UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION, CITIZENS EQUAL RIGHTS ALLIANCE, DAVID R. TOWNSEND, New York State Assemblyman, MICHAEL J. HENNESSY, Oneida County Legislator, D. CHAD DAVIS, Oneida County Legislator, and MELVIN L. PHILLIPS,

Plaintiffs,

v.

KENNETH L. SALAZAR, individually and in his official capacity as Secretary of the U.S. Department of the Interior; P. LYNN SCARLETT, in her official capacity as Deputy Secretary of the U.S. Department of the Interior; JAMES E. CASON, in his official capacity as Associate Deputy Secretary of the Interior; FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs; JAMES T. KARDATZKE, Eastern Regional Environmental Scientist; and ARTHUR RAYMOND HALBRITTER, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation,

Defendants.

CIVIL ACTION NO.
6:08-cv-00660-LEK-GJD

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL OF AMENDED COMPLAINT

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On May 8, 2009, this Court "so ordered" a stipulation between the parties as to the filing of Plaintiffs Central New York Fair Business Association ("CNYFBA"), Citizens Equal Rights Alliance ("CERA"), and Michael J. Hennessy's Amended Complaint.[1/] The remaining Plaintiffs have not joined in the filing of the Amended Complaint, so as concerns them, the original complaint has not been superseded and the Federal Defendants' motion for dismissal respecting that complaint requires no supplementation.

Plaintiffs seek judicial review of the Department of the Interior's ("DOI") May 20, 2008 decision to accept 13,003.89 acres of land into trust on behalf of the Oneida Indian Nation of New York ("Oneidas" or "Tribe"). Plaintiffs' Amended Complaint also challenges a separate agency action, the December 30, 2008 transfer of approximately 18 acres of excess federal property by the General Services Administration ("GSA") to DOI to be held in trust for the Oneidas. Plaintiffs fail to identify a waiver of sovereign immunity on the part of the United States to challenge this transfer. Nor can they establish standing to invoke this Court's subject matter jurisdiction over the challenge. In any event, the claim should be dismissed as a matter of law if the Court reaches the merits.

As regards the original complaint, the United States moved to dismiss Plaintiffs' constitutional and civil rights claims on September 22, 2008. Specifically, the Federal Defendants sought dismissal of Plaintiffs' claims that the Indian Reorganization Act ("IRA") was unconstitutional because it violated the non-delegation doctrine and offended the Tenth Amendment of the Constitution. See Compl. (Dkt. No. 1) ¶¶ 55-72 (non-delegation claim), ¶¶ 94-100 (Tenth Amendment claim); U.S. Mem. (Dkt. No. 21a) at 6-8 (Tenth Amendment claim),

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[1/] Collectively, this portion of the Plaintiffs are referred to as "CNYFBA" in this brief.

8-12 (non-delegation claim). Those claims appear to have been dropped from CNYFBA's Amended Complaint and are now replaced with a claim alleging that the acceptance of land into trust in New York violates the Separation of Powers doctrine. Amd. Compl. ¶¶ 149-186. Like the other constitutional challenges to DOI's ability to accept land into trust, Plaintiffs allegations fail to state a claim and should be dismissed.

The Federal Defendants also previously moved to dismiss the Fifth, Sixth and Seventh counts of Plantiffs' original complaint – three claims asserting that DOI's action on behalf of the Oneidas constitute racial discrimination. U.S. Mem. at 12-19. Those claims remain in CNYFBA's Amended Complaint and should be dismissed for the reasons set forth in the United States' initial Motion to Dismiss. In addition, CNYFBA has added an eighth count raising another civil rights claim that should be dismissed for the same reason as Plaintiffs' other civil rights claims: because the United States deals with federally recognized Indian tribes on a political – not racial – basis.

In the initial motion to dismiss, the Federal Defendants moved for dismissal of Plaintiffs' claim brought under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, for lack of standing. U.S. Mem. at 19-22. CNYFBA has made its NEPA claim the first count of its Amended Complaint and added some new allegations to it, but nothing in the Amended Complaint changes the fact that Plaintiffs lack standing to raise the claim. Accordingly, the Federal Defendants continue to seek dismissal of the CNYFBA NEPA claim for the reasons set forth in the initial motion to dismiss.[2/]

[2/]The original complaint also contained allegations that appeared to raise a challenge to the Oneidas' Turning Stone casino pursuant to Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719. Compl. ¶¶ 105-106. The Federal Defendants' sought dismissal of

Background: The transfer of 18 acres pursuant to 40 U.S.C. § 523

The relevant background to Plaintiffs' challenge to DOI's May 20, 2008 decision to accept land into trust for the Oneidas has been set forth in the Federal Defendants' brief in support of the Motion for Partial Dismissal of Claims. U.S. Mem. (Dkt. No. 21a) at 2-5. Some Plaintiffs now also challenge the December 30, 2008 transfer of approximately 18 acres of federal property into trust for the benefit of the Oneidas. That action was mandated by 40 U.S.C. § 523. Section 523 "requires the GSA to transfer, without consideration, excess real property located within the reservation of any federally recognized Indian tribe to the Secretary of the Interior, to be held in trust for the benefit and use of the tribe." Shawnee Tribe v. United States, 423 F.3d 1204, 1207 (10th Cir. 2005). Section 523(a) concerns the transfer of federal excess property between federal agencies and requires that:

> The Administrator of General Services shall prescribe procedures necessary to transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation of any group, band, or tribe of Indians that is recognized as eligible for services by the Bureau of Indian Affairs.

Section 523(a). Excess property is defined in the Federal Property and Administrative Services Act ("FPASA") as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. § 102(3).

Section 523 (b)(1), in turn, requires – and thus congressionally authorizes – DOI to hold such land in trust:

> Except as provided in paragraph (2), the Secretary shall hold excess real property

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any IGRA claim in their initial motion to dismiss. U.S. Mem. at 22-25. It does not appear that comparable allegations appear in CNYFBA's Amended Complaint, but to the extent CNYFBA seeks to raise an IGRA challenge, it should be dismissed for the reasons stated in the Federal Defendants' initial motion to dismiss.

> transferred under this section in trust for the benefit and use of the group, band, or tribe of Indians, within whose reservation the excess real property is located.

40 U.S.C. § 523(b)(1).[3/]

In this case, the Department of the Air Force issued a Report of Excess of Real Property concerning 18.195 acres at the Griffiss Air Force Base, Verona Test Site, in the Town of Verona, New York on January 23, 2001. See Attachment 1 (Report of Excess). On May 28, 2002, GSA, by letter, stated that it "hereby transfers the Property to the BIA to be held in trust by the Department of the Interior, for the benefit and use of the Oneidas pursuant to Section 483(a)(2) of the Federal Property and Administrative Services Act of 1949 [now codified at 40 U.S.C. § 523(b)(1)]." Attachment 2 (May 28, 2002 GSA letter). DOI acknowledged custody and accountability for the parcel on December 30, 2008. Attachment 3 (December 30, 2008 DOI acknowledgment letter).

Argument

I. Standard for motions to dismiss.

Federal Rule of Civil Procedure 12(b) enumerates a number of defenses to a claim for relief that a defendant may present by motion. Rule 12(b)(1) provides that a defendant may move for dismissal of a claim based upon "lack of subject-matter jurisdiction" when the district court lacks the statutory or constitutional authority to adjudicate a case. See Fed. R. Civ. P. 12(b)(1). In ruling on such a motion, a court is not confined to the allegations in the complaint, but "may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir.

[3/] Section 523(b)(2) provides special conditions for transfers of excess property in the State of Oklahoma.

1998) (quoting Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991)). The plaintiff has the burden of proving subject matter jurisdiction by a preponderance of the evidence. See Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005).

Rule 12(b)(6) permits a defendant to move for dismissal of a claim based upon the failure of the pleading "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When ruling on a motion made pursuant to this rule, a court must accept as true the material facts alleged in the complaint. See Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994). A court may not dismiss an action unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

2. The Court lacks subject matter jurisdiction over Plaintiffs' challenge to the Section 523 transfer.

a. The United States has not waived its sovereign immunity

The sovereign immunity of the United States bars all suits absent a showing of an express waiver of that immunity. See United States v. Dalm, 494 U.S. 596, 608 (1990) ("Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (internal quotations and citations omitted; ellipsis in original). Prior to 1972, the doctrine of sovereign immunity entirely barred quiet title actions against the United States. Block v. North Dakota, 461 U.S. 273, 280 (1980). In the Quiet Title Act of 1972, 28 U.S.C. § 2409a ("QTA"), Congress for the first time enacted a limited waiver of sovereign

immunity allowing parties to challenge title or real property interests claimed by the United States. Id. at 280, 283-85. In enacting the QTA, Congress intended it to serve as the "exclusive means" for challenging the United States' title to real property. Governor of Kansas v. Kempthorne, 516 F.3d 833, 841 (10th Cir. 2008).

Several types of challenges were excluded from the QTA's waiver of sovereign immunity, including legal challenges that seek to divest, or have the effect of divesting, the United States of its title to "trust or restricted Indian lands." United States v. Mottaz, 476 U.S. 834, 842-43 (1986); Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966, 974-78 (10th Cir. 2005); Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 961-66 (10th Cir. 2004). The QTA provides in relevant part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands*. . . .

28 U.S.C. § 2409a(a) (emphasis added). Based upon this language, courts have recognized that "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." Mottaz, 476 U.S. at 843.

The QTA's legislative history explains Congress' rationale for preserving the United States' immunity to suit over trust or restricted Indian lands.

> The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged the administration against abridging the historic

> relationship between the Federal Government and the Indians without the consent of the Indians.

H.R. Rep. No. 92-1559, at 4556-57 (1972). Thus, "[b]y forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes." Florida v Dept. of Interior, 768 F.2d 1248, 1254-55 (11th Cir. 1985). See also Mottaz, 476 U.S. at 843 n.6 (The "trust or Indian restricted lands" exception was enacted to "prevent the abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands. A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent.").

Plaintiffs challenge the transfer of an 18 acre parcel of land from the GSA to DOI to be held in trust for the benefit of the Oneidas on the ground that the land does not fall within an Indian reservation. Amd. Compl. ¶¶ 158-186. For relief, Plaintiffs ask that the Federal Defendants be enjoined from "taking any action to effectuate or implement the decision[] dated December 30, 2008 to transfer 18 acres into trust." Amd. Compl. Prayer for Relief at ¶ E. Regardless of how Plaintiffs may wish to style their claim, the nature of the relief sought is determinative of whether the QTA bars the suit. Kempthorne, 516 F.3d at 842 ("a court faced with a suit challenging the United States' title to land held in trust for an Indian tribe must focus on the *relief* sought by the plaintiffs") (emphasis in original); Neighbors, 379 F.3d at 965 ("Following the Supreme Court's lead, we focus our attention on how the plaintiff's suit could impact the United States' title to Indian trust land rather than on the type of property interest the plaintiff asserts."); Mottaz, 476 U.S. at 842 (noting that the relief sought by plaintiff confirms

characterization of the suit as one under the QTA).

In this case Plaintiffs' requested relief would have the practical effect of removing the land from trust and depriving the Oneida Indian Nation of New York of beneficial title to the parcel. In a case seeking similar relief – a declaration that acquisition of land into trust was "null and void," the Tenth Circuit held that the relief requested "fall[s] within the scope of suits the Indian trust land exemption in the Quiet Title Act sought to prevent." Neighbors, 379 F.3d at 961-962 (10th Cir. 2004). Because Plaintiffs' challenge targets the status of the land as trust lands held by the United States for the benefit of the Oneidas, this is precisely the kind of suit the Indian lands exclusion of the QTA's waiver of sovereign immunity meant to bar, and the Court should dismiss Plaintiffs' supplemental claims for lack of jurisdiction.

B. Plaintiffs lack standing to raise their claim.

Plaintiffs' Section 523 challenge must also be dismissed for lack of subject matter jurisdiction because they lack standing to challenge the federal government's determination of how to dispose of its own property among its agencies. See Lerner v. Fleet Bank, N.A., 318 F.3d 113, 126 (2d Cir. 2003) ("It is clear that constitutional standing is a jurisdictional prerequisite to suit."). Accordingly, Plaintiffs bear the burden of establishing they have standing to bring their new claim. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009) (plaintiff "bears the burden of showing that he has standing for each type of relief sought"). Standing requires a showing of three elements: (1) "*injury-in-fact*, which is a concrete and particularized harm to a legally protected interest"; (2) "*causation* in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant"; and (3) "*redressability*, or a non-speculative likelihood that the injury can be remedied by the requested relief." W.R. Huff Asset

Management Co. v. Deloitte & Touche, 549 F.3d 100, 106-07 (2d Cir. 2008) (emphasis in original) (internal quotations omitted); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiffs are two non-profit corporations and Mr. Michael J. Hennessy, an Oneida County Legislator. Amd. Compl. ¶¶ 19-21. Mr. Hennessy and the members of the non-profit corporations allegedly own homes and operate businesses in the area of the land to be taken into trust pursuant to DOI's May 20, 2008 decision. Id. It is unclear, however, whether any of Plaintiffs reside near or own a business near the 18 acre parcel that is the subject of their Section 523 claim. Moreover, it is unclear and unestablished how Plaintiffs are injured – or affected in any way at all – by the transfer of federal property from one federal agency to another. Similarly, Plaintiffs fail to allege how the fact that the 18 acre parcel is now held in trust has any impact on themselves. There are no allegations that the eighteen acre parcel is anything other than vacant land. Any claimed injury premised on future development of the land by the Oneida Indian Nation of New York is simply speculative at this point, and such speculation does not suffice to establish an injury for standing purposes. See Lujan, 504 U.S. at 560-61 (1992) (plaintiff alleging standing must have suffered an "injury in fact . . . which is . . . actual or imminent, not conjectural or hypothetical") (internal quotations and citations omitted). Because Plaintiffs have failed to show standing, they have not established an entitlement to judicial review and their challenge to the 18 acre transfer must be dismissed.

3. Plaintiffs' challenge to the Section 523 transfer should be dismissed for failure to state a claim.

Plaintiffs contend 40 U.S.C. § 523 does not apply to the Oneidas because that statute only

addresses transfers of excess federal property into trust where the property lies within an Indian reservation, and the Oneidas have no reservation. Amd. Compl. ¶¶ 158-186. They allege that the Oneidas ceded all their land to New York in the 1788 Treaty of Fort Schuyler and therefore never had a federal Indian reservation. Amd. Compl. ¶ 160. This Court has previously rejected the notion that the so-called 1788 State treaty deprived the Oneidas of all their lands and left them with only a state reservation, explaining that this "interpretation of the Treaty of Ft. Schuyler simply makes no sense [in light of] the Treaty's words, later treaties, the United States treatment of the Oneidas and their lands, and the fact that [New York] later purchased this very land from the Oneidas." Oneida Indian Nation of N.Y. v. New York, 194 F. Supp.2d 104, 140 (N.D.N.Y. 2002).

As the Court pointed out, the "Supreme Court acknowledged the effect of the Ft. Schuyler Treaty when it found that in the Treaty, '[t]he Oneidas retained a reservation of about 300,000 acres." Id. (quoting Oneida County v. Oneida Indian Nation of N.Y., 470 U.S. 226, 231 (1985)) (brackets in original). It is this same reservation that the Second Circuit held has not been disestablished or diminished. See Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139, 159-65 (2d Cir. 2003). Accordingly Plaintiffs' contention that Section 523 cannot apply to the Oneidas because they never had a reservation fails to state a claim in the face of the precedent of this Court, the Second Circuit, and the Supreme Court.

4. CNYFBA's separation of powers count fails to state a claim

CNYFBA's Amended Complaint replaces its Tenth Amendment and non-delegation claim with a new separation of powers claim. CNYFBA alleges that DOI's acceptance of land into trust "violates the separation of powers between the federal branches and between the federal

government and the states known as federalism." Amd. Compl. ¶ 152. The allegation that DOI has violated the separation of powers between federal branches is simply another way of phrasing the non-delegation challenge of the original complaint. And Plaintiffs' new claim fails for the same reasons that the non-delegation argument fails. The allegations regarding the violation of the separation of powers between states and the government rest upon the faulty premise that the Oneidas do not have a reservation in New York, and therefore also fails to state a claim.

Plaintiffs' separation of powers claim alleges that DOI "is subverting the exclusive authority of the Congress pursuant to the Property Clause by attempting to establish sovereign rights in the Oneidas that were not reserved to them before New York attained statehood." Amd. Compl. ¶ 153. Separation of powers, the basis for the non-delegation doctrine, is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another built into the tripartite Federal Government." Mistretta v. United States, 488 U.S. 361, 381-82 (1989) (citing The Federalist No. 47 (James Madison)); see also Lujan, 504 U.S. at 559-560 ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts").

Plaintiffs allege the executive has here violated the separation of powers by usurping a power reserved to the legislative branch. The non-delegation doctrine does not require, however, that Congress dictate every detail of pertaining to the implementation of a federal policy or regulatory program. Congress may rely on the other branches to make rules that carry out its will. Mistretta, 488 U.S. at 372 ("the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches").

See also Loving v. United States, 517 U.S. 748, 758 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). The nondelegation doctrine provides "that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of the separation of powers has occurred." Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) (internal quotations omitted).

DOI's May 20, 2008 decision to accept land into trust does not involve a separation of powers violation because DOI acted pursuant to power delegated to it by Congress in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. CNYFBA's Amended Complaint does not appear to challenge the delegation of power contained in the IRA as violating the non-delegation doctrine.[4/] Rather, Plaintiffs now allege that the Oneidas ceded all their land to New York in the 1788 State treaty of Fort Schuyler and that this alleged cession somehow precludes DOI from accepting land into trust on behalf of the Oneidas pursuant to the IRA or any other statute. Amd. Compl. ¶¶ 154, 173.

As noted above, this Court has previously held that the Oneidas did not cede all their lands in the Treaty of Fort Schuyler. Instead, they retained an area of about 300,000 acres that was recognized by the United States as their reservation in the Treaty of Canandaigua in 1794, 7 Stat. 44. See City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 (2005) (noting Oneidas retained a reservation of about 300,000 acres in Treaty of Fort Schuyler). But even if

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[4/] To the extent CNYFBA's Amended Complaint can be construed as raising a non-delegation challenge to the IRA, the federal defendants incorporate by reference pages 8-12 of the U.S. memorandum in support of the motion for partial dismissal (Dkt. No. 21a).

Plaintiffs' allegations were correct, they would remain legally irrelevant to the question of whether the Secretary has authority pursuant to the IRA to take land into trust for the Oneidas in New York.

5. Plaintiffs Civil Rights Claims should be dismissed

Plaintiffs raise four civil rights claims pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986, respectively. Amd. Compl. ¶¶ 187-271. Although Plaintiffs have altered some of the allegations for their § 1981, § 1983, and § 1985 claims, they are not material changes and those claims should all be dismissed for the reasons set forth in the United States Memorandum in Support of its Motion for Partial Dismissal, incorporated here.[5/] The main addition to Plaintiffs' Amended Complaint concern their vague and odd allegations, pursuant to their § 1985 claim, that President Nixon began a scheme still underway of "promot[ing] tribal sovereignty" in order to "commandeer the massive expansion of welfare reform to centralize all government functions in the White House." Am. Compl. ¶¶ 255-56, 263-66. This not only fails to state a Section 1985 claim for the reasons set forth in the Federal Defendants' previous motion to dismiss this claim, but, due both to their lack of sufficiently specific factual allegations and their illogical nature,

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[5/]Plaintiffs newly allege, for example, that Indians are federal instrumentalities. Amd. Compl. ¶ 197. In support of this proposition, they cite the Act of May 19, 1937, Ch. 227, 50 Stat. 188, a statute that makes Indian homesteads purchased with trust or restricted funds of Indians, *not the Indians themselves*, federal instrumentalities and imposes a restriction on their alienation. The term "federal instrumentality" in that Act, which Plaintiffs seize upon, is irrelevant to the current case both because the Act is inapplicable and because the phrase merely refers to Indian lands "held immune from state taxation" in furtherance of the federal government's "obligation . . . to protect and preserve" restricted Indian lands. Bd. of County Comm'rs of Creek County v. Seber, 318 U.S. 705, 717-18 (1943) (explaining legislative history of 25 U.S.C. § 412a); see also Matheson v. Kinnear, 393 F. Supp. 1025, 1029 (W.D. Wash. 1975) ("The presence of language designating § 412a lands as federal instrumentalities does not give them any special status differentiating them from other tax exempt Indian lands. The tax exemption in § 412a is not distinguishable from that contained in § 465 [of the IRA].").

borders on the frivolous.[6/]

Plaintiffs' eighth claim, Am. Compl. ¶¶ 267-271, alleges that the federal defendants are "furthering the conspiracy of the Nixon Indian Policy" in violation of 42 U.S.C. § 1986. Am. Compl. ¶¶ 267, 271. Section 1986 "provides a cause of action against anyone who having knowledge that any of the wrongs conspired to be done and mentioned in section 1985 are about to be committed and having power to prevent or aid, neglects to do so." Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1088 (2d Cir. 1993) (internal quotations omitted). "[A] § 1986 claim must be predicated upon a valid § 1985 claim." Id. Thus, because Plaintiffs "fail[] to state a cause of action under § 1985, [p]laintiff[s] ha[ve] failed to state a claim under § 1986." Dacey v. Dorsey, 568 F.2d 275, 277 (2d Cir. 1978).

6. Plaintiffs NEPA claim should be dismissed for lack of standing.

As noted above, in the initial motion to dismiss, the Federal Defendants moved for dismissal of Plaintiffs' NEPA claim for lack of standing. U.S. Mem. at 19-22. In that motion, Federal Defendants explained that Plaintiffs rely only upon economic and jurisdictional injuries; thus, their NEPA claim should be dismissed. The NEPA claim included in the Amended Complaint suffers from the same defects and should also be dismissed.

The prudential standing doctrine requires a party to "establish that the injury he

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[6/]When a conspiracy is alleged, a plaintiff is required to plead specific facts sufficient to show an agreement or "meeting of the minds" by the alleged conspirators. See Holdiness v. Stroud, 808 F.2d 417, 424-25 (5th Cir. 1987); Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999) (conspiracy, at a minimum requires showing "a tacit understanding to carry out the prohibited conduct") (quoting LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 427 (2d Cir. 1995). The conspiracy must also aim to violate someone's civil rights, but as noted in previous briefing of these claims, federal Indian law and Indian policy are not inherently violative of anyone's civil rights and they are certainly not a prop to aggrandize the federal government.

complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990) (citation omitted; emphasis in original). "[T]o assert a claim under NEPA, a plaintiff must allege injury to the environment; economic injury will not suffice." Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S Department of Agriculture, 415 F.3d 1078, 1103 (9th Cir. 2005) (citation omitted). See also Town of Stratford, Conn. v. F.A.A., 285 F.3d 84, 88 (D.C. Cir. 2002) ("[W]e have squarely held that a NEPA claim may not be raised by a party with no claimed or apparent environmental interest."); Knaust v. City of Kingston, N.Y., 1999 WL 31106 *3 (N.D.N.Y. 1999) ("Economic injury does not, by itself, fall within NEPA's zone of interests") (citation omitted); Knowles v. U.S. Coast Guard, 924 F. Supp. 593, 599 (S.D.N.Y. 1996) ("Economic injury by contrast, does not fall within NEPA's zone of interests") (citations omitted).

The arguments made in the Federal Defendants' initial motion to dismiss apply equally to the NEPA claim in the Amended Complaint.[7] The Amended Complaint includes additional

[7] All of the arguments made in the Federal Defendants' initial motion and reply regarding the NEPA claim are incorporated by reference here. Am. Int'l Speciality Lines Ins. Co. v. United States, 71 Fed. Cl. 37, 39 (2006) (noting that "in situations where a motion to dismiss addresses purported defects that remain even after the filing of the amended complaint, it is a waste of resources to require defendant to file a new motion."); Jordan v. City of Philadelphia, 66 F.Supp.2d 638, 641 n. 1 (E.D.Pa.1999) (if amended complaint suffers from same deficiencies addressed in motion to dismiss, the court may consider that motion as addressing the amended complaint); Patton Elec. Co. v. Rampart Air, Inc., 777 F.Supp. 704, 712 (N.D.Ind. 1991) (same); Wright, Miller and Kane, Federal Practice and Procedure, § 1476 (2d ed. 1990).

allegations in support of the NEPA claim. See Am. Compl. ¶¶ 98, 101-06.[8/] None of these allegations, however, serve to assert an injury to the environment. Moreover, such allegations continue to concentrate on economic impacts. See, e.g., id. at ¶ 98 (alleging that the Federal Defendants failed to assess any of the jurisdictional or economic impacts of the land decision); ¶¶ 104-05 (discussing Interior Board of Indian Affairs and court decisions that allegedly relate to the consideration of economic impacts). Plaintiffs' economic grievances clearly do not fall within NEPA's zone of interests and the NEPA claim contained in the Amended Complaint should also be dismissed for lack of standing.

CONCLUSION

For the reasons stated above, Plaintiffs' Separation of Powers claim, their claims brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986; their NEPA claim, and their challenge to the December 30, 2008 transfer of 18 acres into trust should all be dismissed.

DATED this 7th day of July, 2009.

Respectfully submitted,

John C. Cruden
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/
STEVEN MISKINIS (105769)
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice

[8/] A portion of Paragraph 3 also appears to include a new allegation. See Am. Compl. ¶ 3 ("plaintiff[]s also allege that the DOI has failed to withdraw the Final Environmental Impact Statement (FEIS) that wrongfully assumed that non-Indian interests did not require consideration against the interests of the OIN").

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