid* at p. 714, quoting *The Federalist No. 39*, p. 245 [C. Rossiter, ed. 1961] [James Madison]. What the application of 25 U.S.C. § 465in this case does is to obliterate those spheres mentioned by James Madison and cited in even recent Supreme Court cases. No longer would the State of New York even have a "sphere" of supremacy so long as the BIA and an available entity calling itself an "Indian tribe" can team up and operate to render New York State a mere pawn in a scheme that empowers the federal government and an extra-Constitutional entity to negate the Tenth Amendment, nullify the Indian Commerce Clause of any limits or meaning, and make citizens subject to unchecked and unconstitutional powers.

THE ONEIDA INDIAN NATION OF NEW YORK, AS CURRENTLY REPRESENTED BT ARTHUR RAYMOND HALBRITTER, IS NOT POSITIONED TO RECEIVE ANY FEDRAL BENEFITS WHAT-SO-EVER, INCLUDING THE BENEFIT OF HAVING LAND PUT INTO TRUST FOR THE ONEIDA TRIBE OF INDIANS

The Court below has consistently dodged the nagging question of Mr. Halbritter's role in this controversy. In the most recent expression of this dodging, the Court has said, "[T]he Court lacks subject matter jurisdiction over matters of a tribe's internal governance" (citations omitted) (SPA-17). "The claim is not appropriately presented to BIA in the context of a fee-to-trust determination." (SPA-17). "Plaintiffs lack standing to challenge Halbritter's leadership of OIN

because Plaintiffs – who are not members of OIN – cannot show that the purported illegitimacy of Halbritter's leadership has caused them an 'injury in fact.' (citations omitted) (SPA-17,18).

The Court's handling of this aspect of the case stimulates fundamental questions of fairness, justice, and redress of grievances under our current system of jurisprudence. To anybody who has ever read *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708 (2d Cir. 1998), the plight that Mr. Halbritter has caused to the members of the Oneida tribe is so extensive that the very existence of the tribe itself has been threatened and is now very likely irretrievably lost. The traditional structure of political power being distributed between and amongst various tribal clans and clan-mothers is gone. The traditional balance of power in granting "chief" status to three different leaders simultaneously has been collapsed into one "mens' council," completely dominated by Halbritter allies. This "mens' council" is completely foreign to any traditional Oneida governmental structure and has caused irretrievable damage to the Haudensaunee Confederacy. While the Court may be legally correct in sidestepping this unpopular aspect of the case (Mr. Halbritter's usurpation of the Oneida tribal government and the power that may rest with it), it is none-the-less an aspect of the case that this litigant will not simply ignore because it may not be a "legal winner." This issue goes to the heart

of whether or not Appellees acted at the request of a person who has the requisite authority to make a proper request to take the subject land into trust.

CONCLUSION

This controversy presents an existential threat to our own system of checks and balances, so carefully ironed out in the framing of the Constitution. The federal government is meant to have powers that prevent the States from doing damage to the union. Therefore, as in *Gibbons v. Ogden*, the federal government plays a correct role in preventing any one State from legislating in such a way that another State's commercial welfare is choked off. However, if one State, within its own boundaries, desires to establish an onerous and burdensome tax on any given product, the federal government is not empowered to legislate to force a "better" decision on that State. If the citizens of that State do not act to correct the burdensome tax, then it stays until such time as a majority of citizens in that State decide to change their representatives, who in turn change the law.

In this case at bar, the federal government is using a 1934 Congressional Act, passed with an expressed intent to alleviate poverty amongst landless (or land poor) tribes west of the Mississippi as a vehicle to create a de-facto federal "enclave" in which all meaningful New York State jurisdiction is ousted. And the goal is simply to improve the financial health of an already financially successful venture – the Oneida Indian Nation of New York – an entity clearly not in need of

any land taken into trust in order to generate revenue or do the ever-so politically correct task of "creating jobs."

Should this Court decide in favor of the Defendants and allow this land into trust action to stand, it will have done so at the express expense of the U.S. Constitution and the citizens who have always relied on the balances contained therein to maintain a fair playing field for all. A decision in favor of the Defendants renders the protections in the Indian Commerce Clause of the Constitution null and void and will usher in an era of unprecedented and extra-Constitutional crises. There are no limits to what activity can be "protected" on federal trust land – land that is set aside for a tribe to govern. Presumably any all businesses can locate there and avoid New York's tax burdens, regulatory burdens, environmental protection burdens, etc., etc. And as those businesses thrive, the tax paying businesses that still have to obey the now outmoded laws and taxes of New York State will no doubt die a fairly quick death. It is clear that we will look at a future in which all economic activity will be taking place on parcels of land that will have been taken into "trust" for one of America's 565 tribes – no matter whether that land was ever under federal jurisdiction or not. It is clear that any land not in "federal trust" will suffer disproportionate tax burdens and the owners eventually will be unable to sustain those burdens; State land will be synonymous with waste land and "tribal trust land" will be synonymous with economically

prosperous land, but land that has no rules, no regulations and no protections attached to it. The federal government must be reigned in and only the Court can do it. The Indian Commerce Clause is simply not elastic enough to allow a tribe and the Department of the Interior to team up and eliminate a State's sovereignty simply because those two entities want to.

Dated October 9, 2015
Fayetteville, New York

/S/ David B. Vickers
David B. Vickers, Esq.
Attorney for Appellants Upstate Citizens for Equality, Inc., David Vickers, Richard Tallcot, Scott Peterman and Daniel T. Warren
244 Salt Spring Street
Fayetteville, New York 13066
(315) 637-5130

Certificate of compliance with FRAP 32(a)

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, that the foregoing brief is proportionately spaced, has a typeface of 14 points and contains 11,749 words.

Dated October 9, 2015
Fayetteville, New York

/S/ David B. Vickers

David B. Vickers, Esq.
Attorney for Appellants Upstate Citizens for Equality, Inc., David Vickers, Richard Tallcot, Scott Peterman and Daniel T. Warren
244 Salt Spring Street
Fayetteville, New York 13066
(315) 637-5130

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UPSTATE CITIZENS FOR EQUALITY, INC.; DAVID VICKERS; RICHARD TALLCOT; SCOTT PETERMAN; and DANIEL T. WARREN,

Plaintiffs,

-against-

5:08- cv-0633 (LEK/DEP)

SALLY M. R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior; MICHAEL L. CONNOR, in his official capacity as Deputy Secretary of the Interior; ELIZABETH J. KLEIN, in her official capacity as Associate Deputy Secretary of the Department of the Interior;[1] the UNITED STATES OF AMERICA; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiffs Upstate Citizens for Equality, Inc. ("UCE"), a non-profit corporation; and a number of UCE's officers, Richard Tallcot, Daniel T. Warren, Scott Peterman, and David Vickers (collectively, "Plaintiffs"), commenced this action to challenge a May 20, 2008, Record of Decision issued by Department of the Interior ("DOI") taking over 13,000 acres of land in Central New York into trust for the benefit of the Oneida Indian Nation of New York ("OIN" or the "Nation"). Dkt.

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Sally M. R. Jewell is substituted as Secretary of the Interior; Michael L. Connor is substituted as Deputy Secretary; and Elizabeth J. Klein is substituted as Associate Deputy Secretary.

Nos. 1; 35 ("Complaint"). Presently before the Court is Defendants' Motion for summary judgment. Dkt. Nos. 79 ("Motion"); 79-1 ("Memorandum"). Plaintiffs have filed a Response and Defendants, in turn, have filed a Reply. Dkt. Nos. 80 ("Response"); 81 ("Reply"). For the following reasons, Defendants' Motion is granted.

II. BACKGROUND

A. Legal Framework

The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C.§ 461 *et seq*., was the centerpiece of New Deal Indian policy, which sought to enable tribes "to interact with and adapt to modern society as a governmental unit," and repudiated an era in which federal Indian policy had encouraged cultural assimilation. F. Cohen, Handbook of Indian Law § 1.05, at 81 (Newton ed. 2012). The IRA ended allotment, see General Allotment Act of 1887, 24 Stat. 388, where tribal lands had been broken up and distributed to individual Indians, and instead "facilitat[ed] tribes' acquisition of additional acreage and repurchase of former tribal domains," Handbook of Indian Law § 1.05, at 81.

To that end, § 5 of the IRA empowers the Secretary of the DOI (the "Secretary") to acquire land in trust for Indian tribes, such that the land is exempt from state and local taxation. 25 U.S.C. § 465. A tribe is qualified to have land taken into trust under § 5 if they meet the IRA's definition of "Indian," which includes, *inter alia*, "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction." 25 U.S.C. § 479. DOI has promulgated regulations at 25 C.F.R. Part 151, which establish procedures for the acquisition of land in trust under § 5. These include criteria the Secretary must consider in making an acquisition, depending on whether the acquisition is on-reservation, 25 C.F.R. § 151.10, or off-reservation, id. § 151.11.

B. Factual Background

"OIN is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation," which historically occupied what is now central New York, although the tribe's land holdings and population have fluctuated significantly over time. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 (2005). On April 4, 2005, OIN submitted a request to DOI under § 5 of the IRA requesting that the Secretary acquire approximately 17,370 acres in Madison County and Oneida County, New York into trust status for OIN.[2] Dkt. No. 57-4 ("ROD") at 6. The request comprised properties that were reacquired by OIN in open-market transactions, two centuries after they had last been possessed by the Oneidas. Id. The land is the location of OIN's Turning Stone Resort & Casino ("Turning Stone"), a Class III casino under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*.; various other commercial enterprises, such as gas stations and golf courses; and OIN's government and cultural facilities. ROD at 6. OIN intends to continue existing uses of the land. See id. at 8, 31.

Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*., DOI issued a draft Environmental Impact Statement ("EIS") regarding the proposed fee-to-trust request on November 24, 2006. Id. at 6. The purpose of the proposed action was "to help address the Nation's need for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth." Id. at 8. Public comments were solicited until February 22, 2007, and public hearings were held on December 14, 2006, and February 6, 2008. Id. at 6-7. DOI issued its final EIS on February 22, 2008. Id. at 7.

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[2] For further background on the history of OIN and the events leading to OIN's fee-to-trust request, see generally City of Sherrill, 544 U.S. 197.

In the final EIS, DOI analyzed the environmental and socioeconomic impacts of the proposed action—acquiring the full 17,370 acres requested in trust—and eight reasonable alternatives. Id. at 6-7. On March 20, 2008, DOI issued its decision to accept approximately 13,003.89 acres in trust for the Nation. Id. at 7. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping." Id. at 19. Under the selected alternative, 4,284 of the requested acres would not be placed into trust. Id. The selected lands are centered around Turning Stone in Oneida County and OIN's 32-acre territory in Madison County. Id.

C. Procedural Background

Plaintiffs commenced this action on June 16, 2008, asserting a number of legal challenges under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq*., and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*.[3] The named Defendants are: Sally M. R. Jewell, United States Secretary of the Interior; Michael L. Connor, Deputy Secretary of the Interior; Elizabeth J. Klein, Associate Deputy Secretary of the Interior; the United States of America; and the United States Department of the Interior (collectively, "Defendants").[4] Id. ¶¶ 25-28.

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[3] Several other parties also filed suit challenging the ROD. State of New York, *et al.* v. Salazar, *et al*., No. 6:08-cv-0644; City of Oneida v. Salazar, *et al.*, No. 5:08-cv-0648; Town of Verona, *et al.* v. Salazar, *et al*., No. 6:08-cv-0647; Central New York Fair Business Association, *et al.*, v. Salazar, *et al*., No. 6:08-cv-0660; and Niagra Mohawk Power Corp. v. Kempthorne, *et al*., No. 5:08-cv-0649.

[4] Defendants Philip N. Hogen, chairman of the National Indian Gaming Commission; the National Indian Gaming Commission; and Michael B. Mukasey, Attorney General of the United States were dismissed as Defendants in a Memorandum-Decision and Order dated March 4, 2010. Dkt. No. 49.

Plaintiffs' Complaint raises, *inter alia*, the following claims: (1) Defendants exceeded their statutory authority in deciding to acquire the land into trust under the IRA; (2) that § 5 of the IRA violates the non-delegation doctrine; (3) Defendants acted arbitrarily and capriciously because they failed to apply the appropriate criteria and consider the relevant factors; (4) Defendants' decision to acquire the land into trust was arbitrary and capricious because it was based on the assumption that gambling at Turning Stone was lawful under the IGRA; (5) the operation of Turning Stone violates the statutory procedures mandated by IGRA §§ 2710 and 2719; (6) a 2007 letter determining that DOI would not reconsider its approval of the 1993 gaming compact between OIN and New York State was arbitrary and capricious; and (7) a claim seeking a writ of mandamus, ordering Defendants to carry out their statutory duties. See generally Compl. Plaintiffs subsequently submitted an Amended Complaint, which challenged a separate decision by the General Services Administration on December 30, 2008, to transfer 18 acres from the former Griffiss Air Force Base to DOI to be held in trust for OIN. Dkt. No. 35.

Defendants filed a Motion for partial dismissal of Plaintiffs' claims and a Motion to dismiss Plaintiffs' supplementary claim. Dkt. Nos. 23; 45. On March 4, 2010, the Court granted Defendants' Motions in their entirety. Dkt. No. 49 ("2010 Memorandum-Decision and Order"). The Court dismissed "Plaintiffs' (a) non-delegation claim, (b) IGRA compliance claim, (c) gaming compact claim challenging Defendant Cason's June 13, 2007 letter, (d) claim challenging NGIC's 1994 approval of the gaming compact, and (e) claim seeking to enjoin Defendant officials to take enforcement actions pursuant to the IGRA." Id. at 30-31. The Court also dismissed Plaintiffs' supplementary claim. Id. at 31.

On November 15, 2011, Defendants moved for summary judgment on the remaining claims

in Plaintiffs' Complaint. Dkt. No. 57. On the same date, Plaintiffs filed a letter motion for summary judgment. Dkt. No. 58. A newly central issue raised in Plaintiffs' challenge to the ROD was whether OIN was eligible to have land taken into trust under the IRA in light of the Supreme Court's recent decision in Carcieri v. Salazar, 555 U.S. 379 (2009). In Carcieri, the Supreme Court determined that the word "now" in the definition of "Indian" in the IRA—"all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"—meant the date of the IRA's enactment in 1934. Carcieri, 555 U.S. at 381. Thus, to be eligible to have land taken into trust under the IRA, a tribe must have been under federal jurisdiction in 1934. Since Carcieri had not been addressed in the ROD, the Court issued a Memorandum-Decision and Order dated September 24, 2012, denying all motions for summary judgment across the related cases, and remanding to DOI to establish a record and determine in the first instance whether OIN was under federal jurisdiction in 1934. Dkt. No. 65.

On February 19, 2014, after the parties had an opportunity to submit evidence for DOI to consider, DOI filed an Amendment to the ROD applying Carcieri to OIN, consistent with the Court's remand. Dkt. No. 76-1 ("Opinion"). The Opinion concluded that OIN "was under federal jurisdiction in 1934 because the Oneidas voted in an election called and conducted by the Secretary of the Department of the Interior pursuant to Section 18 of the IRA on June 18, 1936." Id. at 3. The Opinion determined that while the vote alone was sufficient, there were a number of other federal actions which, "either in themselves or taken together," establish that OIN was under federal jurisdiction in 1934. Id.

On March 7, 2014, Defendants again moved for summary judgment on the remaining claims in Plaintiffs' Complaint. Mot.

III. LEGAL STANDARD

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure instructs a court to grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant bears the burden of informing the court of the basis for the motion and of identifying those portions of the record that the movant claims will demonstrate the absence of a genuine issue of a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). If the movant has shown that there is no genuine dispute as to any material fact, the burden shifts to the non-moving party to establish a genuine issue of fact by "citing to particular parts of materials in the record." FED. R. CIV. P. 56(c). This requires the non-moving party to do "more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Corp., 475 U.S. 574, 586 (1986).

"The question whether an agency's decision is arbitrary and capricious . . . is a legal issue," and is thus, "amenable to summary disposition." Noroozi v. Napolitano, 905 F. Supp. 2d 535, 541 (S.D.N.Y. 2012) (quoting Citizens Against Casino Gambling in Erie Cnty. v. Stevens, 945 F. Supp. 2d 391, 399 (W.D.N.Y. 2013)). "When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." State of Conn. v. U.S. Dep't. of Commerce, No. 04-cv-1271, 2007 WL 2349894, at *1 (D. Conn. Aug. 15, 2007) (citing Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001)); see also James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking,

district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.").

B. Administrative Procedure Act

Under the APA, a district court may set aside an agency's findings, conclusions of law, or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In reviewing agency action, [a][c]ourt may not 'substitute its judgment for that of the agency.'" Natural Res. Def. Council v. EPA, 658 F.3d 200, 215 (2d Cir. 2011) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). Rather, a reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). Courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 664, 658 (2007) (internal quotations and citations omitted).

Nevertheless, a reviewing court's "inquiry must be searching and careful." Natural Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 555 (2d Cir. 2009) (internal quotation marks and citations omitted). An agency decision may be deemed arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Mfrs. Ass'n of U.S., Ind. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Yale New Haven Hosp. v. Leavitt, 470 F.3d 71, 79 (2d Cir. 2006).

Further, courts "do not hear cases merely to rubber stamp agency actions. To play that role would be 'tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act.'" Natural Res. Def. Council v. Daley, 209 F.3d 747, 755 (D.C. Cir. 2000) (quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1491 (D.C. Cir. 1995)); see also Islander East Pipeline Co., LLC v. McCarthy, 525 F.3d 141, 151 (2d Cir. 2008) ("This is not to suggest that judicial review of agency action is merely perfunctory. To the contrary, within the prescribed narrow sphere, judicial inquiry must be searching and careful.") (internal quotation marks and citations omitted). In order for an agency's decision to survive judicial review, the agency must have articulated "a rational connection between the facts found and the choice made." Henley v. FDA, 77 F.3d 616, 620 (2d Cir. 1996) (internal quotation marks omitted).

IV. DISCUSSION

Defendants move for summary judgment on the following claims remaining in Plaintiffs' Complaint: (1) DOI lacks authority to create federal land in New York State on the basis of federalism principles; (2) the Indian Commerce Clause does not authorize the removal of land from a state's sovereign control; (3) the IRA does not apply to OIN because the Oneidas voted to reject the Act's application and the IRA only applies to lands that were subject to allotment; (4) OIN's fee-to-trust application was not properly before DOI because Raymond Halbritter ("Halbritter") is not the legitimate leader of OIN; (5) the Bureau of Indian Affairs ("BIA") is institutionally biased in favor of Indian tribes and ignored UCE's comments; (6) DOI incorrectly applied the on-reservation regulations, rather than the off-reservation regulations; and (7) DOI failed to consider the requisite regulatory criteria.

A. Carcieri

The Court first addresses the extent to which Plaintiffs have made a claim premised on Carcieri. Plaintiffs have stated that the Oneidas were under State jurisdiction, Compl. ¶¶ 55-57, and that the Oneidas have only ever had a State reservation, Resp. at 14. Plaintiffs presented these arguments, *inter alia*, to DOI during the remand process. Op. at 39-40. The Court will consider these arguments insofar as they challenge DOI's conclusion that the Oneidas were under federal jurisdiction in 1934.

1. State Jurisdiction and Reservation

Plaintiffs claim that the Oneidas, in the 1788 Treaty of Fort Schuyler, ceded all of their lands to the State of New York and retained only a "state use right reservation." Compl. ¶ 37. Plaintiffs further claim that the Oneidas sold their "possessory interests" to the State from 1795 onward. Resp. at 14. Plaintiffs deny that the 1794 Treaty of Canandaigua, 7 Stat. 44, created a federal reservation, and instead interpret that Treaty as "acknowledg[ing] the state reservation" created in the earlier Treaty of Fort Schuyler. Compl. ¶ 37; Resp. at 14. Based on the foregoing, Plaintiffs claim that the Oneidas have no reservation—State or federal—because they sold any rights they retained to the State. Resp. at 14.

Defendants rejected these arguments that on the ground that the Treaty of Canandaigua created a federal reservation, which has never been disestablished by Congress. Op. at 36-38. Defendants relied on the Second Circuit's holding in Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 337 F.3d 139, 165 (2d Cir. 2003), that the Oneida reservation has not been disestablished, which, as the Court has recognized, remains the law in the Second Circuit, New York v. Salazar, No. 08-cv-644, 2009 WL 3165591, at *8-9 (N.D.N.Y. Sept. 29, 2009) (Kahn, J.).

Defendants also considered related arguments that the Oneidas were under State jurisdiction. Defendants noted "confusion by some federal officials as to the interplay of state authority . . . vis-a-vis federal jurisdiction," Op. at 21, and that management of "Indian affairs had been left to the state," id. at 34. Defendants concluded, however, that any such confusion was belied by the record as a whole. Id. at 21. Defendants again relied on the Second Circuit's holdings in United States v. Boylan, 265 F. 165 (2d Cir. 1920) and Oneida Indian Nation, 337 F.3d 139, which recognized a federal OIN reservation and, implicitly, federal jurisdiction. See Op. at 18-19 ("State laws cannot change the status of either a federal reservation or a federally recognized tribe.").

The Court again acknowledges binding Second Circuit precedent that there is a federal OIN reservation that has not been disestablished. See Oneida Indian Nation, 337 F.3d at 165. Plaintiffs' argument that the Oneidas have remained under State jurisdiction, resp. at 14, fails because the Supreme Court determined in Oneida Indian Nation of N.Y. v. Oneida Cnty., N.Y., 414 U.S. 661 (1974) ("Oneida II"), that "[o]nce the United States was organized and the Constitution adopted, . . . tribal rights [of occupancy] to Indian lands became the exclusive province of the federal law," id. at 667. "The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian Tribes, including the Oneidas." Id. Thus, it follows from Oneida II that the land "acknowledged" as "reserved to the Oneida" in the Treaty of Canandaigua was under the jurisdiction of federal law, and not state law. See id. at 670-71; see also Boylan, 265 F.3d at 171 ("[T]he exclusive federal jurisdiction over the [Oneidas] is in the federal government . . . even though the state of New York has legislated.").

2. Plaintiffs' Other Comments

Plaintiffs made several other comments during the remand regarding the lineage of OIN. First, Plaintiffs claimed that the Oneidas had ceased to exist as a tribe by 1934. Op. at 39. Defendants considered the "Reeves Report," which was prepared by the Chief Counsel in the Office for Indian Affairs in 1914, and documented the "absence" of the Oneidas in New York State. Id. at 33. Defendants, however, concluded that the Reeves Report was "not an accurate representation of the Oneidas' status in 1934." Id. Defendants found that statements from other DOI officials and federal actions—including the lawsuit the United States brought on the Oneidas' behalf in Boylan—were better evidence of the official Department view. Id. at 34. Judgments regarding a tribe's existence is a matter that is squarely in BIA's expertise, see, e.g., United Tribe of Shawnee Indians v. United States, 253 F.3d 543 (10th Cir. 2001), and the Court finds that Defendants reasonably weighed the conflicting evidence.

Plaintiffs also argued that the tribe the government recognized "may have been the Oneida Tribe of Wisconsin." Op. at 39. This assertion, however, is contradicted by all the evidence considered by Defendants, which concerns the Oneida groups in New York and their relations with the federal government. See, e.g., Op. at 34. Finally, Plaintiffs claimed that "there is no legitimate link between the Oneida Indian Nation of New York and the entity currently enjoying BIA recognition." Id. at 39 (quotation marks omitted). This argument also fails to state a claim against DOI's conclusion the Oneidas were under federal jurisdiction in 1934 because "the United States (including the Department) has officially recognized the OIN as a successor in interest to the historic Oneida Nation since treaty times." Id. at 25 n.168.

B. Plaintiffs' Constitutional Arguments

In their Response, Plaintiffs broadly attack the constitutionality of the § 5 fee-to-trust

procedure. Resp. Specifically, Plaintiffs contend that § 5 violates principles of federalism implicit in the Constitution and exceeds Congress's authority under the Indian Commerce Clause. Resp. at 7-9. Plaintiffs are effectively making an argument under the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. A Tenth Amendment argument can be viewed as challenging congressional action as either exceeding delegated power, or as having "invade[d] the province of state sovereignty reserved by the Tenth Amendment." New York v. United States, 505 U.S. 144, 155 (1992).

The Court already rejected a Tenth Amendment challenge to § 5 in a related case and does so again here. Town of Verona v. Salazar, No. 08-cv-647, 2009 WL 3165556, at *2-4 (N.D.N.Y. Sept. 29, 2009) (Kahn, J.). Section 5 represents a valid exercise of congressional authority pursuant to the Indian Commerce Clause, which grants Congress the power "[t]o regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has consistently interpreted Congress' authority to legislate in matters involving Indian affairs broadly. See, e.g., United States v. Lara, 541 U.S. 193, 200 (2004) (describing Congress' powers to legislate with respect to Indian matters as "plenary and exclusive"); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]") (citing Morton v. Mancari, 417 U.S. 535, 551-52 (1974)). Plaintiffs argue that the Indian Commerce Clause has limits, in the same way that the Interstate Commerce Clause has limits. See United States v. Lopez, 514 U.S. 549 (1995). However,

Plaintiffs' lone citation is a Justice Thomas concurrence. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2565-71 (2013) (Thomas, J., concurring). Given Congress' plenary authority in matters involving Indian affairs, the Court finds that the Secretary's determination to acquire land into trust for OIN pursuant to § 5 is a valid exercise of the power delegated Congress by the Constitution.

The case law Plaintiffs cite suggesting that the federal acquisition of sovereign state land offends principles of federalism is unavailing. Resp. at 7-8 (citing Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009); Idaho v. United States, 533 U.S. 262 (2001); Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941)). None of the cited cases involve § 5 of the IRA. Rather, the cited cases involve land bestowed to a state at its admission to the union and later congressional action inconsistent with state sovereignty over those lands. Hawaii, 556 U.S. at 176 (finding that interpretation of congressional resolution would raise "grave constitutional concerns" where it would "cloud" Hawaii's title to sovereign lands three decades after Hawaii's admission to union); Idaho, 552 U.S. at 280 n.9 ("Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State.") (quotation omitted). The Secretary's acquisition of lands into trust within the OIN reservation is clearly a different situation. It is well established that trust acquisition does not negate state authority. Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."). Thus, the Secretary's § 5 trust acquisition on behalf of OIN does not interfere with state sovereignty so as to create the "grave constitutional concerns" found by the Hawaii Court, 556 U.S. at 176.

The Court also notes Plaintiffs' Guarantee Clause argument. Resp. at 8-9. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican

Form of Government." U.S. CONST. art. 4, § 4, cl. 1. Plaintiffs appear to claim that the Guarantee Clause is violated because the trust acquisition deprives the Oneida Indians of a republican form of government since the leadership of Halbritter "is of a non-democratic and decidedly non-republican nature." Resp. at 9. This claim fails in the first instance because it is doubtful whether the Guarantee Clause is justiciable. New York, 505 U.S. at 184 ("In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."); see also Cnty. of Charles Mix v. U.S. Dep't of Interior, 799 F. Supp. 2d 1027, 1037-38 (D.S.D. 2011) (finding Guarantee Clause challenge to trust acquisition nonjusticiable). Assuming, *arguendo*, that the claim is justiciable, Plaintiffs have not alleged that any "State" is deprived of a republican form of government, see New York, 505 U.S. at 144, nor do Plaintiffs—not being members of OIN—have standing to raise a claim regarding the nature of OIN's government, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

C. Application of the IRA to the Oneidas

Plaintiffs summarily assert that the IRA does not apply to OIN because: (1) OIN voted in 1936 to reject the application of the Act under § 18 and (2) the IRA only applies on lands that were subject to allotment. Compl. ¶¶ 136-37. The first argument fails because Congress in the Indian Land Consolidation Act ("ILCA"), 96 Stat. 2517, extended the benefits of the IRA to tribes that had initially opted out of the Act by a § 18 vote. Section 2202 of the ILCA provides that "[t]he provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title." 25 U.S.C. § 2202. In a related argument, Plaintiffs claim that OIN does not meet the definition of "tribe" in the ILCA, because that definition is limited to tribes for which the United States has held land in trust. Compl. ¶ 59. The Court rejected this argument in two

related cases and does so again here. See New York v. Salazar, 2009 WL 3165591, at *13-15; Town of Verona, 2009 WL 3165556, at *9-11. Similarly, the Court has also already rejected the argument that the IRA is limited to lands that were subject to allotment in related cases and does so again here. City of Oneida, N.Y. v. Salazar, No. 08-cv-0648, 2009 WL 3055274, at *5 (N.D.N.Y. Sept. 21, 2009) (Kahn, J.).

D. State Consent

In group of arguments, Plaintiffs claim that State consent is necessary in order for the United States to acquire land within the State. Compl. ¶¶ 119, 142, 145. Plaintiffs' claim appears to be premised on the Enclave Clause, which provides that Congress may "exercise . . . 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." U.S. CONST. art. 1, § 8, cl. 17. Courts, however, including this Court, have rejected Enclave Clause challenges to § 5 trust acquisitions. See Carcieri v. Kempthorne, 497 F.3d 15, 40 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 379; Town of Verona, 2009 WL 3165556, at *3. As explained above, the federal government does not exercise exclusive jurisdiction over land held in trust on behalf of a tribe. Nevada, 533 U.S. at 361; see also Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930) (citing Indian reservation as example of land that is not an enclave).

Plaintiffs further argue that New York has only consented to the United States acquiring property in the open market under limited circumstances, which do not include taking land into trust on behalf of a tribe. Compl. ¶ 145 (citing N.Y. STATE LAW § 50). However, § 50 only applies where the State's consent is necessary. State consent is necessary only where the United States will acquire exclusive jurisdiction over the state property. See United States v. Johnson, 994 F.2d 980,

984 (2d Cir. 1993) ("The federal government can only acquire jurisdiction over property [within a state] . . . if both state and federal governments agree to the transfer."). Thus, for the same reason Plaintiffs' Enclave Clause claim fails, Plaintiffs' reliance on New York State Law § 50 is also misplaced. See Nevada, 533 U.S. at 361.

E. Plaintiffs' APA Claims

Plaintiffs' third count for relief consists of wide ranging allegations that Defendants' determination was arbitrary and capricious and without observance of procedures required by law under 5 U.S.C. § 706(2). Compl. ¶¶ 158-80.

1. Legitimacy of Halbritter's Leadership of OIN

Plaintiffs claim that Defendants' acquisition of land into trust on behalf of OIN is arbitrary and capricious because the application was presented by Halbritter, as the leader of OIN, when in fact, Halbritter had been removed from that position "on or about May 21, 1995." Compl. ¶ 159. The events Plaintiffs rely on are recounted in Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708, 710 (2d Cir. 1998). Plaintiffs' conclusory claim may be interpreted as either requesting that the Court determine the leadership of OIN, or as challenging BIA's recognition of Halbritter. Insofar as Plaintiffs request the former, the Court lacks subject matter jurisdiction over matters of a tribe's internal governance. See Runs After v. United States, 766 F.2d 347, 352 (8th Cir. 1985). To the extent Plaintiffs challenge BIA's recognition of Halbritter, that claim is appropriately considered in the first instance by BIA. See Shenandoah, 159 F.3d at 712-13 (requiring challenge to BIA's recognition of Halbritter to be first exhausted before BIA); Runs After, 766 F.2d at 352. The claim is not appropriately presented to BIA in the context of a fee-to-trust determination. In addition, Plaintiffs lack standing to challenge Halbritter's leadership of OIN because Plaintiffs—who are not

members of OIN—cannot show that the purported illegitimacy of Halbritter's leadership has caused them an "injury in fact." See Lujan, 504 U.S. at 560.

2. Plaintiffs' Comments and Institutional Bias of BIA

In similar claims, Plaintiffs allege that DOI did not consider their comments and that BIA is generally biased in favor of Indian tribes. Compl. ¶¶ 160-62.

"[A]n agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, . . . stating its response in the final statement." 40 C.F.R. § 1503.4(a). Furthermore, "[t]he agency shall discuss at appropriate points in the final statement any responsible opposing view." Id. § 1502.9. The record demonstrates that DOI considered and responded to Plaintiffs' comments, to the extent that they were relevant. See, e.g., Final EIS, App. M at 291-93, AR010877-79,[5] (UCE comment letter dated December 14, 2006 and BIA responses); Final EIS, App. M at 823-37, AR029681-95 (noting UCE comment letter dated December 27, 2006); ROD, App. B at 223-28, AR005322-27 (UCE comment letters challenging constitutionality of fee-to-trust process). Although "there must be good faith, reasoned analysis in response" to opposing viewpoints, "an agency's obligation to respond to public comment is limited" and "[n]ot every comment need be published in the final EIS." California v. Block, 690 F.2d 753, 773 (9th Cir. 1982) (internal quotation omitted). The Court finds that DOI adequately considered Plaintiffs' comments in the final EIS and ROD. See Final EIS, App. M at 291-93, AR010877-79 (responding to UCE's contentions, *inter alia*, that § 5 of the IRA violates the non-delegation doctrine, that OIN is an "unconstitutional entity," and that the trust acquisition violates state sovereignty).

[5] The administrative record was filed with the Court on disks. Dkt. No. 54.

"The Department of Interior's review of an application to take land in trust is subject to the due process clause and must be unbiased." South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005). However, "a presumption of regularity attaches to the actions of Government agencies," U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001), and the party asserting bias bears the burden of proof, Schweiker v. McClure, 456 U.S. 188, 196 (1982). Plaintiffs' general allegation that BIA "only represents the interests of the Indian tribe" is effectively a claim that the policies established by Congress in the IRA create structural bias in favor of Indians. The Court finds that Congressional polices cited by Plaintiffs—which have been approved by the Supreme Court, e.g., Morton, 417 U.S. at 554-55—are insufficient to establish structural bias. See South Dakota, 401 F. Supp. 2d at 1011 ("Following Congress's statutory policies does not establish structural bias.").

3. On- and Off-Reservation Regulations

DOI has established different regulations applicable to "on" and "off" reservation trust acquisitions. 25 C.F.R. §§ 151.10, 151.11. The off-reservation regulations require the Secretary to give "greater scrutiny to the tribe's justification of anticipated benefits," and "greater weight" to the jurisdictional concerns of local governments. Id. § 151.11(b). Plaintiffs claim that the Secretary incorrectly applied the on-reservation regulations. Compl. ¶¶ 163-65.

An acquisition is considered "on-reservation," when "the tribe is recognized by the United States as having governmental jurisdiction" over the area of land. 25 C.F.R. § 151.2(f). Plaintiffs argue that the Supreme Court's holding in City of Sherrill that OIN "cannot unilaterally reassert sovereign control" over the lands in question means that OIN does not have governmental jurisdiction over those lands. Compl. ¶¶ 163, 167. The City of Sherrill Court, however, clearly

distinguished between questions of right and questions of remedy; its holding was that equitable considerations bar OIN from reasserting sovereign control. See City of Sherrill, 544 U.S. at 213-14. The City of Sherrill Court reserved judgment on whether the Oneidas' reservation still exists, 544 U.S. at 215 n.9, and as the Court has acknowledged, it remains the law in the Second Circuit that the OIN reservation has not been disestablished, see New York, 2009 WL 3165591, at *8-9. Thus, the United States does recognize OIN as having governmental jurisdiction over the land in question, and, accordingly, DOI correctly applied the on-reservation regulations.

4. Regulatory Factors

Plaintiffs allege that DOI did not adequately consider certain of the requisite regulatory criteria under 25 C.F.R. § 151.10.

a. Statutory Authority

Section 151.10(a) requires the Secretary to consider "[t]he existence of statutory authority for the acquisition." Plaintiffs claim that "there is no valid statutory authority for Defendants to take the land into trust." Compl. ¶ 172. This claim is premised on Plaintiffs' constitutional challenges to the IRA, and since the Court has already rejected those challenges, this claim also fails. See also ROD at 33-34 (discussing statutory authority for trust acquisition).

b. OIN's Need for Land

Section 151.10(b) requires the Secretary to consider "[t]he need of the individual Indian or the tribe for additional land." Plaintiffs claim that DOI did not adequately consider OIN's need for the land and that the acquisition will make OIN "wealthy at the expense of the surrounding non-Indian communities." Compl. ¶ 173. DOI did, in fact, consider comments that OIN is a financially secure tribe and would therefore have its needs met by continuing as a private landowner. ROD at

36. DOI noted, however, that "a demonstration of necessity may take into account more than economic need." Id. DOI determined that acquiring the land in trust was important because of the antagonistic relationship between OIN and State and local governments; DOI concluded that so long as OIN is a private landowner, it will continue to face litigation. Id. Acquiring the land in trust would enable OIN to continue existing uses of its lands, and thereby promote tribal self-determination and economic development; it would help "address the Nation's current and near-term needs to permanently reestablish a sovereign homeland for its members." Id.

The Court finds that DOI reasonably weighed OIN's need for the land to be held in trust. See South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 801 (8th Cir. 2005) ("It [is] sufficient for the Department's analysis to express the Tribe's needs and conclude generally that the IRA purposes were served."). DOI adequately responded to Plaintiffs' objection in the ROD.

c. Removal of Land from Local Tax Rolls

Section 151.10(e) requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." Plaintiffs claim that DOI "failed to adequately consider the loss of taxes actually assessed and paid on the property as required." Compl. ¶ 179.

Contrary to Plaintiffs' assertion, DOI thoroughly analyzed the impact of the trust acquisition on the tax rolls of each affected jurisdiction. ROD at 40-55. While finding that § 151.10(e) only required analysis of tax impacts "based on existing circumstances, i.e., taxes actually assessed and paid," and did not require speculation "on the outcome of the pending litigation between the Nation and the Counties over taxes," id. at 41, DOI also evaluated the tax impacts in the event that the Counties do prevail in that tax litigation, id. at 45. Defendants concluded that, "based on taxes

actually assessed and paid," the benefits of the acquisition to OIN outweighed the tax impacts on local governments. Id. at 50. Defendants' analysis further balanced lost tax revenue against the economic and tax benefits produced by OIN's business activities, and found that the net economic impact on almost every jurisdiction was positive, even assuming, *arguendo*, that OIN does not prevail in the ongoing tax litigation. Id. at 49-50. Considering the foregoing, Defendants ultimately concluded that the impact of removing the land from the tax rolls was not significant when balanced with the benefits to OIN. Id. at 50.

The Court finds that this discussion is sufficient to meet DOI's obligation under § 151.10(e) to consider the impact on local tax rolls. Plaintiffs' assertion that DOI did not consider the "loss of taxes actually assessed and paid on the property," is belied by the ROD, which shows that DOI did consider the loss of taxes actually assessed and paid, and took account of the uncertainties regarding the pending tax litigation.

d. Tax Liens

Plaintiffs challenge the ROD's compliance with § 151.13, which requires the Secretary, upon the determination to acquire land into trust, to require "title evidence." If the Secretary discovers any "liens, encumbrances, or infirmities," she may require "the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition." Id.

Given the uncertainty of the pending tax litigation, DOI required OIN "to provide a letter of credit to the United States for the difference between (a) the total taxes and related charges levied on the casino tax lot as of the date of formal acceptance and (b) the amount that the Nation paid or guaranteed through a letter of credit to the taxing jurisdiction." ROD at 54. "The purpose of the letters of credit . . . is to provide assurances that revenues will be paid over to the Counties *if and*

when taxes are judicially determined to be due and owing." Id.

Defendants argue that Plaintiffs do not have standing to challenge DOI's compliance with its title examination provisions. Mot. at 47. The Court agrees. Article III standing requires that a plaintiff has (1) suffered an injury-in-fact, that (2) is caused by the conduct complained, and would be (3) redressed by a favorable decision. Lujan, 504 U.S. at 560-61. Plaintiffs lack standing because they are unable to show that DOI's title examination process caused their injuries. The language of § 151.13 makes clear that title examination is separate from the Secretary's determination to take land into trust; title examination occurs "[*i*]*f* the Secretary determines that he will approve a request for the acquisition of land." 25 C.F.R. § 151.13 (emphasis added). Although title examination occurs prior to final approval action on the acquisition, see id. § 151.12(b), it is not a factor that the Secretary considers in making a trust decision under either § 151.10 or § 151.11. Plaintiffs' alleged injuries are caused by the decision to acquire the land into trust, and not by the title examination procedures. Compl. ¶ 18. Plaintiffs therefore lack standing to challenge DOI's requirement of letters of credit.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion (Dkt. No. 79) for summary judgment on all remaining claims is **GRANTED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: March 26, 2015
Albany, NY

Lawrence E. Kahn
U.S. District Judge

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***** UNITED STATES DISTRICT COURT *****

NORTHERN DISTRICT OF *NEW YORK*

JUDGMENT IN A CIVIL CASE

DOCKET NO: 5:08- cv-0633 (LEK/DEP)

UPSTATE CITIZENS FOR EQUALITY, INC.; DAVID VICKERS; RICHARD TALLCOT; SCOTT PETERMAN; and DANIEL T. WARREN,

Plaintiffs,

-AGAINST-

SALLY M. R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior; MICHAEL L. CONNOR, in his official capacity as Deputy Secretary of the Interior; ELIZABETH J. KLEIN, in her official capacity as Associate Deputy Secretary of the Department of the Interior; the UNITED STATES OF AMERICA; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

____ **JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

XX **DECISION by COURT. This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the Defendants as against the Plaintiffs, in accordance with the MEMORANDUM-DECISION and ORDER of the Honorable Lawrence E. Kahn, U. S. District Judge, dated March 26, 2015.

DATE: March 26, 2015

LAWRENCE K. BAERMAN
CLERK OF THE COURT

Scott A. Snyder
Courtroom Deputy to the
Honorable Lawrence E. Kahn

Federal Rules of Appellate Procedure
Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;
(ii) a United States agency;
(iii) a United States officer or employee sued in an official capacity; or
(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TOWN OF VERONA; TOWN OF VERNON; ABRAHAM ACEE; and ARTHUR STRIFE,

Plaintiffs,

-against- 6:08-CV-647 (LEK/GJD)

KENNETH SALAZAR, in his Official Capacity as United States Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; and MARK FILIP, in his Official Capacity as Attorney General of the United States,

Defendants.

MEMORANDUM-DECISION AND ORDER

Plaintiffs filed this action on June 19, 2008, challenging a May 20, 2008 Record of Decision ("ROD") in which the United States Department of the Interior ("DOI") decided to accept over 13,000 acres of land in central New York into trust for the benefit of the Oneida Indian Nation of New York ("OIN"). See Compl. (Dkt. No. 1). Presently before the Court is Defendants' Motion seeking partial dismissal of Plaintiffs' Complaint. Motion to dismiss (Dkt. No. 10). Also before the Court is Plaintiffs' Motion seeking summary judgment on their second claim. Motion for Sum. Judg. (Dkt. No. 18). For the reasons that follow, Defendants' Motion is granted and Plaintiffs' Motion is denied.

I. BACKGROUND[1]

[1] The above-captioned case is one of several filed in this Court by different plaintiffs raising challenges to various aspects of the DOI's May 20, 2008 Record of Decision. See 5:08-CV-633; 5:08-CV-648; 5:08-CV-649; 6:08-CV-644; 6:08-CV-660. These cases represent only the latest chapter in a long saga of litigation involving the OIN's land claims in New York. For a more

On April 4, 2005, the OIN submitted a fee-to-trust request to the DOI's Bureau of Indian Affairs ("BIA") requesting that the Secretary of the Interior (the "Secretary") take approximately 17,370 acres into trust on behalf of the OIN. ROD at 2, 6 (Dkt. No. 1, Ex. A); see Compl. ¶¶ 38-39. The request included land located in the Towns of Verona and Vernon, New York. Compl. ¶ 1. Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the DOI issued a draft Environmental Impact Statement ("EIS") regarding the proposed fee-to-trust request on November 24, 2006. ROD at 2, 6; Compl. ¶ 44. Public comments were solicited until February 22, 2007, and public hearings were held on December 14, 2006 and February 6, 2007. ROD at 2, 6; Compl. ¶ 45. The DOI issued its final EIS on February 22, 2008. ROD at 2, 7; Compl. ¶ 45. On May 20, 2008, "based on the Department's review of the Draft EIS, the Final EIS, comments received from the public, Federal agencies, State agencies, local governmental entities, and potentially affected Indian tribes, and the applicable statutory and regulatory criteria for acquiring title to lands in trust status[,]" the DOI issued its Determination to acquire approximately 13,003.89 acres in trust for the OIN. ROD at 2.

In their Complaint, Plaintiffs challenge the DOI's May 20, 2008 ROD, alleging violations of, *inter alia*, the Tenth Amendment; the land into trust provision of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 ("Section 465"); and the Indian Gaming Regulatory Act ("IGRA"). See

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detailed historical background of the OIN and this litigation, see, for example, the Supreme Court's opinion in City of Sherill, New York v. Oneida Indian Nation of New York ("Sherill"), 544 U.S. 197 (2005); the Second Circuit's opinion in Oneida Indian Nation of New York v. City of Sherill, New York ("Oneida Indian Nation"), 337 F.3d 139 (2d Cir. 2003) (reversed by the Supreme Court in Sherill); or this Court's opinions in Oneida Indian Nation of New York v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007) and Oneida Indian Nation of New York v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002).

generally Compl. Plaintiffs invoke federal jurisdiction pursuant to, *inter alia*, the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. Id. ¶ 11. Plaintiffs seek a declaratory judgment that the Defendants' actions were illegal, null and void, and a permanent injunction prohibiting implementation of the May 20, 2008 ROD. See id.

On September 22, 2008, Defendants filed the pending Motion of partial dismissal. Dkt. No. 10. On November 18, 2008, Plaintiffs filed the pending Motion seeking summary judgment with respect to their Second Claim. Dkt. No. 18.

II. DEFENDANTS' MOTION TO DISMISS

A. Standard of Review

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When considering a motion to dismiss pursuant to Rule 12(b)(6), a district court must accept the allegations made by the non-moving party as true and "draw all inferences in the light most favorable" to the non-moving party. In re NYSE Specialists Securities Litigation, 503 F.3d 89, 95 (2d Cir. 2007). "The movant's burden is very substantial, as '[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'" Log On America, Inc. v. Promethean Asset Mgmt. L.L.C., 223 F. Supp. 2d 435, 441 (S.D.N.Y. 2001) (quoting Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995) (internal quotation and citations omitted)).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), "[a] case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power

to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing FED. R. CIV. P. 12(b)(1)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." Makarova, 201 F.3d at 113 (citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)). In reviewing a motion to dismiss for lack of subject matter jurisdiction, a court "'must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor.'" Sharkey v. Quarantillo, 541 F.3d 75, 83 (2d Cir. 2008) (quoting Merritt v. Shuttle, Inc., 245 F.3d 182, 186 (2d Cir. 2001)). A defendant's challenge to a plaintiff's constitutional standing to sue is properly brought under Rule 12(b)(1). See Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 89 n.6 (2d Cir. 2006) ("Although we have noted that standing challenges have sometimes been brought under Rule 12(b)(6), as well as Rule 12(b)(1) . . . the proper procedural route is a motion under Rule 12(b)(1).") (internal citations omitted).

B. Tenth Amendment

In their First Claim, Plaintiffs allege that Section 465,[2] as applied, violates the Tenth

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[2] Section 465 provides, in relevant part, that:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> ***
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

Amendment. See Compl. ¶¶ 62-71. Plaintiffs contend that "[p]rinciples of state sovereignty, implicit throughout the Constitution and explicit in the Tenth Amendment," prohibit the federal government from "commandeer[ing] thousands of acres of settled land from the jurisdiction of the State without its consent for the purpose of creating a sovereign Indian enclave." Pls.' Mem. in Opp'n at 14 (Dkt. No. 17). Defendants contend that Plaintiffs lack standing to raise a Tenth Amendment claim, and that Plaintiffs' Tenth Amendment claim fails to state a claim upon which relief can be granted. See Motion to dismiss.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." New York v. United States, 505 U.S. 144, 156 (1992) (citations omitted).

Plaintiffs' Tenth Amendment claim must be dismissed, as Section 465 represents a valid exercise of congressional authority pursuant to the Indian Commerce Clause.[3] Pursuant to the

[3] Plaintiffs' Tenth Amendment claim has been addressed only sparingly by other courts. In Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (en banc) (reversed on other grounds), the State of Rhode Island and associated plaintiffs challenged the DOI's decision to accept a 31-acre parcel of land into trust for an Indian Tribe. The plaintiffs brought numerous statutory and constitutional claims, including a Tenth Amendment challenge. The First Circuit affirmed the District Court's grant of summary judgment for the DOI on all claims. As to the Tenth Amendment claim, the First Circuit held that "[b]ecause Congress has plenary authority to regulate Indian affairs, section 465 of the IRA does not offend the Tenth Amendment." 497 F.3d at 40 (citation omitted). The plaintiffs petitioned for certiori on various grounds, but not on the Tenth Amendment claim. In Carcieri v. Salazar, ___ U.S. ___, 129 S. Ct. 1058 (2009), the Supreme Court reversed the First Circuit on statutory grounds.

Indian Commerce Clause, Congress has the power "[t]o regulate commerce . . . with the Indian tribes[.]" U.S. CONST. art. I, § 8, cl. 3. As the Supreme Court has repeatedly noted, Congress possesses plenary authority to legislate in matters involving Indian affairs. See, e.g., United States v. Lara, 541 U.S. 193, 200 (2004) (describing Congress' powers to legislate in respect to Indian matters as "plenary and exclusive"); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]") (citing Morton v. Mancari, 417 U.S. 535, 551-52 (1974)). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 234 (1985).

Given the Supreme Court's broad interpretation of the Indian Commerce Clause, the Secretary's determination to take land into trust for the OIN pursuant to Section 465 must be read as a valid exercise of the power delegated to Congress by the Constitution. As the Secretary's authority to take land into trust for Indians springs from powers delegated to Congress in Article I, Section 465, as applied herein, does not implicate the Tenth Amendment. See New York, 505 U.S. at 156.

Plaintiffs also cite to the Enclave Clause in support of their Tenth Amendment claim. See Pls.' Mem. in Opp'n at 14. The Enclave Clause provides that Congress has the power "to exercise exclusive Legislation in all Cases . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts . . . and other needful Buildings[.]" U.S. CONST. art. I, § 8, cl. 17. However, the Enclave Clause is not implicated by the DOI's

accepting land into trust pursuant to Section 465. Accepting land into trust does not amount to exclusive federal jurisdiction over the subject land, as would be required for the Enclave Clause to apply. See, e.g., Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.").

Plaintiffs also argue that "New York, as one of the original 13 colonies, stands in a somewhat different position from most other States with respect to this issue of state sovereignty." Pls.' Mem. in Opp'n at 15. However, this argument is without merit, as pursuant to the "'equal footing doctrine,' all States are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States." Minnesota v. Mille Lacs Bank of Chippewa Indians, 526 U.S. 172, 203 (1999) (citing Coyle v. Smith, 221 U.S. 559 (1911)). The authorities cited by Plaintiffs do not support the proposition that the ROD – because it concerns land in one of the original thirteen colonies – runs counter to the Tenth Amendment.

Accordingly, Plaintiffs' Tenth Amendment claim is dismissed.[4]

C. Indian Gaming Regulatory Act and the Legality of Gaming at Turning Stone Casino

In their Third Claim, Plaintiffs allege that the Defendants' decision to take the subject land into trust for the OIN was arbitrary, capricious and an abuse of discretion because, *inter alia*, the

[4] As the Court is granting Defendants' Motion to dismiss Plaintiff's Tenth Amendment claim pursuant to Rule 12(b)(6), the Court need not address Defendants' argument that Plaintiffs lack standing to pursue this claim.

operation of the Turning Stone Casino,[5] a Class III gaming[6] facility, is illegal, and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719 (Section 2719) prohibits gambling on land acquired in trust after IGRA's enactment, and the OIN does not qualify for any of the exceptions to Section 2719. Compl. ¶¶ 96-109. Plaintiffs contend that they "neither assert a claim for relief under IGRA nor request an order terminating the illegal gambling operation there." Pls.' Mem. in Opp'n at 17. Instead, Plaintiffs contend that the alleged illegality of gambling at Turning Stone is an element of Plaintiffs' APA claim seeking an order nullifying the Secretary's decision to take 13,000 acres into trust for the OIN. Id.

Defendants argue that Plaintiffs lack standing to challenge the legality of gaming at Turning Stone. See Motion to dismiss. Defendants also argue that because the Turning Stone Casino is situated within the boundaries of the OIN reservation, the Secretary need not comply with 25 U.S.C. § 2719(b)(1)(A) before taking the subject land into trust. See id.

The Court concludes as a matter of law that to the extent Plaintiffs invoke IGRA or otherwise challenge the legality of gaming at Turning Stone Casino, Plaintiff's claims are without merit and must be dismissed. IGRA establishes the requirements for lawful Class III gaming on Indian lands:

> 1) Class III gaming activities shall be lawful on Indian lands only if such activities are–

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[5] It is undisputed that the ROD includes the land where the Turning Stone Casino is located and that the Turning Stone Casino is located in Verona, New York. Compl. ¶ 13.

[6] Class III gaming is defined in IGRA as "all forms of gaming that are not class I gaming or class II gaming[,]" 25 U.S.C. § 2703(8), and "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 48 (1996).

> (A) authorized by an ordinance or resolution that--
> (I) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> (ii) meets the requirements of subsection (b) of this section, and
> (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d). IGRA defines "Indian lands" as including, *inter alia*, "all lands within the limits of any Indian reservation[.]" 25 U.S.C. § 2703(4)(A).

Plaintiffs contend that the OIN is illegally operating a Class III gaming facility at Turning Stone Casino because the OIN lacks jurisdiction over the land where the casino is located, and there is no valid Tribal-State compact. See 25 U.S.C. § 2710(d). However, in the ROD, the DOI discussed the issue of the legality of gaming at the Turning Stone Casino:

> The State of New York and others questioned whether further State approval of Class III gaming at the Turning Stone Resort & Casino is necessary before the Department may issue this ROD. Since 1993, the Nation has been lawfully conducting Class III gaming at Turning Stone under IGRA. The casino is situated within the Oneida reservation on Indian lands as required by IGRA. See 25 U.S.C. § 2703(4). The casino has been operating pursuant to a gaming compact between the State and the Nation that was approved by the Department in 1993 and that remains in effect. See BIA, Notice of Approved Nation-State Compact, 58 Fed. Reg. 33160 (June 15, 1993). Under the terms of the compact, the Nation exercises "full jurisdiction over and . . . responsibility for Nation Class III gaming operations" at Turning Stone. Nation-State Compact Between the Oneida Indian Nation of New York and the State of New York § 3 (1993); see also id. §§ 5 (law enforcement powers), 12 (protection of health and safety). Thus, no further approvals by the State or the Department are required. . . .

ROD at 8-9. Plaintiffs have failed to show how the alleged illegality of gaming at the Turning Stone Casino pursuant to IGRA would impair the DOI's statutory authority to take

land into trust for the OIN pursuant to Section 465 of the IRA. Moreover, the National Indian Gaming Commission, and not the DOI, is the federal agency tasked with ensuring compliance with IGRA. See 25 U.S.C. §§ 2705, 2713.

Plaintiffs have also failed to show that the ROD failed to comply with Section 2719 of IGRA. Section 2719 provides, in relevant part, that:

> (a) Prohibition on lands acquired in trust by Secretary
>
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless–
>
> > (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
> >
> > * * *
>
> (b) Exceptions
>
> > (1) Subsection (a) of this section will not apply when–
> >
> > > (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
> >
> > * * *
>
> (c) Authority of Secretary not affected
>
> Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

25 U.S.C. § 2719.

Because the Turning Stone Casino is within the boundaries of the OIN reservation, the

procedures required by 25 U.S.C. § 2719(b)(1)(A) do not apply. In Oneida Indian Nation, in a series of consolidated cases, the OIN brought suit against the City of Sherrill and Madison County, New York, alleging that properties once part of the OIN's ancestral land that OIN members had reacquired on the open market were within the OIN reservation and therefore not subject to taxation. The Second Circuit held, *inter alia*, that the OIN reservation, as recognized by the 1794 Treaty of Canandaigua, has never been disestablished, and that therefore the lands were not subject to taxation. 337 F.3d at 160-65, 167; see id. at 165 ("Construing the Buffalo Creek Treaty liberally and resolving, as we must, all ambiguities in the Oneidas' favor, we conclude that neither its text nor the circumstances surrounding its passage and implementation establish a clear congressional purpose to disestablish or diminish the OIN reservation.").

In Sherrill, the Supreme Court reversed and remanded, holding that "'standards of federal Indian Law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." 544 U.S. at 214. The Supreme Court noted how the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks." Sherrill, 544 U.S. at 216-17. However, the Supreme Court noted that it "need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneida's reservation, as Sherrill argues." 544 U.S. at 216 n.9.

Plaintiffs argue that sovereignty is a distinguishing characteristic of an Indian reservation, and that accordingly the OIN reservation must be considered disestablished because the Supreme Court's decision in Sherrill confirmed that the OIN cannot exercise sovereignty over lands

reacquired in fee after over a century of non-tribal ownership. However, the Second Circuit's holding in Oneida Indian Nation that the OIN reservation has not been disestablished remains binding precedent on this Court. In Oneida Indian Nation of New York v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005) (Hurd, J.), Madison County unsuccessfully argued that relying upon the Second Circuit's holding that the Oneida reservation was not disestablished is contrary to the Supreme Court's decision in Sherrill. Judge Hurd concluded that, because the Supreme Court "explicitly declined to decide whether the Second Circuit erred in determining that the reservation was disestablished . . . the Second Circuit holding that the reservation was not disestablished remains undisturbed." Oneida, 401 F. Supp. 2d at 231.

This Court agrees that the Second Circuit's holding remains good law. In Sherrill, the Supreme Court not only expressly declined to address the Second Circuit's determination that the OIN reservation had not been disestablished, but also noted that "'only Congress can divest a reservation of its land and diminish its boundaries.'" 544 U.S. at 216 n.9 (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984) (other citations omitted)); see Solem, 465 U.S. at 470 ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Congress has not divested the OIN of its reservation. Therefore, the Turning Stone Casino is "located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a). Accordingly, the provisions of 25 U.S.C. § 2719(b)(1)(A) do not apply, and Defendants' Motion to dismiss this claim is granted.

D. Attorney General as Defendant

Plaintiffs have named the Attorney General of the United States as a Defendant in this

action. See generally Compl. Defendants move to dismiss the Attorney General from the case, asserting that no claim has been raised against him and that Plaintiffs have shown no waiver of sovereign immunity that permits a suit against him. See Motion to dismiss.

The Court agrees with Defendants that the Attorney General must be dismissed as a party to these proceedings. The Complaint lists the Attorney General as the official who is responsible for "defending the constitutionality of all statutes enacted by Congress that are challenged in actions such as this[,]" Compl. ¶ 10, but includes no direct allegations regarding the Attorney General's conduct. While Plaintiffs cite to 28 U.S.C. § 2403 in support of their inclusion of the Attorney General as a Defendant, that statutory provision does not provide a basis for the Attorney General to be a proper party to this litigation. The provision provides, in relevant part, that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is *not* a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(a) (emphasis added). The provision is inapplicable here as a federal agency and federal officers are already parties to this action. In any event, the provision would not mandate that the Attorney General be named as a party, but only that the court notify the Attorney General of the action, and permit, but not require, the United States to intervene. See id.

As Plaintiffs have not otherwise demonstrated how the Attorney General was sufficiently involved in the challenged action, i.e. a determination by the DOI, to make the Attorney General a proper party to this action, he is dismissed as a Defendant.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see Beard v. Banks, 548 U.S. 521, 529 (2006) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). A court must "'resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.'" Brown v. Henderson, 257 F.3d 246, 251 (2d Cir. 2001) (quoting Cifra v. General Electric Co., 252 F.3d 205, 216 (2d Cir. 2001)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

If the moving party meets its initial burden of demonstrating that no genuine issue of material fact exists for trial, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citations omitted). The nonmovant "must come forth with evidence sufficient to allow a reasonable jury to find in her favor." Brown, 257 F.3d at 251 (citation omitted). The nonmoving party "may not rely merely on allegations or denials in its own pleadings;" bald assertions or conjecture unsupported by evidence are insufficient to overcome a motion for summary judgment. FED. R. CIV. P. 56(e)(2); see also Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir. 1991); Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990).

B. Discussion

Plaintiffs move for summary judgment on their Second Claim on the grounds that there is no statutory authority for the Secretary to take land into trust for the OIN. See generally Mem. in Supp.

(Dkt. No. 18, Attach. 1); Reply (Dkt. No. 34). Specifically, Plaintiffs contend that:

> the Indian Reorganization Act ("IRA"), and, in particular 25 U.S.C. § 465, which the Defendant U.S. Secretary of the Interior has invoked as the sole authority for taking land into trust on behalf of the of the Oneida Indian Nation ("Oneidas"), does not apply to the Oneidas because the IRA, by its very terms, applies only to tribes which affirmatively chose via a tribal election to be subject to its terms. The Oneidas, by Defendants' own admission, specifically elected not to be covered by the IRA. While the Defendants have indicated that the Indian Land Consolidation Act of 1983 ("ILCA") nevertheless extended the reach of the IRA to tribes regardless of any such election, Defendants overlook the limited application to the ILCA. That law applies only to tribes for which the United States Holds land in trust, 25 U.S.C. § 2201(1),[7] and the Oneidas are not such a tribe.

Mem. in Supp. at 4 (internal citations omitted). Defendants dispute Plaintiffs' reading of 25 U.S.C. § 2201(1) ("Section 2201(1)") and contend that land can, in fact, be accepted into trust for the OIN pursuant to Section 465. See generally Defs.' Opp'n to Mot. for Sum. Judg. (Dkt. No. 27). For the following reasons, this Court finds that there are extant issues of fact which preclude the granting of summary judgment on this ground.

i. Voting to Opt-Out of the IRA

Plaintiffs contend that the United States lacks the authority to take land into trust for the OIN pursuant to Section 465 of the IRA because the OIN voted to reject the IRA. Mem. in Supp. at 1. Plaintiffs rely on section 18 of the IRA, enacted as part of the original IRA in 1934 and codified at 25 U.S.C. § 478 ("Section 478"). Id. It provides:

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

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[7] Under Section 2201(1), "Indian tribe" or "tribe" means "any Indian tribe, band, group, pueblo, or community for which, or for members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1).

25 U.S.C. § 478.

In 1935, Congress extended the voting deadline and changed the majority vote requirement from a majority of eligible adults to a majority of those voting, assuming at least thirty percent (30%) of eligible adults voted. See 25 U.S.C. § 478a. A tribe that did not vote, or that did not meet the statutory requirements, did not, under Section 478, reject the IRA. Id. Defendants concede that the OIN opted out of the IRA by tribal vote. See Defs.' Opp'n to Mot. for Sum. Judg. at 2-4. It is, however, irrelevant whether the OIN rejected the IRA,[8] as Congress enacted the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202 ("Section 2202"),[9] to amend or repeal any possible Section 478 trust land disability. See 25 U.S.C. § 2202.

ii. Defining "Tribe" Under 25 U.S.C. § 2201(1)

In the ROD, the DOI invoked Section 2202 as authority for accepting land into trust for the OIN pursuant to Section 465. See ROD at 33-34 ("In the 1983 Indian Land Consolidation Act, 25 U.S.C. § 2202, Congress extended the provisions of Section 5 to all tribes except as otherwise provided under Federal law. Therefore, no statutory limitation on acquiring land in trust is applicable to the Nation's request."); Defs.' Statement of Facts ¶¶ 13-14 (Dkt. No. 27, Attach. 2). Plaintiffs, however, argue that pursuant to the definition section of ILCA, Section 2201, the OIN are not considered a "tribe." Mem. in Supp. at 5-8.

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[8] "The Federal Defendants are aware that the Nation believes that the vote to opt out of the IRA may not have been valid, but for purposes of this motion it is assumed that the ROD is correct on this point. Of course if the Nation is correct, resort to ILCA is not necessary in order to accept land into trust on behalf of the Nation pursuant to the IRA so, as a factual matter, it is immaterial to the ROD." Id. at 2, n. 3.

[9] Section 2202 states that "the provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title . . ." Id.

Under Section 2201(1), "Indian tribe" or "tribe" is defined as "any Indian tribe, band, group, pueblo, or community for which, or for members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). Plaintiffs contend that under Section 2201(1), the meaning of "tribe" is restricted to those tribes for which the United States holds land in trust and urge this Court to adopt this reading. Mem. in Supp. at 7. According to Plaintiffs' reasoning, the "all tribes" provision in Section 2202 would then be restricted to only those entities that already have trust land. See id. The Defendants contest Plaintiffs' reading of the statute. See Defs.' Opp'n to Mot. for Sum. Judg. at 4-19. Defendants argue that the statutory purpose, legislative history, and canons of construction refute Plaintiffs' interpretation. See id. This is an issue of first impression.

A principle purpose of both the IRA and ILCA was to restore Indian economic life through expanding tribal land bases. The IRA was promulgated in 1934 as "[a]n Act to conserve and develop Indian lands and resources." 48 Stat. 984 (1934). "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152-54 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)); see also Morton v. Mancari, 417 U.S. 535, 542 (1974) ("The overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically"). ILCA was subsequently enacted in 1983 to further effectuate this purpose by, *inter alia*, removing the Section 478 disability and expanding the reach of the IRA and Section 465, specifically. See H.R. Rep. No. 97-908, 7 (1982) ("Section 203 [25 U.S.C. § 2202] extends the provisions of section 5 of the Act of June 18, 1834 [i.e., the IRA] to all tribes."). Restricting the definition of "tribe" under Section 2201(1) to only include tribes for which the

United States already holds land in trust would vitiate the very purpose and intent of ILCA.[10] Further, the canons of statutory construction support giving the word "tribe" a less restricted meaning.

The Supreme Court has stated that according to the rule of the last antecedent, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows. . . ." Barnhart v. Thomas, 540 U.S. 20, 26 (2003). In Barnhart, the Court construed a statute providing disability benefits to a claimant if "he is not only unable to do his previous work but cannot . . . engage in another kind of substantial gainful work which exists in the national economy." Id. at 21-22. The question was whether "which exists in the national economy" modifies only the phrase it followed, "another kind of substantial gainful work," or whether it modifies all previous phrases, specifically "his previous work." Id. The Court of Appeals had read

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[10] Even assuming *arguendo* that this Court was incorrect about Congress' intent and purpose of the IRA and ILCA, which it is not, the DOI's interpretation, which is consonant with that of the Defendants, would be entitled to deference. In determining whether to accept an administrative agency's interpretation of a statute that it is tasked with administering, the Court should first inquire whether:

> Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the Court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). As evidenced by the ROD, the DOI's interpretation of Section 2201(1) is consistent with Defendants. See ROD at 33-34. In order to uphold the DOI's interpretation, the court need only find that the DOI's interpretation "is a sufficiently rational one." Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985). Here, Plaintiffs fail to proffer any argument that pushes the DOI's interpretation "over the edge of reasonable interpretation." Whitman, 531 U.S. at 485.

the limiting language to modify all prior phrases. The Supreme Court said that this was in "disregard[]" of the rule of the last antecedent, under which the limitation at the end of the statute applied only to the last antecedent, not to an earlier phrase in the statute. Justice Scalia, writing for a unanimous Court, explained "the error of the Third Circuit's perception" that the limitation at the end of the statute applied to more than the last antecedent:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house--for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both.

Id. at 27-28.

In Barnhart, the Court relied on FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959), which construed a statute defining "invoice" as "a written account, memorandum, list, or catalog . . . transported or delivered to a purchaser, consignee, factor, bailee, correspondence, or agent, or any other person who is engaged in dealing commercially in fur products or furs." The Court of Appeals had interpreted "who is engaged in dealing commercially in fur products or furs" as applying to all prior phrases, such as "purchaser" and "consignee." The Supreme Court reversed, holding that the limitation applied only to the last antecedent, "any other person." The "limiting clause is to be applied only to the last antecedent." 359 U.S. at 389 & n.4; see also United States v. Kerley, 416 F.3d 176, 180 & n.2 (2d Cir. 2005) (in statute defining "support obligation" as "any amount determined under a court order or an order of an administrative process pursuant to the law of a

State or of an Indian tribe," qualifying phrase "pursuant to, etc." applies to last antecedent, "order of an administrative process," and not to earlier antecedent, "court order"). The Court rejects Plaintiffs' position that the last antecedent rule is "ridiculous as applied . . . . [and] totally unavailing."[11] Reply at 3.

Finally, the Supreme Court has also said that "[w]hen we are faced with . . . two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in th[e] Court's Indian jurisprudence: '[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" County of Yakima v. Confederated Tribes, 502 U.S. 251, 269 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)); accord County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). Based on the foregoing discussion, this Court finds that "for which, or for members of which, the United States holds lands in trust" only applies to the last antecedent, "community," and not to the entirety of Section

[11] Further, a feature of, or corollary, to the rule of the last antecedent is the rule of punctuation. It confirms the proper reading of the trust land qualification at the end of Section 2201(1) as applying only to the word "community." "When a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents." Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd, 186 F.3d 210, 215 (2d Cir. 1999) (abrogated on other grounds) (for term defined as "clause in a contract or an arbitration agreement, signed by the parties," modifier applied to all antecedents because it was set off by a comma). Where the comma is not used to set off the modifier, then there is confirmation that the modifier applies only to the last antecedent. See id. at 216 n.1.

Under this rule of punctuation, it would be necessary to insert a comma, as shown below, to read the trust land qualification at the definition's end as applying to "tribe" and the entire series that comes before, rather than as just applying to the last antecedent, "community," i.e., "Indian tribe" or "tribe" means "any Indian tribe, band, group, pueblo, or community ***[,]*** for which, or for the members of which, the United States holds land in trust." Obviously, however, there is no such comma in Section 2201(1). The absence confirms that the trust land qualification modifies only the antecedent to which it is connected, "community."

2201(1).[12] Accordingly, this Court finds for Defendants and denies Plaintiffs' Motion for summary judgment.

IV. CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED, that Defendants' Motions seeking partial dismissal (Dkt. No. 10) is **GRANTED**; and it is further

ORDERED, that the Attorney General is **DISMISSED** as a defendant in the above-captioned action; and it is further

ORDERED, that Plaintiffs' Motion for summary judgment on their Second Claim (Dkt. No. 18) is **DENIED**; and it is further

ORDERED, that the Clerk serve a copy of this Memorandum-Decision and Order on the parties.

IT IS SO ORDERED.

DATED: September 29, 2009
Albany, New York

Lawrence E. Kahn
U.S. District Judge

[12] Plaintiffs also argue that Congress "clearly intended that a tribe is one for which the United States holds land in 'trust,' not one with 'trust or restricted fee' land." Reply at 13. The land in question is land that was accepted into trust by the United States on behalf of the OIN. See generally ROD. Therefore it is irrelevant to the issue at bar whether there is any "basis to read [Section 2201(1)] to include lands that tribe own [sic] subject to a restriction on alienation by operation of law" and the Court will, therefore, reserve judgment. Reply at 14.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TOWN OF VERONA; TOWN OF VERNON; ABRAHAM ACEE; and ARTHUR STRIFE,

Plaintiffs,

-against- 6:08-cv-0647 (LEK/DEP)

SALLY M. R. JEWELL,[1] in her official capacity as United States Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiffs the Town of Verona, the Town of Vernon, Abraham Acee, and Arthur Strife (collectively, "Plaintiffs"), commenced this action to challenge a May 20, 2008, Record of Decision issued by the Department of the Interior ("DOI") acquiring over 13,000 acres of land in Central New York into trust for the benefit of the Oneida Indian Nation of New York ("OIN" or the "Nation"). Dkt. No. 1 ("Complaint") ¶ 1. Presently before the Court are Plaintiffs' Motion for summary judgment and Defendants' Cross-Motion for summary judgment. Dkt. Nos. 64 ("Motion"); 65 ("Cross-Motion"). For the following reasons, Defendants' Motion is granted and Plaintiffs' Motion is denied.

[1] Sally M. R. Jewel, as Secretary of the United States Department of the Interior, was substituted as a defendant for Kenneth L. Salazar on April 8, 2014, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

II. BACKGROUND

A. Legal Framework

The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C.§ 461 *et seq*., was the centerpiece of New Deal Indian policy, which sought to enable tribes "to interact with and adapt to modern society as a governmental unit," and repudiated an era in which federal Indian policy had encouraged cultural assimilation. F. Cohen, Handbook of Indian Law § 1.05, at 81 (Newton ed. 2012). The IRA ended allotment, see General Allotment Act of 1887 ("GAA"), 24 Stat. 388, where tribal lands had been broken up and distributed to individual Indians, and instead "facilitat[ed] tribes' acquisition of additional acreage and repurchase of former tribal domains," Handbook of Indian Law § 1.05, at 81.

To that end, § 5 of the IRA empowers the Secretary of the DOI (the "Secretary") to acquire land in trust for Indian tribes, such that the land is exempt from state and local taxation. 25 U.S.C. § 465. A tribe is qualified to have land taken into trust under § 5 if it meets the IRA's definition of "Indian," which includes, *inter alia*, "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction." Id. § 479. DOI has promulgated regulations at 25 C.F.R. Part 151, which establish procedures for the acquisition of land in trust under § 5. These include criteria the Secretary must consider in making an acquisition, depending on whether the acquisition is on-reservation, 25 C.F.R. § 151.10, or off-reservation, id. § 151.11.

B. Factual Background

"OIN is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation," which historically occupied what is now central New York, although the tribe's land holdings and population have fluctuated significantly over time. City of Sherrill, N.Y. v. Oneida

Indian Nation of N.Y., 544 U.S. 197, 203 (2005). On April 4, 2005, OIN submitted a request to DOI under § 5 of the IRA requesting that the Secretary acquire approximately 17,370 acres in Madison County and Oneida County, New York in trust status for OIN.[2] Dkt. No. 1-1 ("ROD") at 6. The request comprised properties that were reacquired by OIN in open-market transactions, two centuries after they had last been possessed by the Oneidas. Id. The land is the location of OIN's Turning Stone Resort & Casino ("Turning Stone"), a Class III casino under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*; various other commercial enterprises, such as gas stations and golf courses; and OIN's government and cultural facilities. ROD at 6. OIN intends to continue existing uses of the land. See id. at 8, 31.

Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, DOI issued a draft Environmental Impact Statement ("EIS") regarding the proposed fee-to-trust request on November 24, 2006. Id. at 6. The purpose of the proposed action was "to help address the Nation's need for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth." Id. at 8. Public comments were solicited until February 22, 2007, and public hearings were held on December 14, 2006, and February 6, 2008. Id. at 6-7. DOI issued its final EIS on February 22, 2008. Id. at 7.

In the final EIS, DOI analyzed the environmental and socioeconomic impacts of the proposed action—acquiring the full 17,370 acres requested in trust—and eight reasonable alternatives. Id. at 6-7. On March 20, 2008, DOI issued its decision to accept approximately 13,003.89 acres in trust for the Nation. Id. at 7. The selected alternative "reflects the balance of the

[2] For further background on the history of OIN and the events leading to OIN's fee-to-trust request, see generally City of Sherrill, 544 U.S. 197.

current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping." Id. at 19. Under the selected alternative, 4,284 of the requested acres would not be placed into trust. Id. The selected lands are centered around Turning Stone in Oneida County and OIN's 32-acre territory in Madison County. Id. The decision included lands in the Towns of Verona and Vernon, both located in Oneida County. Compl. ¶¶ 1, 4, 5.

C. Procedural Background

Plaintiffs commenced this action on June 19, 2008, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.[3] Compl. ¶ 1. The named Defendants are: Sally M. R. Jewel, United States Secretary of the Interior; DOI; and Mark Filip, in his official capacity as Acting Attorney General of the United States (collectively, "Defendants").

Plaintiffs' Complaint raises the following claims: (1) § 5 of the IRA, as applied to the State of New York, violates the Tenth Amendment; (2) the IRA does not apply to the lands for which OIN requests trust status because the lands were never the subject of allotment under the GAA, OIN was neither federally recognized nor under federal jurisdiction in 1934, and OIN voted not to have the IRA apply to it; and (3) DOI's determination was arbitrary, capricious, an abuse of discretion, and otherwise not accordance with the law because it was based on the erroneous assumption that Turning Stone is legally operated under the IGRA and failed to consider various factors under the

[3] Several other parties also filed suit challenging the ROD. State of New York, *et al.* v. Salazar, *et al.*, No. 6:08-cv-0644; City of Oneida v. Salazar, *et al.*, No. 5:08-cv-0648; Upstate Citizens for Equality, Inc., *et al.* v. United States, *et al.*, No. 5:08-cv-0633; Central New York Fair Business Association, *et al.* v. Salazar, *et al.*, No. 6:08-cv-0660; and Niagra Mohawk Power Corp. v. Kempthorne, *et al.*, No. 5:08-cv-0649.

applicable regulations. See generally id.

On September 22, 2008, Defendants filed a Motion seeking partial dismissal of Plaintiffs' Complaint. Dkt. No. 10. On November 18, 2008, Plaintiffs filed a Motion seeking summary judgment with respect to their second claim. Dkt. No. 18. In a Memorandum-Decision and Order dated September 29, 2009, the Court granted Defendants' Motion—dismissing Plaintiffs' claim under the Tenth Amendment, Plaintiffs' claims related to the IGRA, and all claims against the Attorney General of the United States—and denied Plaintiffs' Motion. Dkt. No. 38 ("2009 Memorandum-Decision and Order").

On November 15, 2011, the parties both moved for summary judgment on the remaining claims in Plaintiffs' Complaint. Dkt. Nos. 46; 47. A newly central issue raised in the case was whether OIN was eligible to have land taken into trust under the IRA in light of the Supreme Court's recent decision in Carcieri v. Salazar, 555 U.S. 379 (2009). In Carcieri, the Supreme Court determined that the word "now" in the definition of "Indian" in the IRA—"all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"—meant the date of the IRA's enactment in 1934. Carcieri, 555 U.S. at 381. Thus, to be eligible to have land taken into trust under the IRA, a tribe must have been under federal jurisdiction in 1934. Since Carcieri had not been addressed in the ROD, the Court issued a Memorandum-Decision and Order dated September 24, 2012, denying all motions for summary judgment across the related cases, and remanding to DOI to establish a record and determine in the first instance whether OIN was under federal jurisdiction in 1934. Dkt. No. 56.

On February 19, 2014, after the parties had an opportunity to submit evidence for DOI to consider, DOI filed an Amendment to the ROD applying Carcieri to OIN, consistent with the

Court's remand. Dkt. No. 61-1 ("Opinion"). The Opinion concluded that OIN "was under federal jurisdiction in 1934 because the Oneidas voted in an election called and conducted by the Secretary of the Department of the Interior pursuant to Section 18 of the IRA on June 18, 1936." Id. at 3. The Opinion determined that while the vote alone was sufficient, there were a number of other federal actions which, "either in themselves or taken together," establish that OIN was under federal jurisdiction in 1934. Id.

III. STANDARD OF REVIEW

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure instructs a court to grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant bears the burden of informing the court of the basis for the motion and of identifying those portions of the record that the movant claims will demonstrate the absence of a genuine issue of a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). If the movant has shown that there is no genuine dispute as to any material fact, the burden shifts to the non-moving party to establish a genuine issue of fact by "citing to particular parts of materials in the record." FED. R. CIV. P. 56(c). This requires the non-moving party to do "more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Corp., 475 U.S. 574, 586 (1986).

"The question whether an agency's decision is arbitrary and capricious . . . is a legal issue," and is thus, "amenable to summary disposition." Noroozi v. Napolitano, 905 F. Supp. 2d 535, 541

(S.D.N.Y. 2012) (quoting Citizens Against Casino Gambling in Erie Cnty. v. Stevens, 945 F. Supp. 2d 391, 399 (W.D.N.Y. 2013)). "When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." State of Conn. v. U.S. Dep't. of Commerce, No. 04-cv-1271, 2007 WL 2349894, at *1 (D. Conn. Aug. 15, 2007) (citing Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001)); see also James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.").

B. Administrative Procedure Act

Under the APA, a district court may set aside an agency's findings, conclusions of law, or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In reviewing agency action, [a][c]ourt may not 'substitute its judgment for that of the agency.'" Natural Res. Def. Council v. EPA, 658 F.3d 200, 215 (2d Cir. 2011) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). Rather, a reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). Courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 664, 658 (2007) (internal quotations and citations omitted).

Nevertheless, a reviewing court's "inquiry must be searching and careful." Natural Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 555 (2d Cir. 2009) (internal quotation marks and citations

omitted). An agency decision may be deemed arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Mfrs. Ass'n of U.S., Ind. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Yale New Haven Hosp. v. Leavitt, 470 F.3d 71, 79 (2d Cir. 2006).

Further, courts "do not hear cases merely to rubber stamp agency actions. To play that role would be 'tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act.'" Natural Res. Def. Council v. Daley, 209 F.3d 747, 755 (D.C. Cir. 2000) (quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1491 (D.C. Cir. 1995)); see also Islander E. Pipeline Co., LLC v. McCarthy, 525 F.3d 141, 151 (2d Cir. 2008) ("This is not to suggest that judicial review of agency action is merely perfunctory. To the contrary, within the prescribed narrow sphere, judicial inquiry must be searching and careful.") (internal quotation marks and citations omitted). In order for an agency's decision to survive judicial review, the agency must have articulated "a rational connection between the facts found and the choice made." Henley v. FDA, 77 F.3d 616, 620 (2d Cir. 1996) (internal quotation marks omitted).

IV. DISCUSSION

Defendants move for summary judgment on the following claims remaining in Plaintiffs' Complaint: (1) OIN is not eligible to have lands taken into trust under the IRA because it was neither federally recognized nor under federal jurisdiction in 1934; (2) the IRA does not apply to the lands OIN has requested be taken into trust because those lands were never subject to allotment; and (3) DOI's determination was arbitrary, capricious, and an abuse of discretion because it failed to

properly consider the requisite criteria. The parties have both moved for summary judgment on Plaintiffs' arbitrary and capricious claim. Dkt. Nos. 64-9 ("Plaintiffs Memorandum") at 3; 65-1 ("Defendants Memorandum") at 12. Defendants have also moved for summary judgment on Plaintiffs' Carcieri and allotment claims. Defs. Mem. at 11-12.

A. Carcieri Claim

Defendants argue that to the extent Plaintiffs make a claim premised on Carcieri, summary judgment is appropriate in light of the Opinion adopted by DOI. Defs. Mem. at 13. Defendants argue that DOI's interpretation of "under federal jurisdiction" and "recognized" are entitled to Chevron deference. Id. Defendants further argue that DOI's determination that the Oneidas were under federal jurisdiction in 1934 is reasonable. Id. Plaintiffs have not briefed the Carcieri issue in either their Response to Defendants' Motion for summary judgment, nor in their own Motion for summary judgment. See generally Dkt. No. 67 ("Plaintiffs Response"); Pls. Mem. Plaintiffs state, however, that they have "preserved" the issue in the Complaint. Pls. Mem. at 2. As stated in the Complaint, the entirety of the claim is that "[u]pon information and belief, OIN was neither Federally recognized nor under Federal jurisdiction in 1934 at the time of the enactment of the IRA." Compl. ¶ 85.

An agency's decision is accorded a "presumption of regularity," Overton Park, 401 U.S. at 416, and the party challenging the decision has the burden of proof, Coal. on W. Valley Nuclear Wastes v. Bodman, 625 F. Supp. 2d 109, 116 (W.D.N.Y. 2007) (quoting Cnty. of Seneca v. Cheney, 12 F.3d 8, 12 (2d Cir. 1994)). Defendants, on remand, determined that the Secretary was authorized to acquire land in trust for the OIN under the IRA because the Oneidas were under federal jurisdiction in 1934. See Op. This determination is presumed to be reasonable absent a showing by

Plaintiffs to the contrary. Plaintiffs have not made any arguments as to why this determination was arbitrary, capricious, or otherwise not in accordance with law, aside from a bald assertion that the Oneidas were not under Federal jurisdiction in 1934. However, a party "must present evidence that the agency did not consider a particular factor; [they] may not simply point to the end result and argue generally that it is incorrect." South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 800 (8th Cir. 2005). In the absence of any argument by Plaintiffs, the Court finds that Plaintiffs have failed to meet their burden of proof, and that to the extent they make a claim premised on Carcieri, summary judgment in favor of Defendants is therefore appropriate.

B. Allotment Claim

Defendants also move for summary judgment on Plaintiffs' claim that the IRA does not apply to the lands which are the subject of the trust application because those lands were never subject to allotment. Defs. Mem. at 23. This argument has already been rejected by the Court in a related case and is rejected here for the same reasons. See City of Oneida v. Salazar, No. 08-cv-0648, 2009 WL 3055274, at *5 (N.D.N.Y. Sept. 21, 2009) (Kahn, J.). First, the IRA is explicit that its application is general. See 25 U.S.C. § 473. Second, the legislative history makes clear that the IRA was intended to apply to New York State. See, e.g., 78 Cong. Rec. S11124, S11125. Accordingly, summary judgment is granted in favor of Defendants on Plaintiffs' claim that the IRA only applies to lands that were subject to allotment.

C. Arbitrary and Capricious Claim

Plaintiffs claim that DOI's determination was arbitrary and capricious because it failed to properly consider the requisite criteria under the applicable regulations. Compl. ¶¶ 101, 103, 107. Specifically, Plaintiffs claim that DOI has not: (1) considered the purposes for which the land will

be used and have rewarded unlawful behavior; (2) taken account of the jurisdictional problems that acquiring the land will create; and (3) considered the impacts of the decision on small business.

1. On-Reservation and Off-Reservation Regulations

As a threshold issue, the parties dispute whether Defendants appropriately applied the on-reservation regulations. Pls. Mem. at 17-19; Dkt. No. 68 ("Defendants Response") at 20-21. Plaintiffs argue that Defendants were required to apply the off-reservation regulations, Pls. Mem. at 18-19, which require the Secretary to give "greater scrutiny to the tribe's justification of anticipated benefits," and "greater weight" to the jurisdictional concerns of local governments, 25 C.F.R. § 151.11(b).

An acquisition is considered "on-reservation," when "the tribe is recognized by the United States as having governmental jurisdiction" over the area of land acquired. 25 C.F.R. § 151.2(f). Plaintiffs argue that the Supreme Court's holding in City of Sherrill that OIN "cannot unilaterally reassert sovereign control" over the lands in question means that OIN does not have governmental jurisdiction over those lands. Pls. Mem. at 18. The City of Sherrill Court, however, clearly distinguished between questions of right and questions of remedy; its holding was that equitable considerations bar OIN from reasserting sovereign control. See City of Sherrill, 544 U.S. at 213-14. The City of Sherrill Court reserved judgment on whether the Oneidas' reservation still exists, 544 U.S. at 215 n.9, and as the Court has acknowledged, it remains the law in the Second Circuit that the OIN reservation has not been disestablished, see Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 337 F.3d 139, 165 (2d Cir. 2003); see also 2009 MDO at 11-12 ("[T]he Second Circuit's holding in Oneida Indian Nation that the OIN reservation has not been disestablished remains binding precedent on this Court."). Therefore, the United States does recognize OIN as having

governmental jurisdiction over the land in question, and, accordingly, Defendants correctly applied the on-reservation regulations.

2. Purposes for which the Land will be Used

25 C.F.R. § 151.10(c) requires the Secretary to consider "[t]he purposes for which the land will be used" in making a fee-to-trust decision. Plaintiffs claim that Defendants' decision to acquire the land in trust "inappropriately rewards unlawful behavior" because OIN's operation of Turning Stone is illegal. Compl. ¶ 98. The Court has already concluded that to the extent Plaintiffs make claims premised on the legality of gaming at Turning Stone, those claims are without merit and must be dismissed. See 2009 MDO. Thus, since Plaintiffs' claim that Defendants did not consider "the purposes for which the land will be used" is premised on the legality of Turning Stone, that claim is dismissed.

3. Jurisdictional Impacts of Acquiring the Land

25 C.F.R. § 151.10(f) requires the Secretary to consider the "[j]urisdictional problems and potential conflicts of land use which may arise" from a trust acquisition. Plaintiffs generally assert that Defendants' determination was arbitrary and capricious because the ROD inadequately considered the negative jurisdictional impacts of the acquisition and ignored alternatives that would have reduced jurisdictional conflicts. Pls. Mem. at 14.

Plaintiffs argue that the acquisition will cause lost tax revenue and complicate Plaintiffs' provision of services. Id. at 10-13. The lost tax revenue, Plaintiffs argue, will strain the ability of local governments to provide services, and will increase the burden on taxpaying landowners. Id. at 11. For example, the Vernon-Verona-Sherrill school district, which educates OIN and non-Indian children alike, will lose an important source of revenue. Id. Plaintiffs assert that the acquisition

will complicate Plaintiffs' provision of services insofar as OIN refuses to participate in local planning processes. Id. at 11-12. For example, in order to provide fire protection services at Turning Stone, the towns have incurred additional expenses through special training and increased insurance costs. Id. at 12. Similarly, the consumption of water at Turning Stone has exceeded permitted levels, which has created difficulties in distributing the cost of system upgrades. Id. at 11-12. Finally, OIN has undertaken numerous projects without participating in the towns' planning, permitting, zoning processes, or complying with local environmental regulations. Id. at 13, 17.

Section 151.10(f) only requires the Secretary to consider potential jurisdictional and land use conflicts; it does not mandate an outcome minimizing jurisdictional problems. South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1009 (D.S.D. 2005) (citing South Dakota v. U.S. Dep't of Interior, 314 F. Supp. 2d 935, 945 (D.S.D. 2004)). The Court finds that Defendants properly considered the jurisdictional concerns raised by Plaintiffs and rationally evaluated such concerns in light of the facts found.

Defendants thoroughly analyzed the impacts of removing the land from State and local tax rolls in the ROD and final EIS.[4] Plaintiffs do not point to specific flaws in Defendants' analysis, but simply refer to the revenue losses Plaintiffs argue they will suffer. Pls. Mem. at 10, 20. Plaintiffs' argument appears to be that Defendants have not properly weighed these losses. The Court finds that Defendants have reasonably considered the impacts of lost tax revenues on local government. Defendants' analysis estimated the tax revenues that would be lost by each affected jurisdiction under various scenarios, given uncertainty about the resolution of ongoing tax litigation. ROD at

[4] The Secretary is required to consider the impacts of removing land from local tax rolls under § 151.10(e), not § 151.10(f).

45-46. Defendants concluded that, "based on taxes actually assessed and paid," the benefits of the acquisition to OIN outweighed the tax impacts on local governments. Id. at 50. Defendants' analysis further balanced lost tax revenue against the economic and tax benefits produced by OIN's business activities, and found that the net economic impact on almost every jurisdiction was positive, even assuming, *arguendo*, that OIN does not prevail in the ongoing tax litigation. Id. at 49-50. Considering the foregoing, Defendants ultimately concluded that the impact of removing the land from the tax rolls was not significant when balanced with the benefits to OIN. Id. at 50.

Defendants similarly addressed Plaintiffs' concerns about the disruptive effects of the trust decision on Plaintiffs' provision of water and fire-protection services and implementation of land use and zoning controls. Plaintiffs again do not point to specific flaws in Defendants' reasoning, but generally allege that Defendants inadequately weighed these concerns. See Pls. Mem. at 11-13. The Court finds that Defendants' discussion of these impacts and the conclusions Defendants reach are reasonable. In response to Plaintiffs' concern about the provision of services, the ROD notes that OIN has entered into agreements with local governments to defray costs of municipal services. ROD at 57. Thus, OIN has provided funds to the Town of Verona Fire Department and participated in the creation of an emergency response plan in the event of a significant fire at Turning Stone. Id. at 58. Likewise, OIN has financed a multi-million dollar water and sewer line, which it conveyed to the Town of Verona, and offered to contribute $10 to $11 million for the development of a new water system in Oneida County. Id. Defendants concluded that these agreements demonstrated OIN's "willingness and ability to cooperate," id. at 57, and Plaintiffs have not presented any evidence that contradicts that conclusion.

Defendants also responded to Plaintiffs' contention that the trust acquisition would disrupt

Plaintiffs' planning and zoning processes. Defendants found that although OIN has not submitted to local zoning processes, OIN has developed its lands in a manner that is generally consistent with local zoning regulations. ROD at 59. Defendants specifically found that OIN's land use in the Town of Vernon and the Town of Verona was generally consistent with those towns' zoning regulations. See Final EIS at 3-542 to 3-544, AR020837-39;[5] Final EIS 3-552 to 3-554, AR020847-49. "In the municipalities where the Nation owns property, approximately 90% of the land usage is agricultural, residential, or vacant." ROD at 59. The most significant non-conforming use is Turning Stone, which Defendants acknowledged, but emphasized was essential to OIN's "self-sufficiency." Id. Defendants concluded that any effect on the ability of local governments to zone consistently would likely be minimal, "[i]n view of the Nation's past and current management and use of its lands." Id. at 21. Plaintiffs argue that Defendants' reliance on OIN's past management practices is a "non-sequitur," but do not elaborate on why it is unreasonable. Mot. at 15; Compl. ¶ 15. Defendants are not, as Plaintiffs suggest, required to speculate about future development that OIN might undertake. See City of Lincoln City v. U.S. Dep't of Interior, 229 F. Supp. 2d 1109, 1123-24 (D. Or. 2002) (denying claim that DOI should have considered possibility that tribe might "substitute some other use in the future").

Plaintiffs also claim that Defendants' conclusion that the trust acquisition will not have a "direct impact" on the natural environment is clearly erroneous because OIN has repeatedly undertaken projects without complying with local environmental regulations. Pls. Mem. at 17. However, the final EIS does not say that the acquisition will not cause environmental impacts, but rather that the change in jurisdiction will not in itself cause environmental impacts. Final EIS at 4-

[5] The administrative record was filed with the Court on disks. Dkt. No. 43.

362, AR021349. Defendants acknowledge that the trust acquisition will have indirect environmental impacts insofar as OIN would no longer be subject to local and State regulations. See ROD at 29. The land, however, would still be subject to Federal law and OIN law. Final EIS at ES-45, AR020195. Defendants again considered OIN's past management of the lands, and finding no significant adverse environmental impacts, concluded the environmental impacts would be insignificant. ROD at 29-30. Plaintiffs have not made any argument that would contradict that conclusion.

Finally, the Court rejects Plaintiffs' contention that Defendants' decision is arbitrary and capricious because the alternative selected will cause more jurisdictional conflicts than other alternatives considered. Pls. Mem. at 15. NEPA is "a procedural statute that mandates a process rather than a particular result." Brodsky v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 113, 118 (2d Cir. 2013) (quoting Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 557 (2d Cir. 2003)). The ROD shows that Defendants adequately considered the various alternatives, and balanced the purpose and need for action with the interests of the State and local governments. Thus, Defendants selected one of the alternatives where jurisdictional impacts would be least conspicuous, because the majority of the properties "form highly contiguous and compact groupings." ROD at 21. Moreover, Defendants determined that those alternatives with fewer jurisdictional impacts would not have met the purpose of providing a land base for OIN. See id. at 21, 30. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping than the Proposed Action." Id. at 19.

In view of the discussion *supra*, the Court finds that Defendants reached a rational decision regarding Plaintiffs' jurisdictional concerns.

4. Economic Impacts of the Trust Acquisition

Plaintiffs claim that the trust acquisition will grant OIN an unfair advantage in allowing it to operate a business in direct competition with local small businesses, without being subject to State and local laws. Compl. ¶¶ 106-07. Plaintiffs fail to state a legally cognizable claim because they are essentially objecting to the fee-to-trust mechanism that Congress established in the IRA to promote tribal self-governance, and not to Defendants' decision in the ROD. Furthermore, Plaintiffs ignore Defendants' discussion of this concern, which notes that "[p]lacement of the lands into trust would not prevent the State from enforcing lawfully applicable sales and excise taxes if in the future it determines to do so." See ROD at 24-25. Thus, to the extent that tribal businesses do enjoy a competitive advantage, it is for the State to decide whether to apply sales and excise taxes to tribal businesses.

5. Summary

Plaintiffs have failed to meet their burden under the APA. The Record demonstrates that Defendants reached a reasonable decision that took account of the applicable regulatory factors. Moreover, Defendants considered and responded to the objections raised by Plaintiffs. Accordingly, the Court finds Defendants' decision to acquire the land in trust was not arbitrary and capricious, and that summary judgment is warranted in favor of Defendants on Plaintiffs' arbitrary and capricious claims.

D. State and Counties Settlement

Plaintiffs argue that the settlement between the State and Oneida and Madison counties on

the one hand, and OIN on the other, represents a changed circumstance that the Court should take into account. Pls. Mem. at 22-24; Pls. Resp. The settlement agreement was approved by the Court in New York v. Salazar, No. 08-cv-644, 2014 WL 841764 (N.D.N.Y. Mar. 4 2014) (Kahn, J.). Plaintiffs have challenged the settlement in New York Supreme Court, Albany County, and now have appealed to the Appellate Division, Third Department. Dkt. Nos. 73-3; 73-4. Plaintiffs specifically argue that the Court should defer ruling on the present summary judgment motions pending resolution of that litigation. Pls. Mem. at 22-24. Plaintiffs further argue that the settlement reveals OIN's intention to submit a new fee-to-trust application, which Defendants must consider in approving OIN's current fee-to-trust application. Pls. Resp.

With respect to Plaintiffs' first argument, the Court finds no reason to defer ruling on the present summary judgment motions on account of challenges to a settlement agreement in a separate proceeding. Plaintiffs do not draw any connection between the settlement agreement and this proceeding.

The Court also rejects Plaintiffs' argument that Defendants must assess the settlement agreement in approving OIN's fee-to-trust application. Under the APA, judicial review is generally subject to the "record rule"; "a court reviewing an agency decision is confined to the administrative record complied by that agency when it made the decision." Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (citing Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)). The settlement agreement is not part of the administrative record— because it was entered five years after the ROD was issued—and therefore will not be considered by the Court.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Plaintiffs' Motion (Dkt. No. 64) for summary judgment is **DENIED**; and it is further

ORDERED, that Defendants' Motion (Dkt. No. 65) for summary judgment on all remaining claims is **GRANTED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: March 26, 2015
Albany, NY

Lawrence E. Kahn
U.S. District Judge

SPA-67

* * * * * *UNITED STATES DISTRICT COURT* * * * * *

NORTHERN **DISTRICT OF** *NEW YORK*

JUDGMENT IN A CIVIL CASE

DOCKET NO: 6:08-cv-0647 (LEK/DEP)

TOWN OF VERONA; TOWN OF VERNON; ABRAHAM ACEE; and ARTHUR STRIFE,

Plaintiffs,

-AGAINST-

SALLY M. R. JEWELL, in her official capacity as United States Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

____ **JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

XX **DECISION by COURT. This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the Defendants as against the Plaintiffs, in accordance with the MEMORANDUM-DECISION and ORDER of the Honorable Lawrence E. Kahn, U. S. District Judge, dated March 26, 2015.

DATE: March 26, 2015

LAWRENCE K. BAERMAN
CLERK OF THE COURT

Scott A. Snyder
Courtroom Deputy to the
Honorable Lawrence E. Kahn