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.

DIRK KEMPTHORNE, 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

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, Dirk Kempthorne, individually and in his capacity as Secretary of the Interior; P. Lynn Scarlett, in her capacity as Deputy Secretary of the Interior; James E. Cason, in his capacity as Associate Deputy Secretary of the Interior; Franklin Keel, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs ("BIA"), and James T. Kardatzke, Branch Manager, Natural Resources, Bureau of Indian Affairs, Eastern Regional Office (collectively, the "United States"), by undersigned counsel, hereby submit this Memorandum of Law in support of their Motion for Partial Dismissal.

Plaintiffs, two citizens groups, the Central New York Fair Business Association ("CNYFBA") and the Citizens Equal Rights Alliance ("CERA"), along with a number of individuals, have brought an Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, challenge to the Department of the Interior's ("DOI") May 20, 2008 decision to accept 13,003.89 acres of land into trust for the benefit of the Oneida Indian Nation of New York ("Tribe" or "Oneidas"). The United States here moves for dismissal of two claims alleging that the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, is unconstitutional, and three claims that the federal action challenged here constitutes racial discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 1985 for failure to state a claim on which relief can be granted. In addition, the United States challenges Plaintiffs' standing to pursue their claim alleging the action was taken in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370. Finally, the United States seeks dismissal of a claim that appears to challenge whether this decision complies with Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719. This Court can determine the validity of the challenged claims and Plaintiffs' standing as a

matter of law without review of the administrative record supporting DOI's determination.

BACKGROUND

A. The Oneida Indian Nation of New York

The Tribe is a federally recognized Indian Tribe and a descendant of the historic Oneida Indian Nation. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 (2005). The historic Oneida Nation's aboriginal homeland consisted of six million acres in what became the State of New York. Id. In 1788, the Oneidas ceded most of their lands to New York, but retained 300,000 acres. Id. Those lands were reserved to the Oneida Nation by the United States in the Treaty of Canandaigua of 1794, 7 Stat. 44, and the Nonintercourse Act precluded alienation of these lands without Congressional approval. See 25 U.S.C. § 177; Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994). "Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land." Oneida County v. Oneida Indian Nation of N.Y., 470 U.S. 226, 232 (1985). Although the United States informed New York Governors George Clinton and John Jay that the Nonintercourse Act applied to the State's dealings with the Oneida, the State continued purchasing Indian lands without compliance with the Act. Id. Between 1795 and 1846, New York acquired the land at issue in this litigation in violation of the Nonintercourse Act. As noted by the Second Circuit, "New York's abuse of the Oneidas was not accomplished without protest . . . especially between 1840 and 1875, and between 1909 and 1965." Oneida Indian Nation of N.Y. v. County of Oneida, 719 F.2d 525, 529 (2d Cir. 1983), aff'd in part and rev'd in part, 470 U.S. 226 (1985). Indeed, New York's acquisition of Oneida lands in violation of the

Nonintercourse Act is the subject of another suit currently pending before this Court. See Oneida Indian Nation of N.Y. v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007).

In addition to the land claim litigation, the Oneidas have been involved in other lawsuits addressing whether properties acquired by the Tribe within the boundaries of their historic reservation are subject to taxation. In Oneida Indian Nation of New York v. Sherrill, 337 F.3d 139 (2d Cir. 2003), the Second Circuit Court of Appeals held, among other things, that the Oneida Reservation has not been disestablished or diminished, id. at 159-165, and concluded that lands acquired by the Oneidas within the boundaries of their Reservation are not subject to taxation. Id. at 167. The Supreme Court reversed the Second Circuit on other grounds, holding that the relief sought by the Tribe, "declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market," was barred by "'standards of federal Indian law and federal equity practice.'" City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214 (2005).[1/] In reaching its decision, the Court made clear that it was not reaching – and therefore not overturning – the Second Circuit's holding that the Oneida Reservation has not been disestablished. Id. at 215 n.9 ("The Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation . . . ."). Therefore the Second Circuit's holding remains binding precedent. See In re Sokolowski, 205 F.3d 532, 535 (2d Cir. 2000).

B. The Indian Reorganization Act

In Sherrill, the Supreme Court directed the Oneidas to the Indian Reorganization Act as

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[1/] "This 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." Id. at 216-217.

the means provided by Congress "for the acquisition of lands for tribal communities." Sherrill, 544 U.S. at 220. The IRA, enacted in 1934, was Congress' response to the failures of its Indian policies during the preceding allotment era. See Hodel v. Irving, 481 U.S. 704, 707-08 (1987) (describing allotment policy as "disastrous for the Indians"); see also Cohen's Handbook of Federal Indian Law § 1.05 (2005 ed.). 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." Morton v. Mancari, 417 U.S. 535, 542 (1974).

"Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians" and exempts the land from state and local taxation. Sherrill, 544 U.S. at 220. In pertinent part, Section 5 provides:

> 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.
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> 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.

C. The Challenged Decision

In the wake of Sherrill, the Oneidas requested the United States take approximately 17,370 acres of land in Madison and Oneida Counties, New York, into trust on behalf of the Tribe. See Notice of Availability of the Record of Decision for the Oneida Indian Nation Trust

Application, May 16, 2008.[2/] DOI issued a draft environmental impact statement pursuant to NEPA, on November 24, 2006. Id. Following an extensive public comment the Department issued its final environmental impact statement on February 22, 2008, which analyzed the Oneidas' request and eight reasonable alternatives. Id. On May 20, 2008, DOI determined to accept 13,003.89 acres into trust. Compl. ¶ 1.

Plaintiffs filed their complaint on June 21, 2008, and served the United States on July 21, 2008.

STANDARD FOR DISMISSAL OF CLAIMS

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. 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).

[2/] Attachment 1 to the Affirmation in Support of the United States' Motion for Partial Dismissal.

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)).

ARGUMENT

I. CNYFBA's Tenth Amendment claim should be dismissed.

Plaintiffs' second count, Compl. ¶¶ 94-100, alleges that applying Section 5 of the IRA within New York is a "literal hijacking of state sovereignty" that offends Plaintiffs' "constitutional rights as state citizens." Compl. ¶¶ 96, 100. The Tenth Amendment reserves to states all powers not granted to the federal government by the Constitution. See 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).

a. Plaintiffs lack standing to raise a Tenth Amendment claim.

The law of the Supreme Court and the Second Circuit is clear: private parties like Plaintiffs have no standing to allege a violation of the Tenth Amendment. See Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 144 (1939) (private parties "have no standing . . . to raise any question under the" Tenth Amendment). As explained by the Second Circuit, where "the requisite representation by the states or their officers is notably absent" in the context of a Tenth Amendment claim, the "Supreme Court's determination [in Tennessee] that the plaintiffs under

these circumstances have no standing ends our inquiry." Brooklyn Legal Serv. Corp. v. Legal Serv. Corp., 462 F.3d 219, 234 (2d Cir. 2006). Although Plaintiffs include a state assemblyman, Compl. ¶ 19, he cannot be said to be acting as an officer of the State in this lawsuit. See Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (no standing for legislators claiming interest in seeing laws enforced because once a law is enacted, "their interest is indistinguishable from that of any other citizen").

b. Plaintiffs' Tenth Amendment claim fails to state a claim for which relief can be granted.

Plaintiffs here cannot validly argue that the Tenth Amendment bars the federal government from acquiring state land and holding title for various federal purposes. See Kohl v. United States, 91 U.S. 367, 371 (1875) ("The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States."). The question presented here is whether the United States constitutionally has the authority to regulate the affairs of Indians, even where such regulation may preempt conflicting state laws, or whether that authority has been reserved to the states. The Supreme Court has recognized the "plenary power of Congress to deal with the special problems of Indians . . . drawn both explicitly and implicitly from the Constitution itself." Morton, 417 U.S. at 551-52. Explicitly, the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, "provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." Morton, 417 U.S. at 552 (quoting U.S. Const. art. I, § 8, cl. 3) (ellipses in original). The Treaty Clause and Supremacy Clause of the Constitution have also been cited as the source of federal legislative authority over Indians. See Cohen's Handbook of Federal Indian

Law § 5.01[1] (2005 ed.). Thus, as noted by the First Circuit, "[b]ecause Congress has plenary authority to regulate Indian affairs, section 465 of the IRA does not offend the Tenth Amendment." Carcieri v. Kempthorne, 497 F.3d 15, 40 (1st Cir. 2007) (en banc), pet. for cert. granted in part, 128 S. Ct. 1443 (Feb. 25, 2008).[3/] Moreover, the Supreme Court has expressly held that the United States may take land in trust for Indians even where Indians have ceased to exist in that state. See United States v. John, 437 U.S. 634, 653 (1978).

II. Section 5 of the IRA does not violate the non-delegation doctrine.

In their complaint, Plaintiffs assert a variation of the repeatedly-rejected argument that Congress' delegation of authority, via the IRA, to the Secretary to accept land into trust on behalf of tribes violates the non-delegation doctrine of the U.S. Constitution.[4/] Compl. ¶¶ 57-72. This doctrine holds that while Congress may not delegate its legislative powers, see Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001), it may confer decision-making authority so long as it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)). A court may find a statute in violation of the non-delegation doctrine only if there are no intelligible standards such that "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." Mistretta, 488 U.S. at 379 (quoting Yakus v. United States, 321 U.S. 414, 425-26

[3/] Carcieri's dismissal of the Tenth Amendment challenge to the IRA is not under review by the Supreme Court.

[4/] The non-delegation claim is part of what the Complaint styles as its "First Claim," but the allegations arrayed under this heading actually amount to several claims. On this motion to dismiss, the United States only challenges the constitutional attack on the IRA for failure to state a claim on which relief can be granted.

(1944)).

Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority. Since 1935, the Court has narrowly construed the non-delegation doctrine and has consistently upheld congressional enactments containing broad conferrals of decision-making authority. See, e.g., Whitman, 531 U.S. at 475-76; Mistretta, 488 U.S. at 379; Yakus v. United States, 321 U.S. 414, 427 (1944). In keeping with this Supreme Court precedent, courts have consistently held that Section 5 of the IRA is not an unconstitutional delegation of legislative power, finding that Congress has placed sufficient restrictions on the agency's exercise of power.[5/] This Court should follow their lead and reject Plaintiffs' non-delegation challenge.

The typical non-delegation claim asserts that Section 5 of the IRA has no intelligible standards by which one can determine that the Secretary is following the will of Congress. CNYFBA asserts a variation here. CNYFBA argues that there is a narrow intelligible standard in Section 5 by asserting that the authority contained in Section 5 to take land into trust does not

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[5/] See Carcieri v. Kempthorne, 497 F.3d 15, 40 (1st Cir. 2007) (en banc), pet. for cert. granted in part, 128 S. Ct. 1443 (Feb. 25, 2008); Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966, 974 (10th Cir. 2005), cert. denied, 127 S. Ct. 38 (Oct. 2, 2006); South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 798-99 (8th Cir. 2005), cert. denied, 127 S. Ct. 67 (Oct. 2, 2006); United States v. Roberts, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (May 15, 2000); City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 473 (D.D.C. 1978); accord Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688, 694 (9th Cir. 1997), cert. denied, 522 U.S. 1027 (Dec. 15, 1997). A panel of the Eighth Circuit held otherwise in 1995, see South Dakota v. U.S. Dep't of Interior, 69 F.3d 878, 885, but that opinion was vacated and remanded by the Supreme Court, 519 U.S. 919 (1996), and other courts have expressly declined to place any precedential or persuasive value on that vacated opinion. See, e.g., Shivwits, 428 F.3d at 973 n.4; City of Roseville v. Norton, 219 F. Supp. 2d 130, 155 (D.D.C. 2002). Indeed, the Eighth Circuit itself has since rejected its earlier vacated reasoning. See South Dakota, 423 F.3d at 796-98.

extend to land that is already owned by the tribe requesting trust status. Compl. ¶¶ 69-70. The argument goes that, because Section 5 authorizes the expenditure of up to two million dollars in federal funds for the purchase of land to be taken into trust, Congress intended that only lands purchased with those funds could become trust lands. Compl. ¶¶ 57-73. In other words, Plaintiffs assert the novel argument that the statute does not authorize the trust acquisition of any lands not paid for in cash by the federal government prior to the acquisition because if one construes the statute as permitting the Secretary to take land into trust without using those funds, then the IRA must be unconstitutional because it offends the non-delegation doctrine. Compl. ¶ 72.

First, and most importantly, Plaintiffs' argument is belied by the same section of the statute which makes clear that the Secretary has a variety of means at his disposal to acquire lands for Indians, besides purchase, including by "relinquishment, gift, exchange, or assignment." Id. [6] This enumeration means that the Secretary has a variety of means besides purchase to acquire land into trust and further, defining those means of acquisition, provides an intelligible standard that does not offend the non-delegation doctrine. See Mistretta, 488 U.S. at 372-73.

Second, the Eighth Circuit recently rejected this exact argument in South Dakota v. U.S. Department of Interior, 423 F.3d 790 (8th Cir. 2005). There the Eighth Circuit concluded that the IRA contained sufficient standards guiding the Secretary's discretion to take land into trust. The statutory language of the IRA, the Court explained,

> directs that any land acquired must be for Indians as they are defined in 25 U.S.C. § 479. It authorizes the appropriation of a limited amount of funds with which land could be

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[6] "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . ." 25 U.S.C. § 465.

> acquired and specifically prohibits use of such funds to acquire land for the Navajo Indians outside of their established reservation boundaries in Arizona and New Mexico.

423 F.3d at 797 (citation omitted). Beyond the statute itself, the court looked to the legislative history which demonstrated a Congressional determination that "additional land was essential for the economic advancement and self-support of . . . Indian communities." Id. at 798. Accordingly, the Eighth Circuit held that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust." Id. at 797.

The plaintiff in that case, like the Plaintiffs in this case, contended that the simple fact that "most of the land currently taken into trust has been previously purchased by a tribe" robs Section 5 of a restraining principle because "the limit on appropriated funds for purchasing land is [now] irrelevant." Id. at 798. The Eighth Circuit rejected this argument, explaining, "We disagree that these limitations were meaningless when the IRA was enacted, and we conclude that the context of the entire act and its legislative history continue to give meaning to the phrase 'for the purpose of providing land for Indians.'" Id.

The Eighth Circuit's reasoning rejects the statutory reading advanced by Plaintiffs: that Section 5 of the IRA prohibits land acquisitions that are not purchased with monies authorized to be appropriated annually for such purchases. The relevant language from Section 5 is: "For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year[.]" 25 U.S.C. § 465. The relevant language posts a ceiling on how many federal dollars may be

allocated to the IRA's goal of providing lands to Indians in a given year, but it does not mandate the expenditure of such dollars as a prerequisite to acquiring lands under the IRA. Plaintiffs' proposed reading of the statute would transform a provision meant to limit federal expenditures into one requiring such expenditures since acceptance of lands for free from a willing tribe would be prohibited. Unsurprisingly, there is no precedent to support such a tortured reading of the IRA.

III. Plaintiffs' racial discrimination claims fail to state a claim for which relief can be granted.

Claims Five through Seven allege racial discrimination in violation of 42 U.S.C. § 1981, § 1983, and § 1985, respectively. They all stem from the same flawed assumption that the federal government deals with Indian tribes on a racial, rather than political, basis. The Supreme Court rejected such a claim over thirty years ago. In a case dealing with a challenge to a provision of the IRA that accords an employment preference to qualified Indians in the BIA, the Supreme Court made clear that such a preference does not run afoul of civil rights laws or the Constitution. Morton v. Mancari, 417 U.S. 535 (1974). In upholding the preference against the claim that it constituted "invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment," the Court explained that its decision turned on "the unique legal status of Indian tribes under federal law" and on the "plenary power of Congress to deal with the special problems of Indians [which] is drawn both explicitly and implicitly from the Constitution itself." Id. at 551-5. Specifically, the Court noted that the Indian Commerce Clause, U.S. Const. art. I, § 8, cl.3, "singles Indians out as a proper subject for separate legislation." Id. at 552.

With regard to the preference, the Court explained that it was not racial in nature but

rather political: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." Id. at 554; see also id. at 554 n.24 ("[T]he preference is political rather than racial in nature."); United States v. Antelope, 430 U.S. 641, 646 (1977) ("Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'") (internal quotations omitted). Accordingly, Morton announced the rule that "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Id. at 555. See, e.g., Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 736 (9th Cir. 2003) (statute pertaining to "Indian lands and to tribal self-government and tribal status of federally recognized tribes" subject to "rational-basis review" in face of constitutional challenge).

In Morton, the Court recognized that the challenge before it would have ramifications throughout federal Indian law: "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552. Plaintiffs' claims 5-7 would have similarly sweeping implications for federal Indian law but for the fact that cases like Morton provide well-settled precedent that Plaintiffs' claims must be dismissed. The federal actions of accepting land into trust on behalf of the Oneidas has no racial basis and therefore is not subject to strict constitutional scrutiny. Because acquiring trust land meets the Oneidas' need for a tribal land base, taking land into trust finds a rational basis in the Congressional

determination expressed in the IRA that "additional land was essential for the economic advancement and self-support of . . . Indian communities." South Dakota, 423 F.3d at 798.

a. Plaintiffs' 42 U.S.C. § 1981 claim should be dismissed.

Claim 5 alleges a violation of 42 U.S.C. § 1981 in that Plaintiff Melvin Philips' treatment as a "white citizen" is threatened by Interior's decision to accept land into trust because he will be subjected to tribal laws as a person of "Oneida Indian descent." Compl. ¶¶ 131-135. Plaintiffs' fail to state a claim because a claim pursuant to 42 U.S.C. § 1981 can not be brought against federal officers. Dotson v. Griesa, 398 F.3d 156, 162 (2d Cir. 2005).[7/]

Moreover, although targeted at the Oneidas, this claim in effect challenges all federally recognized tribal governments as racially discriminatory to their tribal members, who are purportedly deprived of rights held by non-members.[8/] But Morton makes clear that legislation singling out members in federally recognized tribes does not prefer people on a racial basis. 417 U.S. at 554 n.24. Accordingly, membership in a federally recognized tribe is "political rather than racial in nature." Id.

Because federal recognition of the Nation long precedes and is independent of the agency action challenged here, Plaintiffs have no standing to challenge it, directly or indirectly. Standing requires a showing that a plaintiff has suffered an injury, that the injury is traceable to an action

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[7/]Section 1981 guarantees the equal rights of persons "in every State and Territory." 42 U.S.C. § 1981. A cause of action under 42 U.S.C. § 1981 requires a showing of intentional racial discrimination. See Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609 (1987) ("Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination . . . .").

[8/]The Complaint does not indicate if Mr. Philips is a member of the Oneida Indian Nation of New York. If he is not a member, he lacks standing to allege members of the Oneida Indian Nation of New York are subject to racial discrimination.

of the defendant, and that it is likely the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To the extent that Mr. Philips' or anyone else's alleged injuries are derived from membership in the Oneida Indian Nation of New York, the act of taking land into trust did not cause those injuries. Any decision rendered by the Court in connection with its review pursuant to the APA of the land-into-trust decision will not impact the Oneidas' status as a federally recognized tribe, its government-to-government relationship with the United States, or the composition of its tribal membership. Thus Plaintiffs cannot establish either that the decision to accept land into trust is the cause of any injury flowing from federal recognition of the Oneidas or that this Court, in the context of this action, could redress any injury flowing from that federal recognition, and hence have no standing to invoke this Court's jurisdiction.

Further, persons of "Oneida Indian descent" are only subject to the Oneidas' tribal government as members of the Tribe if they choose to be members.[9/] Membership in a tribe is bilateral – that is, it requires the consent of both the tribe and the individual member. See Thompson v. County of Franklin, 180 F.R.D. 216, 225 (N.D.N.Y. 1998) ("*Tribal membership is a bilateral relation* . . . . A member of any Indian tribe is at liberty to terminate the tribal relationship *whenever he or she so chooses*, although such termination will not be lightly inferred.") (quoting Cohen's Handbook of Federal Indian Law 22 (1982 ed.)) (emphasis in

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[9/] Indian tribes have limited civil jurisdiction over both non-Indian and Indian non-members on their reservations. See Montana v. United States, 450 U.S. 544, 565-66 (1981). By the same token, "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority from the reservation." Nevada v. Hicks, 533 U.S. 353, 361 (2001).

original).[10/] As noted by another court, "the voluntary nature of tribal membership, like citizenship, is crucial to keep in mind. While one might be unhappy to relinquish one's tribal membership in order to avoid future prosecution by a tribal court, one could still do so." Morris v. Tanner, 288 F. Supp. 2d 1133, 1141 (D. Mont. 2003).

Plaintiffs complain that the United States is purporting to turn "persons of Oneida descent" into "wards of the federal government after being treated as full citizens of New York." Compl. ¶ 135. The federal government has a fiduciary trust relationship with federally recognized tribes and their members. The Oneidas are a federally recognized tribe, and that recognition precedes, rather than derives from, the agency action challenged here. See Sherrill, 544 U.S. at 203; Indian Tribal Entities That Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979). A government-to-government relationship between the United States and a tribe is "a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2. Federal recognition also means that a tribe is entitled "to the immunities and privileges available to . . . tribes by virtue of their government-to-government relationship with the United States . . . ." Id. Importantly, neither the acknowledgment process nor federal actions taken on behalf of a federally recognized tribe, such as taking land into trust for the benefit of a tribe, involuntarily transform state citizens into tribal members or "wards" of the federal government. The federal action of taking land into trust does not create "wards" or tribal members, cannot diminish or even impact the citizenship of any New York State citizen,

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[10/] The same passage is located in the 2005 edition of Cohen's Handbook of Federal Indian Law at § 3.03[3].

and therefore Plaintiffs' fifth claim should be dismissed.

b. Plaintiffs' 42 U.S.C. § 1983 claim should be dismissed.

Plaintiffs' sixth claim, Compl. ¶¶ 136-146, challenges this federal action on behalf of the Oneidas as racially discriminatory to "every other resident of Madison and Oneida Counties" in violation of 42 U.S.C. § 1983. Compl. ¶ 143. A cause of action under § 1983 requires both (1) a violation of a right secured by the Constitution and laws of the United States, and (2) a showing that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). "[A]n individual is acting under color of state law when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Hayut v. State Univ. of N.Y., 352 F.3d 733, 744 (2d Cir. 2003) (quoting Polk County v. Dodson, 454 U.S. 312, 317-18 (1981)). None of the Defendants in this case are acting under color of state law or have otherwise been delegated power by the State. Rather, the challenged acquisition of land into trust is a *federal* action arising from the government-to-government relationship between the federal government and the Oneida Tribe . Thus a proper Section 1983 claim has not been alleged. See Dotson, 398 F.3d at 162.

Moreover, federal actions taken on behalf of federally recognized Indian tribes are not on behalf of "a discrete racial group, but, rather, [on behalf of] members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." Morton, 417 U.S. at 554. To the extent this claim is also a challenge to federal recognition of the Oneidas, Plaintiffs lack standing to bring it for the same reasons they lack standing to bring their fifth claim – the agency action challenged here has not caused the injury they allege and no decision by this Court in connection with the land-into-trust decision will redress any injury allegedly

flowing from the Oneidas' status as a federally recognized tribe. Finally, Plaintiffs also seem to challenge the United States' recognition of Ray Halbritter as the leader of the Oneidas on impermissible racial grounds. Compl. ¶¶ 145-46. Besides lacking merit or standing, the six year statute of limitations for challenges to federal agency actions bars this claim. See 28 U.S.C. § 2401(a); Polanco v. U.S. Drug Enforcement Admin., 158 F.3d 647, 654 (2d Cir. 1998) (applying 28 U.S.C. § 2401(a) to APA claims).

c. Plaintiffs' 42 U.S.C. § 1985 claim should be dismissed.

Plaintiffs' seventh claim alleges that Interior's decision to accept land into trust is the result of a discriminatory government "scheme" that violates the equal protection rights of all non-Indian citizens of New York under 42 U.S.C. § 1985.[11/] Compl. ¶¶ 147-165. This claim, like Plaintiffs' fifth and sixth claims, has sweeping implications since it challenges the federal government's ability to accept or hold land in trust on behalf of any tribe, a practice engaged in by the United States since the founding of the Nation. However, "[t]raditional equal protection analysis . . . does not apply to legislation or governmental action favoring Indians." United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979). Federal actions on behalf of federally recognized tribes are actions on behalf of a political, not racial, group, and the benefits flowing from land

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[11/] A cause of action under 42 U.S.C. § 1985(3) requires four elements: (1) a conspiracy (2) for the purpose of depriving a person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy (4) that injured a person or his property or deprived him of a right or privilege of a citizen. Iqbal v. Hasty, 490 F.3d 143, 176 (2d Cir. 2007). The claim must show "some racial, or . . . otherwise class-based, invidiously discriminatory animus" driving the conspirators' action. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Plaintiffs' alleged aggrieved class, "all non-Indian citizens of New York," Compl. ¶ 165, is no more than "a group of persons who bear the brunt of the same alleged[injury]," and as such does not rise to the level of a "specific, identifiable class" required for a claim under § 1985(3). Aulson v. Blanchard, 83 F.3d 1, 5 (1st Cir. 1996) (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993)).

taken into trust accrue to a political, not racial, entity, the Oneidas. See Morton, 417 U.S. at 554; Warren v. Pataki, 2002 WL 450056, at *3 (W.D.N.Y. Jan. 9, 2002) ("Schemes which favor Indians over non-Indians have . . . been described as political rather than racial in nature."). Accordingly, the federal action challenged here is not racial in nature and Plaintiffs' claim should be dismissed.

IV. Plaintiffs' lack standing to pursue their NEPA claim.

In their fourth claim for relief, Plaintiffs allege that Defendants' Record of Decision ("ROD") failed to adequately assess the environmental impacts in accordance with the National Environmental Policy Act. Compl. ¶¶ 118-130. Plaintiffs, however, lack standing to pursue this claim. "Standing generally has two aspects: constitutional standing, a mandate of the 'case or controversy' requirement in Article III, and prudential considerations of standing, which involve 'judicially self-imposed limits on the exercise of federal jurisdiction . . . .'" Lerner v. Fleet Bank, N.A., 318 F.3d 113, 126 (2d Cir. 2003) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

Plaintiffs' NEPA claim should be dismissed pursuant to the prudential standing doctrine. "Prudential considerations include 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" Lerner, 318 F.3d at 126 (quoting Allen, 468 U.S at 751)). Indeed, in order to pursue a claim, "the plaintiff must establish that the injury he 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. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990) (citation omitted).

"The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987). "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Id.

In enacting NEPA, Congress was concerned with the potential impacts of major federal actions significantly affecting the physical environment. See Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-73 (1983). "The theme of [§ 4332 of NEPA] is sounded by the adjective 'environmental': NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment." *Id*. at 772. "Thus, to 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 Am. v. U.S. Dep't of Agric., 415 F.3d 1078, 1103 (9th Cir. 2005) (citing Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 715-16 (9th Cir. 1993)); see also Town of Stratford v. FAA, 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."); W. Radio Servs. Co. v. Espy, 79 F.3d 896, 902-03 (9th Cir. 1996) ("NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions.") (internal quotation marks 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); Knaust v. City of Kingston, 1999 WL 31106, at *3 (N.D.N.Y. Jan. 15, 1999) ("[E]conomic injury does not, by itself, fall within NEPA's zone of interests.") (citation omitted).[12/]

In Ranchers Cattlemen, the plaintiff challenged a regulation pursuant to NEPA. 415 F.3d at 1090. The plaintiff's only claimed interests were limited to economic interests and safety concerns. Id. at 1103. In considering such interests, the court concluded that because the plaintiff "failed to allege any connection to injury to the physical environment, its injury falls outside of NEPA's zone of interests." Id. at 1103-04. Accordingly, the court found that the plaintiff lacked standing to pursue its NEPA claims. Id.

Here, Plaintiffs' NEPA claim suffers from the same deficiencies. Plaintiffs summarily allege that the ROD's "implementation would cause permanent and irreparable harm to the environment, including the human environment as required under [NEPA] . . . ." Compl. ¶ 3. Plaintiffs, however, fail to include any allegations detailing what such environmental harm might be. Instead, Plaintiffs' allegations of injury rest purely on economic and jurisdictional concerns that do not fall within the zone of interests that NEPA was designed to protect. For example, Plaintiffs claim that the ROD "would create a jurisdictional nightmare for the state and local governments, and would aggravate the ongoing economic destruction of the state and local

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[12/] But see Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1125-27 (8th Cir. 1999) (finding that a CEQ regulation implementing NEPA can confer prudential standing on a petitioner asserting an economic injury even if the statute does not). Friends of Boundary Waters Wilderness was extensively analyzed and rejected by the Ninth Circuit in Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 942-45 (9th Cir. 2005). The Ninth Circuit explained "nothing in the text of [NEPA] suggests than an EIS must address an economic concern that is not tethered to the environment." Id. at 943. The court went on to state that "[t]his conclusion is not surprising given that, for more than a quarter century, courts have understood the purpose of [NEPA] as protecting the environment." Id. (citation omitted).

economies due to the illegal operation on the land in question." Id. Plaintiffs also fault the Final Environmental Impact Statement ("EIS") for failing to "address any of the factors deemed part of the 'justifiable expectations' of the local non-Indian residents or state and local governments identified in the *Sherrill* decision as disruptive." Id. ¶ 129. Plaintiffs claim that "[t]he regulatory and cumulative jurisdictional impacts of removing thousands of acres from the sovereign control of state and local governments has [sic] not been addressed." Id. ¶ 130.

In asserting only economic and jurisdictional injuries, Plaintiffs have "failed to allege any connection to injury to the physical environment." Ranchers Cattlemen, 415 F.3d at 1103-04. "In other words, [Plaintiffs] ha[ve] not connected [their] claimed . . . injury to any environmental effects caused by the allegedly defective EIS. Instead, [their] EIS claim is simply the 'handy stick' with which to attack [Defendants]." Stratford, 285 F.3d at 89. Consequently, Plaintiffs' NEPA claim should be dismissed for lack of standing.

V. Plaintiffs' IGRA challenge fails to state a claim.

The lands to be taken into trust include a parcel on which the Oneidas currently operate a casino. Plaintiffs appear to raise a challenge under IGRA to the lawfulness of the casino, by alleging that the casino is not on reservation lands and that further approvals are required by the State and DOI in connection with the casino's approval. Compl. ¶¶ 105-106. Although vague, Plaintiffs' allegations appear to suggest that the Oneida casino does not comply with Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719. Section 20 defines the conditions under which gaming may occur on a parcel acquired into trust after October 17, 1988, and requires – where the land is not within the boundaries of the tribe's reservation – that the Secretary consult with tribal, state, and local officials and determine that a gaming establishment

would be in the best interest of the tribe and its members and not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). In addition, the governor of the state must concur in the Secretary's finding. Id. However, Section 20 does not bar gaming on – and 25 U.S.C. § 2719(b)(1)(A) does not apply to – "lands [that] are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a)(1).

Plaintiffs' argument fails to state a claim for the simple reason that the land on which the Turning Stone casino is situated is within the boundaries of the Oneida reservation, and, as the Second Circuit has held, this reservation has never been disestablished. Sherrill, 337 F.3d at 159-65. The procedures required by 25 U.S.C. § 2719(b)(1)(A) do not apply to trust lands located within the boundaries of a tribe's reservation, regardless of when the land is acquired. Accordingly no action is required on the part of DOI to bring the gaming operation into compliance with Section 20 of IGRA, assuming for the sake of argument that DOI needed to concern itself with whether the casino complies with Section 20 in connection with this land into trust decision.[13/]

The Second Circuit's holding regarding the Oneida reservation boundaries was not disturbed by the Supreme Court's decision in Sherrill. The Court addressed the Oneidas' (and the United States', as amicus curiae) contention that since New York acquired the Oneidas'

[13/] IGRA and the IRA are different statutes, and while DOI may make determinations pursuant to IGRA as part of a land into trust decision, see, e.g., City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003), no authority requires it. Further, assuming for the sake of argument, that DOI needed to consult and make findings pursuant to 25 U.S.C. § 2719(b)(1)(A) before the lands to be accepted into trust become gaming eligible under IGRA, DOI retains discretion to do that after accepting the land into trust. In any event, the United States has waived sovereign immunity pursuant to the APA to challenges to DOI's decision to accept land into trust, but this has not opened the door for Plaintiffs to raise challenges pursuant to IGRA with regard to the Oneidas' gaming operation.

reservation lands in violation of the Nonintercourse Act, the transactions which purported to disestablish the reservation were not valid and therefore lands acquired within the boundary of the Tribe's reservation were still subject to the Tribe's "sovereign dominion." Sherrill, 544 U.S. at 212-213. The Court specifically declined to grant the "declaratory and injunctive relief recognizing [the Tribe's] present and future sovereign immunity from local taxation," explaining that "[t]his 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." Id. at 214, 216-17.

While Sherrill held that equitable considerations limit the relief the Oneidas may seek in court in connection with their reservation lands, it did not hold that the Oneidas have no reservation or that the reservation has been disestablished. Indeed, the Court was explicit that it was not reaching the Second Circuit's holding that the reservation had not been disestablished, and emphasized that "only Congress can divest a reservation of its land and diminish its boundaries." Id. at 216 n.9 (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)). The Supreme Court did not need to discuss the Second Circuit's holding that Congress has not disestablished the Oneida reservation because disestablishment of a reservation is different from finding equity bars types of relief that may be premised upon the existence of a reservation. IGRA's Section 20 by its plain language only concerns the former: whether the tribe is acquiring reservation lands within or contiguous to an existing reservation.

Because the Oneida reservation was never disestablished, Plaintiffs' IGRA challenge fails because 25 U.S.C. § 2719(b)(1)(A) does not apply to the Turning Stone casino as a matter of law.

Accordingly, a challenge to this land to trust decision asserting that DOI needed to make findings or take any action at all in connection with IGRA fails to state a claim for which relief can be granted.

CONCLUSION

For the reasons stated above, Plaintiffs' Tenth Amendment claim, Compl. ¶¶ 94-100; non-delegation claim, Compl. ¶¶ 57-72; NEPA claim, Compl. ¶¶ 118-130; 42 U.S.C. § 1981 claim, Compl. ¶¶ 131-135; 42 U.S.C. § 1983 claim, Compl. ¶¶ 136-146; 42 U.S.C. § 1985 claim, Compl. ¶¶ 147-165; and IGRA claim, Compl. ¶¶ 105-106, should all be dismissed.

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Respectfully submitted,

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/s/

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