UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

KEN SALAZAR, Secretary, United States Department of the Interior; LAURA DAVIS, Associate Deputy Secretary of the Interior; DAVID HAYES, Deputy Secretary of the Interior; FRANKLIN KEEL, Eastern Regional Director, Bureau of Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA, MARTHA N. JOHNSON, Administrator, General Services Administration; and UNITED STATES GENERAL SERVICES ADMINISTRATION,

Defendants.

CIVIL ACTION NO.
6:08-cv-00644-LEK-DEP

UNITED STATES' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants Kenneth L. Salazar, Secretary, United States Department of the Interior; David Hayes, Deputy Secretary of the Interior; Laura Davis, Associate Deputy Secretary of the Interior; Franklin Keel, Eastern Regional Director, Bureau of Indian Affairs; United States Department of the Interior ("Department" or "DOI"), Bureau of Indian Affairs ("BIA"); Martha N. Johnson, Administrator, United States General Services Administration; United States General Services Administration; and the United States (collectively, the "United States" or "Federal Defendants"), by undersigned counsel, submit this Memorandum of Law in Opposition to the Motion for Summary Judgment filed by State of New York; Andrew M. Cuomo, Governor of the State of New York; Eric T. Schneiderman, Attorney General of the State of New York; Madison County, New York; and Oneida County, New York (collectively, "the State" or "Plaintiffs"). For the reasons described below, and based upon the Administrative Record ("AR") supporting DOI's determination to accept land into trust for the benefit of the Oneida Indian Nation of New York ("Oneidas" or "Nation"), Plaintiffs' surviving claims challenging this administrative action should be denied and their complaint dismissed.

II. BACKGROUND

A. Statutory and Regulatory Background

The Department's decision to accept land into trust for the benefit of the Nation was made pursuant to authority granted by Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465.[1] That section authorizes the Secretary of the Interior, "in his discretion, to acquire

[1] The Statutory and Regulatory Background section is an abbreviated version of that section in the United States' Memorandum of law in Support of Motion for Summary Judgment (Dkt. No. 240-1).

. . . any interest in lands . . . for the purpose of providing land for Indians." Id. Section 5 further provides that any such lands acquired by the Secretary "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian," and "shall be exempt from State and local taxation." Id. The purposes of the IRA are remedial. Congress enacted the IRA in 1934 in order to restore tribal land bases as part of its response to the "failure" of its earlier allotment policy, reflected in the General Allotment Act, 24 Stat. 388 (1887), Hodel v. Irving, 481 U.S. 704, 708 (1987), and similar policies that stripped tribes of their lands. The IRA marked a turn away from federal policies designed to assimilate Indian tribes and a return to "the principles of tribal self-determination and self-governance" that had characterized the pre-General Allotment Act era. County of Yakima v. Confederated Tribes & Bands of the Yakima Nation, 502 U.S. 251, 255 (1992). The "overriding purpose" of the IRA is 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).

The Department's land acquisition regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's exercise of discretionary authority to acquire land in trust for Indian tribes and individual Indians. 25 C.F.R. § 151.1. A tribe wishing to have land taken into trust pursuant to Section 5 must file a written request with the Secretary that sets forth certain information. Id. § 151.9. The Secretary then notifies the state and local governments having regulatory jurisdiction over the land proposed to be acquired in trust and provides them with a thirty-day comment period. Id. § 151.10.

The Part 151 regulations state a general policy regarding trust acquisitions (id. § 151.3) and specify particular factors that guide the Secretary's review of land acquisition requests (id. § 151.10(a)-(h)). Those factors include: "[t]he need . . . for additional land"; "[t]he purposes for

which the land will be used"; "the impact on the state and its political subdivisions resulting from removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." Id. § 151.10(b), (c), (e), (f). Consideration of these factors ensures the Department exercises its discretion after becoming fully informed of the potential impacts of placing land in trust, but the factors do not mandate specific outcomes to the decision process.

B. The Challenged Action

The Nation "is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation . . . one of the six nations of the Iroquois." City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 (2005) (internal quotations omitted). The 1794 Treaty of Canandaigua acknowledged the Oneida Reservation which included approximately 300,000 acres of land. 7 Stat. 44, 45 ("The United States acknowledge the lands reserved to the Oneida . . . and called their reservations, to be their property . . . said reservations shall remain theirs until they choose to sell the same to the people of the United States"). "Despite Congress' clear policy that no person or entity should purchase Indian lands 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). The State's unlawful acquisitions continued until by the 1840's "most of [the Oneidas'] remaining lands" were held by the State. Sherrill, 544 U.S. at 206-07.

Despite the State's efforts, "a band of Oneidas continued to live" on a 32 acre parcel of land, holding it "continuously for over a century," and their rights to possession of that land were affirmed by the Second Circuit in United States v. Boylan, 265 F. 165 (2d Cir. 1920). Sherrill, 544 U.S. at 210 n.3. Beginning in the 1990s, the Nation added to this intact Reservation land by acquiring parcels in Madison and Oneida County, within the bounds of their Reservation,

through open-market transactions. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 144 (2d Cir. 2003) rev'd on other grounds by 544 U.S. 197 (2005). The Nation's attempt to exercise self-government on its reacquired lands was disputed by the State and local governments, and the Supreme Court ruled in Sherrill that equitable grounds barred the Nation from "rekindling embers of sovereignty that long ago grew cold" and seeking a declaration that the reacquired lands were immune to taxation. 544 U.S. at 214. The Court concluded that the "piecemeal shift in governance" that the Nation "seeks unilaterally to initiate" was unworkable. Id. at 221. Instead, the Court stated that the proper avenue for the Nation to re-establish a land base over which it could exercise its sovereign rights was to use the IRA's land-to-trust process. The Court explained that "[t]he regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Id. at 220-21.

On April 4, 2005, the Oneidas requested that the United States take approximately 17,370 acres of land in Madison and Oneida Counties, New York, into trust on behalf of the Nation. Record of Decision, Oneida Indian Nation of New York Fee-to-Trust Request ("ROD") at 6. See U.S. Exh. 1 (Oneida Record of Decision) (Dkt. No. 240-4). In order to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370, the Department opted to prepare an Environmental Impact Statement ("EIS") even though the Nation planned no change in the use of its lands and the expected environmental impacts of the acquisition would therefore be negligible. ROD at 9 (although not necessarily required, an EIS "ensure[d] that the Nation's fee-to-trust request received the most thorough environmental review available under NEPA"). Public participation occurred through scoping meetings held on January 10 and 11, 2006, and comments were received from cooperating agencies, government agencies, the public,

tribal entities, and other interested parties through January 23, 2006.[2] Id. at 9. An additional public meeting was held by the BIA on March 2, 2006, in the City of Utica, New York, to describe the land-to-trust process and NEPA. Id.

DOI announced issuance of a DEIS on November 24, 2006 through a Federal Register notice along with notices in local newspapers and accepted comments through February 22, 2007. Id. The Department held a public hearing in Utica, New York on December 14, 2006, as well as another in the Town of Verona on February 6, 2008. Id. at 6. After considering all public comments provided on the DEIS, the Department issued a Final EIS ("FEIS") on February 22, 2008. The release prompted another comment period of thirty days during which additional comments were accepted. Id. at 10.

On May 20, 2008, DOI issued a ROD in which it determined to accept in trust 13,003.89 of the proposed 17,370 acres. The Department explained that the Oneidas need the land "for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth by providing a tribal land base and homeland." Id. at 8. The Department was also sensitive to the potential jurisdictional problems and other concerns expressed by the State, local governments, and other commenters during the decision process and determined that over 4,000 acres of the Nation's proposed land would not be accepted in trust. The Department explained that 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

[2] The Nation, the New York State Department of Environmental Conservation, Madison County, and Oneida County participated in the NEPA process as cooperating agencies. ROD at 9. The cooperating agencies received a pre-publication version of the Draft EIS ("DEIS") in August 2006, and were encouraged to provide comments. Their comments were received and considered by the Department prior to the release of the DEIS to the public. Id. at 10.

requests to establish a more contiguous and compact trust land grouping than the Proposed Action." Id. at 19. The chosen parcels are located around the Nation's Turning Stone Resort & Casino and around the thirty-two acre territory that remained in the Nation's possession. Id. The Department determined to acquire in trust two highly contiguous clusters of land in order to minimize jurisdictional and other problems, but recognized that complete contiguity was neither practical nor reasonable. Id. at 56. The land to be taken in trust comprises only 1% of the land in Madison County and 1.1% of the land in Oneida County. Id.

III. STANDARD FOR SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." As explained by the Second Circuit, "Summary judgment is appropriate only if, after drawing all permissible factual inferences in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." O'Hara v. Nat'l Union Fire Ins. Co., 642 F.3d 110, 116 (2d Cir. 2011); see also Miller v. Wolpoff & Abramson, LLP, 321 F.3d 292, 300 (2d Cir. 2003) (same).

IV. REVIEW OF AGENCY ACTION UNDER THE APA

Section 706(2)(A) of the APA permits a court to set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard encompasses a presumption in favor of the validity of agency action. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) ("Certainly, the Secretary's decision is entitled to a presumption of regularity."). Typically in APA cases, judicial review is guided by the "record rule": a requirement deriving from the APA itself that limits judicial review to the administrative record prepared by the federal agency in connection

with the agency action challenged. See 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ."); see also Camp v. Pitts, 411 U.S. 138, 142 (1973); Overton Park, 401 U.S. at 420; Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Protection, 482 F.3d 79, 107 (2d Cir. 2006) (same).

Thus, "the ultimate standard of review is a narrow one." Overton Park, 401 U.S. at 416. Review of an administrative record should "be careful, thorough and probing." Ward v. Brown, 22 F.3d 516, 521 (2d Cir. 1994). However, "[t]he court is not empowered to substitute its judgment for that of the agency." Overton Park, 401 U.S. at 416; see also City of New York v. Shalala, 34 F.3d 1161, 1167 (2d Cir. 1994) (same); Friends of Ompompanoosuc v. FERC, 968 F.2d 1549, 1554 (2d Cir. 1994) (same). The 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) (same); Shalala, 34 F.3d at 1167 (same). Even a decision of "less than ideal clarity" should be upheld so long as "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 omitted). A reviewing court should accord deference to an agency "construction of a statutory scheme it is entrusted to administer." Chevron U.S.A., Inc. v. N.R.D.C., Inc., 467 U.S. 837, 844 (1984). Likewise, agency interpretations of their own regulations are "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotations omitted).

V. SUMMARY OF ARGUMENT

Plaintiffs have waived any claim that the Nation was not under federal jurisdiction in 1934 because they failed to raise it before the Department during agency proceedings. Plaintiffs

now seek to supplement the AR with historical documents and an expert report prepared for this litigation but never disclosed pursuant to the Federal Rules of Civil Procedure. These materials were not part of the AR before the Department. If the State had wished these materials to be considered, it should have submitted them to the Department. Nevertheless, should the Court consider them, they establish why a remand on this claim is futile. Nothing the Plaintiffs have offered the Court calls into question the basic facts which compel a conclusion that the Nation was under federal jurisdiction in 1934. The 1794 Treaty of Canandaigua established federal jurisdiction and protection over the Nation and its Reservation. None of Plaintiffs' materials show any action by the United States to terminate federal jurisdiction or to disestablish the Oneida Reservation. In the Boylan litigation, the Second Circuit concretely reaffirmed federal supervision and protection of the Nation and its Reservation lands just fourteen years before enactment of the IRA. That litigation also resulted in controlling Second Circuit precedent holding the Nation exists as a tribe under federal guardianship and that the Nation's land is subject to federal law and thereby under federal jurisdiction. Moreover, the Second Circuit's holding in Sherrill, that the Oneida Reservation recognized and protected in the 1794 Treaty of Canandaigua continues to exist, establishes that the United States had jurisdiction over the Oneida and their lands from 1794 to the present. Finally, that federal jurisdiction was confirmed when the Secretary called a vote of the Oneidas in 1936 to determine whether the Nation would accept application of the IRA to itself.

The remainder of Plaintiffs' claims are similarly meritless. Plaintiffs contend that the Department should have applied its off-reservation regulations to the Nation's trust application, but Second Circuit precedent establishes that the Nation's Reservation has not been disestablished and the United States recognizes the Nation as the tribal entity with governmental

rights over that Reservation. Plaintiffs contend the present decision violates longstanding Department policies, but in fact, the Department's actions all comport with the Department's regulations which define the Department's present policies. Plaintiffs' NEPA claim challenges the Department's utilization of three tax scenarios to consider possible outcomes of the on-going dispute between the Nation and the Counties, but fail to demonstrate how those scenarios affected the Department's consideration of the environmental impacts of its decision, reducing their argument to an irrelevant quibble with a minor aspect of the FEIS.

The challenges to the Department's consideration of factors specified in its land-to-trust regulations are similarly meritless. Plaintiffs contend the Nation does not need land in trust because it is financially capable. However, as the Department made clear, absent trust status, the Nation cannot exercise self-governance in accord with its status as a federally recognized tribe. Plaintiffs argue for a different methodology for determining tax impacts but so long as the Department's approach is reasonable, it should be upheld. The Department explained that it considered the overall fiscal impacts of the Nation on the region which were still positive, even with lands placed in trust. Plaintiffs also complain that the Department had no basis to discount the Town of Verona's taxes assessed on the Nation's casino, but the ROD shows that the Department did consider those taxes at face value, even while concluding they were unlawful under federal law.

Although Plaintiffs contend the Department failed to consider the jurisdictional impacts of its decision, jurisdictional concerns were central in the Department's determination of which lands to accept in trust. The Department selected lands to form contiguous groupings to minimize State and Nation jurisdictional conflicts. As to the State's complaint that it cannot regulate the lands placed in trust, the Department considered the Nation's management of its

own lands and found it to be an environmentally responsible steward of its property. As to the State's complaint that utility easements and rights of way may be threatened by placing land in trust, the Department noted placing land in trust has no effect on valid easements and rights-of-way. Finally, Plaintiffs allege the Department has not considered the BIA's ability to assume responsibility for the newly acquired trust lands. The Department explained in the ROD that it could assume the new responsibilities and this managerial judgment is entitled to deference.

Because all of Plaintiffs' surviving claims lack merit, the Court should grant the United States summary judgment and dismiss Plaintiffs' Complaint.

VI. ARGUMENT

A. Count 3: The Nation Was Under Federal Jurisdiction in 1934

In 2009, the Supreme Court interpreted the IRA's definition of Indian as "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction," 25 U.S.C. § 479, and held that the term "now" in the phrase "now under Federal jurisdiction" meant at the time of the IRA's enactment, rather than at the time the Secretary considered an application to have land taken in trust. Carcieri v. Salazar, 555 U.S. 379, 381 (2009). Plaintiffs, relying on a footnote in a 2006 submission to the Department to preserve their argument, AR000286 n.2[3], now seek to supplement the record with an expert report purporting to establish that the Nation was not under federal jurisdiction in 1934. While the administrative process continued for over two years after Plaintiffs' footnote was submitted (and buried) in lengthy comments to the Department, Plaintiffs opted not to develop this argument. Now that the administrative proceedings are closed and the Department's decision is on review before this

[3] Plaintiffs queried whether the IRA applies to the Nation, alleging "serious questions" regarding its status in 1934.

Court, Plaintiffs muster what they claim to be the historical evidence and even offer a purported "expert report" to flesh out their bare allegation. Based on this extra-record evidence, they ask that this Court find, as a matter of fact, that the Oneidas were not under federal jurisdiction in 1934 with the result that the Oneidas are precluded from the benefits of the IRA.

Plaintiffs waived this potential claim by failing to develop the record during the administrative process. Principles of administrative law preclude a party from reserving a claim and its supporting evidence from agency review and then seeking to litigate when the agency decision is under judicial review. Plaintiffs' new evidence and arguments are not properly before the Court because Plaintiffs denied the Department a fair opportunity to consider them in the first instance. Moreover, in an APA case, Plaintiffs are not entitled to ask this Court to make its own factual findings regarding whether the Nation was under federal jurisdiction in 1934 because that usurps the Department's responsibility to administer and implement the IRA.

Even if the Court reaches the merits, Plaintiffs offer nothing to controvert the fact that the Oneidas have been under federal jurisdiction since at least 1794 when the Treaty of Canandaigua acknowledged and brought their Reservation under federal protection. Since that date, the Oneidas have continually received treaty cloth from the United States pursuant to the treaty, FEIS, App. M at 303, AR026187, demonstrating an ongoing government-to-government relationship between the Oneidas and the United States. In the 1920 Boylan case, the United States successfully brought suit for the benefit of the Oneidas to protect land guaranteed in the Treaty of Canandaigua, demonstrating that the United States maintained active supervision over Oneida land. Finally, in 1936, the Department, pursuant to the IRA, concluded that the Oneidas were under federal jurisdiction, calling a tribal vote on whether the Oneidas would accept application of the IRA.

Plaintiffs ask this Court to ratify various statements of DOI officials, plucked by Plaintiffs from assorted historical documents, concerning the Nation or its Reservation, as an "official" Department position on the Nation. For this argument to succeed, the Court would have to ignore two controlling Second Circuit rulings and to ignore the Department's contemporaneous action of calling an Oneida vote in 1936 to determine whether the Oneidas would accept application of the IRA. Plaintiffs seek to buttress this farfetched argument with a further argument – that by rejecting the IRA, the Oneidas also voted to reject federal jurisdiction over themselves. However, the IRA vote only allowed tribes to choose whether certain provisions of the IRA would apply to themselves, a choice they were permitted to make only because they already were under federal jurisdiction.

Plaintiffs are equally concerned with finding a way to carpet over the incontrovertible fact that in the years leading up to the enactment of the IRA – right in the period in which Plaintiffs contend the Department "officially" disavowed the Oneidas – the United States brought suit on behalf of the Nation and prevailed in an action to protect their Reservation lands. See United States v. Boylan, 265 F. 165 (2d Cir. 1920). Plaintiffs contend that the Boylan litigation and the resulting Second Circuit precedent affirming both the existence of the Nation as a tribe, its Reservation, and the role of the United States as its trustee are of no account. According to Plaintiffs, there is no evidence that the Department of the Interior officially sanctioned the actions of the Department of Justice in bringing the case on behalf of the United States. However, whether the Department of the Interior sanctioned the litigation is irrelevant because either way, the Second Circuit and the United States, through Boylan, affirmed and

vindicated federal protection of both the Oneidas and their land.[4] If Plaintiffs' unique interpretation were adopted, the holding of any case litigated by the United States, including cases resulting in Supreme Court precedent, could be vitiated based on speculation that a federal agency questioned the position asserted for the United States before the Court. The Court should reject this sophomoric argument.

Plaintiffs cannot rewrite the caselaw or the actions of the United States before the federal courts and thereby dismiss Boylan, which both affirmed and proved fourteen years before passage of the IRA that the Oneidas are a tribe under federal jurisdiction. Moreover, the Plaintiffs cannot look behind the fact that in 1936 the Department called an Oneida vote on the IRA. The fact of that vote, by itself, shows federal jurisdiction over the Nation at the time the IRA was enacted. Plaintiffs' selective history and assorted statements by Department officials cannot trump the rulings of the Second Circuit or the contemporaneous actions of the Department. For that reason, the Court should hold the Oneidas were under federal jurisdiction in 1934 as a matter of law. For the same reason, a remand of this case to allow the Department to consider whether the Oneidas were under federal jurisdiction in 1934 would be futile.

1. *Plaintiffs cannot seek review of this claim because they failed to adequately raise it with the Department; and, in any event, their extra-record evidence is not properly before the Court and is irrelevant*

   a. *Plaintiffs have waived their Carcieri claim*

Plaintiffs have waived their Carcieri claim by failing to raise it before the Department during agency proceedings. Because this is an APA case involving review of a record created before the agency, the materials mustered for the Court by Plaintiffs should have been placed

[4] The Department of Justice acts on behalf of the United States in the conduct of litigation. 28 U.S.C. §§ 516, 519.

before the Department in the first instance to enable the agency to evaluate the weight and seriousness of Plaintiffs' claim. Plaintiffs' sole effort to place the Department on notice of their Carcieri claim amounted to a conclusory three sentence description of a potential claim supported by one citation, all of which was relegated to a footnote in comments provided to the Department on January 30, 2006.[5] AR000280-317 at AR000286 n.2. Between that January 30, 2006 notice and the issuance of the ROD in May 2008 Plaintiffs opted not to develop their claim that the agency needed to address whether the Nation was a recognized tribe under federal jurisdiction in 1934. Nor did Plaintiffs proffer any of the materials now on offer to the Court, including their expert report, apparently saving their powder for proceedings before this Court.

In the APA context, reserving claims, arguments, and evidence until a matter is on review before a court results in waiver. Tex Tin Corp. v. EPA, 935 F.2d 1321, 1323 (D.C. Cir. 1991) ("Absent special circumstances, a party must initially present its comments to the agency . . . in order for the court to consider the issue."); SEC ex rel. Glotzer, 374 F.3d 184, 192 (2d Cir. 2004) ("a party seeking to invoke the court's limited power to review agency action under APA § 702 must first exhaust her administrative remedies"). Failure to adequately raise an argument before an agency conflicts directly with the proper role of courts in reviewing agency action, the agency's right to deference from the courts, and the APA. An agency ought not be deprived of the deference due its expert judgment simply because a litigant has failed to provide evidence placed before the court to the agency. Similarly, it is difficult to see that an agency's action can

[5] Plaintiffs did not allege that the Oneidas were not under federal jurisdiction in 1934 but that there were "serious questions" as to the matter. AR000286 n.2. Plaintiffs contend a second three sentence comment, also dropped into a footnote, in their comments submitted February 26, 2006, also put the Department on notice of their Carcieri claim, but that footnote does not challenge the status of the Nation as under federal jurisdiction, although, to be sure, it is as conclusory as their other footnote. See AR001106-38 at AR001113 n.2.

be held arbitrary and capricious or an abuse of discretion under the APA simply because the agency did not respond to an argument not properly before it. As the Supreme Court has explained,

> administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vt. Yankee Nuclear Power Corp. v. N.R.D.C., Inc., 435 U.S. 519, 553-54 (1978).

That describes Plaintiffs' conduct here: a terse three sentence footnoted assertion regarding statutory authority before the agency in contrast to a comprehensive twenty-eight page elaboration of the same claim, supplemented with an expert report specifically prepared for litigation purposes, before this Court. However, "[p]ersons challenging an agency's [action] must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." U.S. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 764 (2004) (internal quotations and alterations omitted); see also N.M. Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 836 (10th Cir. 1986) ("The court will not entertain arguments which should have properly been made before the agency in the first instance."); Nat'l Ass'n of Mfrs. v. U.S. Dep't of Interior, 134 F.3d 1095, 1111 (D.C. Cir. 1998) (issue not preserved for review on appeal just because "buried in hundreds of pages of technical comments [plaintiff] submitted, some mention is made" of a claim to be pressed in the courts). "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952).

This settled principle of administrative law holds even where, as here, a plaintiff raises a claim premised upon agency violation of a statute. See Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1308 (D.C. Cir. 1991) ("We conclude that [plaintiff] waived this statutory challenge by failing to raise it during the rulemaking below."). Plaintiffs cannot withhold the evidence and arguments they believe sustains their claim from the Department and then turn to this Court and complain that their evidence and their arguments were not considered by the Department. The materials prepared for this Court in the present litigation should have been offered to the Department in the first instance at some point between the two years spanning the point at which they gave the Department passing notice of their claim and when the Department made its final decision. Plaintiffs have thus waived any claim that the Oneidas were not under federal jurisdiction in 1934.

b. *Plaintiffs' extra-record evidence is not properly before the Court*

Even if the Court decides to consider Plaintiffs' claim, it should not consider the extra-record evidence that Plaintiffs declined to place before the Department during agency proceedings. The evidence they proffer in support of a resolution of their "legal" question is factual and historical in nature, and includes, most prominently, an expert report prepared for the present litigation that was proffered without the necessary disclosures under the federal rules, and in spite of Plaintiffs' representation in the Court-approved scheduling order that they did not require expert witnesses. Scheduling Order (Dkt. No. 50) at 6.

Specifically, Plaintiffs urge the Court to ignore binding precedent and the vote held by the Department in favor of various letters and reports prepared by Department officials over the years and, based on this scattering of historical evidence selected by Plaintiffs and buttressed by an expert report, to hold that the Department's actual "official" view was that the Oneidas were

not organized as a tribe between 1915-1941. Pl. Br. 26. Plaintiffs have no basis to ask the Court to make these factual findings in an administrative law case – that is the Department's responsibility.[6]

c. *Plaintiffs' evidence is irrelevant*

Nevertheless, Plaintiffs' extra-record evidence makes clear why a remand to the Department would be futile: nothing Plaintiffs offer can undo the concrete and binding acts that Departments of Interior and Justice took which demonstrate federal jurisdiction. But even if the State could convince the Court otherwise, the proper course would be a remand to allow the agency to at last consider the materials Plaintiffs should have proffered years ago if they really did take their Carcieri claim seriously. See Matadin v. Mukasey, 546 F.3d 85, 93 (2d Cir. 2008) ("Because the matter requires determining the facts and because the agency has not yet determined the facts utilizing the appropriate burden of proof, we follow the ordinary remand rule and vacate and remand to the agency for further factual findings.") (internal quotations and citations omitted).

Plaintiffs' own cases do not suggest otherwise. For example, while United States v. Akzo Coatings noted that courts reviewing agency records may, in limited circumstances,

[6] But even if this were not an APA case, Plaintiffs' request would still be inappropriate at this juncture. If the Court is to make findings based on an "historical record," it should be the complete record, one prepared by both parties after discovery. Moreover, if the Court is to adopt Plaintiffs' "expert findings," at a minimum, Plaintiffs should not be permitted to short-circuit the expert discovery procedures mandated by the Federal Rules of Civil Procedure. In short, before any weight is given to Plaintiffs' expert report, the United States should be provided an opportunity to depose their expert, prepare a rebuttal report, and, if appropriate, prepare a Daubert motion striking Plaintiffs' report as unreliable. The Federal rules provide for expert discovery precisely to avoid the kinds of ambush litigation tactics Plaintiffs ask the Court to approve here. Fed. R. Civ. P. 26(b)(4); see also Note to Subdivision (b)(4) ("a prohibition of discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent").

examine "additional evidence" to "determine if the agency examined all relevant factors," it also cautioned that "the reviewing court must be careful not to allow such evidence to change the character of the hearing from one of review to a trial de novo." 949 F.2d 1409, 1428 (6th Cir. 1991); see also Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 15 (2d Cir. 1997) ("Nonetheless, deviation from the record rule . . . is limited. While we allow the consideration of extra-record evidence [in limited circumstances], review of an agency's action is not *de novo*."). See Pl. Br. 10 n.9 (relying on Akzo and Hoffman).

Thus, the Court's examination of Plaintiffs' proffer of extra-record evidence, should it decide to consider it at all, should be limited to determining whether it is substantively sufficient to require remand to allow the Department to address it in the first instance. See, e.g., Illinois v. ICC, 722 F.2d 1341, 1348-49 (7th Cir. 1983) (not remanding where information petitioners sought to place before the agency was "so extraordinarily weak" it could not make any difference on remand). That is required by the ordinary remand rule. Matadin v. Mukasey, 546 F.3d 85, 93 (2d Cir. 2008) ("Because the matter requires determining the facts and because the agency has not yet determined the facts utilizing the appropriate burden of proof, we follow the ordinary remand rule and vacate and remand to the agency for further factual findings.") (internal quotations and citations omitted). The State seeks to evade the ordinary remand rule by broadly and without any support, alleging that the Department cannot be trusted with determining whether the Oneidas were under federal jurisdiction because the Department purportedly seeks to "overturn" Carcieri through its efforts to interpret and apply the language of a statute Congress has clearly tasked it with implementing. Pl. Br. 25. The State, of course, has no basis for this allegation, which is contrary to the bedrock principle of the presumption of reliability that attaches to the actions of government agencies, United States v. Chemical

Foundation, 272 U.S. 1, 15 (1926), other than the fact that some people, including Plaintiffs, disagree with the legal positions taken by the Department. In any event, there are no legal authorities supporting the proposition that a party may circumvent agency review where it believes it will not fare well before the agency.

In contrast to Plaintiffs, the United States is not asking this Court to make factual findings about whether the Oneidas ceased to exist as a tribe before 1934 or whether their reservation ceased to exist. Rather, the United States is asking the Court to hold that Plaintiffs' evidence is irrelevant because in 1936, and within the statutory time-frame permitted by the IRA for such tribal votes, the Secretary called an Oneida vote to determine whether the Nation would accept application of the IRA to itself. The United States asks this Court to hold, as a matter of law, the fact of such a vote called by the Secretary is evidence that, at the time of the IRA's enactment, the tribe was under federal jurisdiction. Similarly dispositive is Boylan, which provides controlling precedent that in 1920 the Oneidas were a recognized tribe holding federally protected reservation land. Such evidence, as a matter of law, cannot be undermined by evidentiary showings of the kind mustered here, that attempt to suggest that the tribal vote on the IRA was not seriously intended to reflect federal recognition of the tribe as under federal jurisdiction.

In short, even if the evidence proffered by Plaintiffs could be considered, remand is still futile because the Department could not seriously deny the Oneidas the benefits of the IRA on the basis that they were not under federal jurisdiction in 1934 in the face of the undisputed fact that the Secretary called an Oneida vote on the statute.

2. *The Department's interpretation of "under federal jurisdiction"*

a. *The legislative history*

Plaintiffs argue that for a tribe to be under federal jurisdiction, it had to have "lands supervised by the DOI," Pl. Br. 21, a view they claim is supported by the legislative history – even though nothing in either the statutory language or the legislative history suggests that federal jurisdiction over a tribe is equivalent to federal jurisdiction over tribal lands. The relevant Committee hearing in which the "under Federal jurisdiction" language was proposed says nothing about federal supervision of lands as being a prerequisite for receiving the benefits of the IRA. See To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs ("Hearing"), 73rd Cong. 234 (1934) (Pl. Exh. A; Dkt. No. 247-1). Instead the Hearing shows that one of the purposes of the IRA was to provide lands for tribes rendered landless by prior federal Indian policies. Hearing at 262 ("Commissioner Collier: The buying of land, for example, for landless Indians and putting them on a colony."). Such a goal would be precluded if Plaintiffs' attempted gloss of the relevant legislative history were adopted and tribes without land were therefore excluded from federal jurisdiction for lack of "lands supervised by the DOI."

The driving concerns of the hearing were how, on the one hand, to ensure tribes neglected by the federal government could receive the benefits of the Act, while, on the other hand, limiting the definition of "Indian" so that the federal government did not have to assume responsibility for Indians not under federal supervision. Senator Thomas of Oklahoma made the case for extending the Act's benefits to the Catawbas of South Carolina, an impoverished tribe about whom he quipped, "The Government has not found out they live yet, apparently." Hearing

at 266. At the same time, Chairman Wheeler asked "how are you going to take care of them unless they are wards of the Government at the present time?" Hearing at 263. He later expressed concern that an over-inclusive definition of Indian would sweep under federal supervision persons who were not really Indians at all. Hearing at 266.

In response to the Chairman's concern, Commissioner Collier suggested that the Act only apply to tribes currently under federal jurisdiction in order to prevent the federal government from assuming statutory responsibilities toward Indian groups with which it had no prior dealings. At the same time, in order to appease Senator Thomas, Collier noted that Indians, alternatively, were defined by blood quantum in the statute. That latter definition of Indian provided the means by which tribes with no dealings with the United States could benefit from the Act: "Commissioner Collier: Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction.' That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help." Hearing at 266. In either case, whether or not Indians possessed land played no role in determining eligibility for the IRA's benefits.[7] Moreover, even if Plaintiffs' interpretation of the phrase "under federal jurisdiction" were correct, the Oneida would satisfy the requirement. As the Second Circuit held in Boylan, Nation land was subject to federal protection and the United States acted to protect that land.[8]

[7] In the end, the statute included a threefold definition of Indian: (1) "members of any recognized Indian tribe now under Federal jurisdiction"; (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"; and (3) "all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

[8] The Second Circuit has also held that the reservation acknowledged in the Treaty of Canandaigua continues to exist. Sherrill, 337 F.3d at 165. If the Reservation created in 1794

b. The Department's interpretation of "now under federal jurisdiction" in the wake of Carcieri

The Department and the Interior Board of Indian Appeals ("IBIA") have carefully considered what "now under Federal jurisdiction" means and how to apply it in the context of tribal land-to-trust applications since Carcieri. In a Record of Decision issued in connection with the application of the Cowlitz Indian Tribe for land to be taken in trust in Washington State, the Assistant Secretary of Indian Affairs noted that Assistant Solicitor Felix Cohen (one of the IRA's drafters) had found the phrase "now under Federal jurisdiction" ambiguous: "Cohen stated that the Senate bill 'limit[ed] recognized tribal membership to those 'now under [f]ederal jurisdiction,' *whatever that may mean*.'" Record of Decision: Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe ("Cowlitz ROD"), (U.S. Exh. 3; Doc. 240-6) at 86 (brackets and emphasis added in ROD text).[9] The Assistant Secretary considered both the legislative history of the IRA, id. at 85-87, and the Department's history of interpreting and implementing the IRA, id. at 89-91. Moreover, the Assistant Secretary recognized that his interpretation of a remedial statute like the IRA must be guided by the Indian canons of construction. Those canons require that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

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continues to exist today, it must also have existed in 1934. Based on the Reservation's existence in the 1934, the Oneida also were under federal jurisdiction.

[9] Commissioner Collier proposed the addition of the phrase "now under federal jurisdiction" at the conclusion of the Hearing. As a result, there is no subsequent discussion in the Hearing regarding the meaning of the phrase or how it might operate. Nor was there further discussion of the meaning of the phrase in a subsequent Hearing or elsewhere. Cohen, thus, found it ambiguous. For Cohen's memorandum, see Differences Between House Bill and Senate Bill, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 2, Memo of Felix Cohen (National Archives Records).

Accordingly, the Assistant Secretary concluded that a two-part test is appropriate when determining whether a tribe was under federal jurisdiction in 1934. First, the Department asks whether a tribe was under federal jurisdiction prior to 1934:

> The first question is to examine whether there is sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or a series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.[10]

Cowlitz ROD at 94. If the answer to this question is affirmative, the Department next asks whether that jurisdiction was retained in 1934. Recognizing that federal jurisdiction is not something that dissolves through federal inaction and that requiring a tribe to produce affirmative evidence of its jurisdictional status for 1934 is too burdensome, the Assistant Secretary cautioned that

> the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status. Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

Id. at 95.

The Assistant Secretary noted (in accord with Justice Breyer's concurring opinion in Carcieri), that "a tribe may have been 'under federal jurisdiction' in 1934 even though the

[10] The Cowlitz Tribe, like the State here, contended for a different approach, albeit one more favorable to tribes. Cowlitz contended that "tribes are under federal jurisdiction as a matter of law pursuant to Congress' constitutional plenary authority over tribes." Cowlitz ROD at 95. The Secretary acknowledged that "Congress's constitutional plenary authority over Indian tribes cannot be divested," but also recognized that "the Supreme Court's ruling in *Carcieri* calls for us, in addition, to point to some indication that in 1934 the tribe in question was under federal jurisdiction." Id. at 97.

Federal Government did not believe so at the time." Id. at 81 (quoting Carcieri, 555 U.S. at 397 (Breyer, J., concurring)). The opinions of federal officials about whether a tribe continues to exist or is under federal jurisdiction, in other words, cannot gainsay "a treaty with the United States that was in effect in 1934, a pre-1934 congressional appropriation, or enrollment as of 1934 with the Indian Office." Id. at 82.

Finally, and importantly here, the Assistant Secretary recognized that certain things could so clearly demonstrate federal jurisdiction over a tribe in 1934 as to render application of the two step inquiry unnecessary:

> For some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to reorganize under the IRA in the years following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934. For such tribes there is no need to proceed to the second step of the two-part inquiry.

Id. at 95 n.98. The example of something that answers both prongs of the two-step inquiry, i.e., that shows both federal jurisdiction and jurisdiction as of 1934, relates, not surprisingly, to actions taken pursuant to the IRA itself.

The Department has subsequently recognized that the fact of a tribal vote called by the Secretary to decide whether a tribe will accept application of the IRA to itself is dispositive of under federal jurisdiction status and is another example of an event that makes unnecessary application of the two-part inquiry. See Shawano County v. Acting Midwest Reg. Dir., BIA, 53 IBIA 62, 71-72 (Feb. 28, 2011) ("Regardless of whether the election for the Tribe . . . had any immediate, practical effect, the Secretary's act of calling and holding this election for the Tribe informs us that the Tribe was deemed to be 'under Federal jurisdiction' in 1934."). The IBIA's ruling was not predicated on an examination of the motivation of federal officials, prior or subsequent federal official actions or statements, or on the outcome of the vote. The mere fact

that the vote was called for and took place is, according to the IBIA, evidence of under federal jurisdiction status. That conclusion was reasonable and, because IBIA exercises the delegated authority of the Secretary to issue final decisions for the Department in appeals involving Indian matters, the IBIA's ruling is entitled to substantial deference. See, e.g., Chevron U.S.A., Inc. v. N.R.D.C., Inc., 467 U.S. 837 (1984); South Dakota v. U.S. Dep't of the Interior, 401 F. Supp. 2d 1000, 1008 (D.S.D. 2005) (IBIA rulings on what Department regulations require "entitled to substantial deference" as the "Department of Interior's interpretation of its own regulation").

c. Plaintiffs' proposed rule

The State dismisses the Cowlitz approach as biased in favor of tribes.[11] The State also ignores the IBIA's unambiguous and dispositive ruling in Shawano County, as well as the controlling Second Circuit precedent in Boylan and Sherrill, and asks the Court to adopt an approach that better suits its litigation objectives. Plaintiffs, however, are not free to craft their own approach as an alternative to the Department's because the Department is entitled to the deference accorded all agencies interpreting and implementing the statutes for which Congress has made them responsible. If, as here, the language of a statute is ambiguous, a court should defer to the interpretation of the agency tasked with administering the statute so long as that interpretation is reasonable. See Chevron, 467 U.S. at 843 ("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"); see also Barnhart v. Thomas, 540 U.S. 20, 29 (2003) ("The proper Chevron inquiry . . . [is] whether, in light of the alternatives, the agency construction is reasonable."). Moreover, the Indian canons of construction mandate that

[11] As noted above, the Cowlitz Tribe proposed a different standard, which the Department considered but rejected.

ambiguous language be construed in favor of Indians. Hagen v. Utah, 510 U.S. 399, 437 (1994) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (quoting Montana, 471 U.S. at 766).

Claiming to rely on a Department brief filed in an IBIA proceeding, Plaintiffs concoct a three factor test that suits their litigation needs. Pl. Br. 22; Department Memorandum of Law, Village of Hobart v. Acting Midwest Reg. Dir., BIA ("Department Brief"), Consolidated Docket Nos. IBIA 10-091, 10-092 and 10-107 (Sept. 27, 2010) (Pl. Exh. B; Doc. 247-2). Plaintiffs' proposal neither tracks the Department's brief nor does it adhere to the Indian canons of interpretation. The Department Brief, as an initial matter, does not attempt to distill a three factor test applicable to all tribes. Rather, and consistent with the Department's opinion in the Cowlitz matter, it considers the various contacts and dealings between the tribe and the United States. Department Brief at 9-19.

Plaintiffs argue that the Department's brief states that to find federal jurisdiction over a tribe, a tribe must "vote to adopt the IRA in 1934." Pl. Br. 22. This third factor Plaintiffs purport to extract from the brief is simply not supported by the brief itself. The Department Brief makes clear that it is not the result of the vote that matters but the fact that the Secretary called it in the first place:

> The fact that the Department of the Interior held an election for the Oneida Tribe [of Wisconsin] to determine whether it wanted to accept the terms of and organize itself under the IRA is incontrovertible proof that the United States viewed the Oneida Tribe as being under its jurisdiction in 1934.

Department Brief at 17-18. In this respect, the Department Brief is entirely consistent with the Department's observation in Cowlitz that some actions, particularly those taken in connection with the IRA, may obviate or make unnecessary application of the detailed two-part inquiry set

forth by the Secretary to determine if a tribe was under federal jurisdiction in 1934. And, of course, the Department Brief is consistent with Shawano, which held that the mere fact that the Secretary called a tribal vote on the IRA is dispositive of the question of federal jurisdiction, regardless of the result of the vote.

In this case, the parties do not dispute that the Secretary called a vote of the Oneida Indian Nation of New York on whether the tribe would accept application of the IRA to itself. Thus the Court need not address whether the two part approach to determining federal jurisdiction set forth in Cowlitz is the correct one. The only question is whether the Court finds reasonable the Department and IBIA's view that the act of the Secretary of calling a tribal vote on whether to accept application of the IRA is dispositive of the question of whether a tribe was under federal jurisdiction in 1934.[12]

3. *Plaintiffs' evidence provides no grounds to disclaim federal jurisdiction over the Oneidas in 1934*

Plaintiffs rely on selected Department documents to allege an "official" Department position that the Oneidas ceased to exist as a tribe under federal jurisdiction sometime in the nineteenth century. This contention, supported by similar evidence, has been previously made before – and was rejected by – the Second Circuit:

> [T]he authorities offered . . . merely reflect the opinions of a handful of government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased. In particular, letters from the Assistant Commissioner of Indian Affairs in 1916 and 1925 stated that the tribe no longer existed in New York. This conclusion is, to some degree, understandable, since

[12] Even if the Cowlitz two-part test is applied, the Oneidas clearly came under federal jurisdiction before 1934 and retained that status as of 1934. The first question, whether the United States had, at or before 1934, dealt with the tribe in a manner to evidence federal jurisdiction, is answered by the 1794 Treaty of Canandaigua as well as Boylan. The second question, whether such federal jurisdiction continued at time of the IRA's enactment, is answered by the fact of the Oneida vote on the IRA.

> most of the Oneida reservation land had been sold to the State, with the remaining parcels divided among members who, increasingly, lived separately from one another and received state services. But these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in Boylan. Moreover, this Court determined in Boylan in 1920 – between the time of the two letters in question – that the Oneida tribe did in fact exist.

Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 166-67 (2d Cir. 2003) (internal citations omitted), rev'd on other grounds by 544 U.S. 197 (2005). This Court should follow the precedent of the Second Circuit and again reject contentions about the Oneidas ceasing to be a tribe or ceasing to have a reservation based on informal opinions of government officials. Instead, the Court should be guided by concrete actions demonstrating federal jurisdiction over the Nation.

a. *The Secretary undisputedly called an Oneida vote on the IRA*

Plaintiffs do not dispute that the Secretary called an Oneida vote within the time limit prescribed by the IRA for tribes eligible for benefits under the statute. They seek to evade the dispositive significance of this vote by, on the one hand, offering legal arguments seeking to displace its significance and, on the other hand, by suggesting that the vote was something of an anomalous departure from the Department's "official" position that the Nation was not under federal jurisdiction.

Plaintiffs contend that because the Oneidas voted against application of the IRA to themselves in 1936, they "rejected any possibility of coming under federal jurisdiction." Pl. Br. 34.[13] Plaintiffs present this as a factual claim, supporting the assertion with a citation to their newly retained expert's report, but it is a legal contention and, as such, is not properly the subject

[13] This argument has absurd implications insofar as it means that any tribe that voted to reject the IRA, like the Navajo, is not under federal jurisdiction. F. Cohen, Cohen's Handbook of Federal Indian Law § 1.05 (2005 Ed.) (Navajo voted to reject the IRA).

of an expert report. United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991) ("As a general rule an expert's testimony on issues of law is inadmissible."). In any event, Plaintiffs' expert report is nearly as conclusory on this legal question as the Plaintiffs' brief. The report offers quotes that show Department officials preparing to assume the administrative responsibilities that the IRA will place upon them should the New York tribes vote not to reject application of the IRA. The Department officials are clearly discussing their responsibilities under the IRA, yet the report attempts to misconstrue that as the Department addressing the question of what responsibilities it will have if the New York tribes accept federal jurisdiction.[14] For example, this quote by Commissioner Collier is offered in the report as evidence that the New York tribes, in voting on application of the IRA, were really voting on the entire question of whether they were under federal jurisdiction: "Possibly most of the New York Indians may come within the scope of the Wheeler-Howard Act, approved June 18, 1934 (Public No. 383, 73rd Congress). However our plans for the administration of this act are yet in a tentative stage and no definite program has been formulated." Pl. Exh. WW (Doc. 242-2) at 39. The State's expert glosses: "Collier was thus looking to the IRA voting results to see if the New York Indians would come under the jurisdiction of the Office of Indian Affairs," as if tribes could choose whose jurisdiction they fall within, whether it be the United States, a State, or a foreign government. Id. at 39-40.

The legal significance of the votes called by the Secretary pursuant to Section eighteen of the IRA is spelled out by the statute itself:

[14] None of this, of course, is to concede the historical facts the Plaintiffs would have the Court adopt. Rather, it shows that even viewed in the light most favorable to Plaintiffs, the incomplete and one-sided historical record they have created for the Court cannot controvert the fact that the Oneidas were clearly under federal jurisdiction in 1934.

> 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 . . . to call such an election . . . .

25 U.S.C. § 478. The existence of federal jurisdiction over a tribe is a prerequisite for, not the result of, a vote called by the Secretary because if the tribe does not meet the IRA's definition of Indian, there is no basis for the Secretary to determine whether the tribe will accept application of the IRA. Moreover, the vote, by the statute's plain language, only goes to whether the provisions of one federal statute will apply to the voting tribe – a negative vote does not affect the federal government's ability to deal with the Indians outside the context of the IRA. That is why Congress could subsequently pass legislation extending the IRA's benefits to tribes regardless of whether they initially elected to reject the statute. See 25 U.S.C. § 2202 ("The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title . . . ."); Carcieri, 555 U.S. at 394-95 (Section 2202 "by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe.").

Leaving aside the legal significance of the vote, the State explains that the Department initially concluded that the Oneidas were not eligible to vote on the IRA, but then concluded that the Oneidas might still have a tribal reservation, particularly in light of Boylan, and determined to hold a vote without making findings about the Oneidas' tribal organization. Pl. Br. 32-33. None of this nullifies the fact that the Department ultimately determined to hold a vote which, in itself, is contemporaneous evidence of federal jurisdiction. Moreover the materials cited by Plaintiffs do not so much cast doubt on the matter of federal jurisdiction as they do on the existence of an Oneida reservation, which is not surprising given that the Oneidas at that point

retained only 32 acres, the rest having been lost through unlawful purchases by the State.[15] While a Department official conceded that the State exercised jurisdiction over Indians in its bounds as a practical matter, the Department asserted that such jurisdiction was concurrent with federal jurisdiction:

> It would therefore appear that the Oneida Indians have a reservation in the State of New York; that such reservation is not a Federal reservation, but is under the jurisdiction of the State; and that the United States and the Oneida Indians occupy the relation of guardian and ward. It is indicated further in [Boylan] that the jurisdiction of the United States and the States is concurrent.

Memorandum from J.M. Stewart, Dir. of Lands, to Mr. Daiker at 3 (May 12, 1936), Pl. Exh. HH (Doc. 248-25).[16]

Moreover, this recognition of federal jurisdiction over the Indians of New York can be found throughout the historical materials relied upon by Plaintiffs. The 1914 Reeves Report, for example, while missing the 32 acre Oneida Reservation, was explicit about the fact that the United States had dealings with and treaty obligations to the tribes in New York. The letter transmitting the Reeves report to Congress noted that "Congress by treaty with these Indians has guaranteed them peaceful possession of the soil (treaty of Nov. 11, 1794, 7 Stat., 44), and the Supreme Court of the United States has denied the State the right to tax their lands." H.R. Doc. 63-1590, at 9 (1915) (Letter from the Secretary of the Interior) (Pl. Exh. C; Doc. 247-3). The

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[15] To the extent that the Department officials might have thought that the Oneida Reservation acknowledged in the Treaty of Canandaigua had ceased to exist, they were wrong as a matter of law. Only Congress can alter a reservation once it is established. Solem v. Bartlett, 465 U.S. 463, 470 (1984). Moreover, the Second Circuit has held that the Oneida Reservation continues to exist. Sherrill, 337 F.3d at 165.

[16] Cursive writing at the end of the document notes disagreement on whether jurisdiction over the Oneidas is concurrent which is no doubt a recognition that the Second Circuit in Boylan had stated that "the exclusive jurisdiction over the Indians is in the federal government." 265 F. at 171.

Reeves report notes the inactivity of the federal government in relation to the New York Indians but nevertheless concludes the Indians are "wards of both the Nation and the State," such that "Jurisdiction seems concurrent rather than exclusive." Id. at 15 (Report of John Reeves).[17]

Similarly, the 1892 Extra Census Bulletin: Indians: The Six Nations of New York, also relied on by Plaintiffs, notes that the "law and facts show that the reservations of the Six Nations of New York are each independent, and in some particulars as much sovereignties, by treaty and obligation, as are the several states of the United States," and concludes that "the Six Nations are nations by treaty and law, and have long since been recognized as such by the United States and the State of New York." Pl. Exh. G (Doc. 247-7) at 3, 4.[18]

Thus while some Department officials at times may have expressed doubts about the survival of any Oneida Reservation lands in the face of the State's successful efforts to dispossess the Nation, and while they may have questioned the continued tribal existence of the Oneidas at various points in time,[19] they were quite clear as to the existence of federal treaty relations with the New York Indians and of the existence of federal jurisdiction over those

[17] Reeves also pointed out that with respect to their lands in New York, "the Indians' right of possession is an indefeasible one which cannot be disturbed without the sanction of the Federal Government." Id.

[18] The Bulletin further notes that the "members of the Six Nations of New York residing on reservations or living in tribal relations do not vote at county or state elections, nor do they pay taxes to the counties or the state. They are therefore Indians not taxed." Id. at 3.

[19] Plaintiffs attempt to characterize their view of the Oneidas as a defunct tribe as the "official" view of the Department, relying on the 1941 edition of Felix Cohen's Handbook of Federal Indian Law. Pl. Br. 28. However, that document, while originally prepared by Department employees, was conceived as "a simple manual" to assist practitioners who previously had to deal with an "unmanageable mass of materials." Id. at v (Foreward). Far from representing an official statement of the federal government, the Foreward to the 1941 edition states that "[i]n publishing this work the Department of the Interior does not assume responsibility for every generalization, prediction, or inference that may be found in the volume." Id. at vi.

Indians, which if not exclusive, was at a minimum "concurrent" with that exercised (legally or not) by State authorities. Hence, when evidence came to light of the Oneidas' continued tribal existence and continued possession of treaty-protected Reservation lands, the Secretary acted in accordance with the Nation's federal jurisdiction status by calling an IRA vote.[20] As the IBIA noted, the outcome of the vote is irrelevant.

b. *The United States undisputedly acted on behalf of the Nation to protect its reservation lands in the years before the IRA's enactment*

Regardless of whether the Department missed the existence of the small 32 acres of the Oneida Reservation never lost to New York, the existence of that Reservation land was confirmed and acknowledged by the United States when State authorities carried out eviction proceedings on it, triggering a legal intervention by the United States on behalf of the Oneidas in the Boylan litigation. That litigation culminated in the 1920 Second Circuit decision affirming the existence of the Nation as a tribe, the existence of its Reservation, and the supervision of the United States over both the tribe and its Reservation land through enforcement of federal protections over the Nation's land. As the Second Circuit explained, "Once a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government." Sherrill, 337 F.3d at 166. It is Plaintiffs' burden, in the face of Boylan, to show an affirmative federal action terminating supervision of both the Nation and its Reservation land at some point between the Second Circuit's 1920 opinion and the

[20] Neither the 1941 Handbook nor other statements of federal officials can alter the government-to-government relationship between the United States and the Oneida, the treaty with the Oneida, the existence of the Oneida Reservation, nor the continuous Oneida ownership of land within the Reservation, all of which may only be altered by Congress. Plaintiffs' arguments to the contrary would permit federal officials to trump Congress's will in violation of federal statute, 25 U.S.C. § 177, and Supreme Court case law, Solem, 465 U.S. at 470.

enactment of the IRA. Absent action by Congress or the Executive branch to terminate federal recognition of the Nation and to disestablish the Nation's Reservation, the Court must conclude that the Nation was under federal jurisdiction in 1934. See United States v. Holliday, 70 U.S. 407, 419 (1865) ("In reference to all matters [of tribal organization], it is the rule of this court to follow the action of the executive and other political departments of the government, whose special duty it is to determine such affairs.").

Boylan presents insuperable problems for Plaintiffs' effort to establish the non-existence of the Oneidas or federal jurisdiction over them in the years before passage of the IRA. The opinions of various Department employees cannot gainsay the fact that the United States took affirmative action to protect tribal reservation land. Nor can the opinions of Department employees alter the status of the Nation's Reservation land as federally protected. Plaintiffs call the decision "infirm[]," Pl. Br. 30, and argue that the litigation was not authorized by the Department, Pl. Br. 31, as if that fact, even if true,[21] were relevant. When the Department of Justice litigates, it acts on behalf of the United States, regardless of any view agency officials may have regarding such litigation. 28 U.S.C. §§ 516, 519.

Similarly, the Department was not free to disclaim the legal precedent created in the Second Circuit, and it did not. Although Plaintiffs assert the Department, in the wake of Boylan, asserted that the Oneidas were not "wards" of the federal government, Pl. Br. 31, the evidence they rely on actually shows the Department beginning to acknowledge the significance of the

[21] Although Plaintiffs contend the Department never authorized the Boylan litigation, they have no evidence to that effect. Instead, all that is clear is that after the litigation commenced, efforts to locate a Department referral recommending litigation were frustrated. Even if such evidence were available, it would be irrelevant. The Department of Justice litigates for the United States and its filings before the federal courts speak for the United States and are binding on the United States.

Boylan decision. Plaintiffs' Exhibit U, for example, a 1920 letter from Assistant Commissioner Merritt, while noting that his office had not "assumed any direct supervision over the internal affairs of the Oneida Reservation," at the same time acknowledged that

> in a recent decision by the Federal Court with reference to a small tract of land remaining at Oneida . . . the Court intimated that the Oneida Indians were still wards of the Federal Government and that the disposal of the remaining lands, belonging to these Indians . . . under State laws was without proper authority.

Pl. Exh. U (Doc. 248-12).

Moreover, part of the reason the Department determined that the Oneidas deserved a second look on the question of their eligibility to vote on the IRA was because of Boylan. Commissioner Collier asked the New York Indian agent to review his position that the Oneidas were not eligible, and, further, in response to Boylan, suggested that he

> examine the present status of all lands within the reservation with a view to determining how much of this land is still in Indian ownership and whether a substantial part of this land may be claimed by the Oneida Tribe under authority of the decision in U. S. v. Boylan, 265 Fed. 165.

Letter from John Collier, Commissioner, to Mr. W. K. Harrison, Special Agent in Charge (Sept. 9, 1935) (Pl. Exh. DD; Doc. 248-21). Agent Harrison's response was that the matter was too complicated to be easily resolved without a survey: "From my examination of this matter I am unable to say that the Oneidas have a reservation. A survey in connection with an examination of a line of treaties made with the State is required to determine that." Letter from W.K. Harrison, Special Agent, to Commissioner of Indian Affairs, at 2 (Jan. 16, 1936) (Pl. Exh. EE; Doc. 248-22). However, by May 12, 1936, the Department's Director of Lands had concluded

that the "Oneida Indians have a reservation in the state of New York." Pl. Exh. HH at 3 (Doc. 248-25).[22]

The distance between the Department's view that its jurisdiction over the Oneidas and other New York Indians was concurrent with the State's, to the implication of Boylan that the State lacked the power to acquire Oneida Reservation land from the Oneidas is great, and while the Department may have been reluctant to embrace Boylan, it did not simply dismiss the case. Indeed, Boylan is part of the reason the Department reversed course and determined the Oneidas should vote on whether to accept the IRA.

The Department was not free to disregard Boylan in 1934, and it is not free to do so today which is why, in the end, all of the historical evidence Plaintiffs have urged upon the Court is irrelevant. It is also why a remand of this issue to the Department is futile. Plaintiffs are not free to dismiss Boylan as a "curious historical footnote" in the present inquiry of whether the Oneidas were under federal jurisdiction. Pl. Br. 32. Boylan is further and incontrovertible proof of the exercise of federal jurisdiction over the Oneidas and their Reservation. That jurisdiction had begun at least since the 1794 Treaty of Canandaigua, and was concretely reaffirmed fourteen years before passage of the IRA. Absent a showing that the United States took subsequent action to disestablish the Nation's Reservation or terminate the tribe, the Court must conclude that in 1934 the Nation was under federal jurisdiction. The holding of a vote on the IRA confirms the existence of that federal jurisdiction existed at the time of the IRA's enactment.

[22] To be sure, the Director of Lands opined that the State had jurisdiction over the Reservation lands because the United States had no possessory rights to Indian land in the original thirteen colonies: "These lands, however, do not constitute a Federal reservation but title thereto was always in the Indians." Id. at 2. That statement is wrong regarding jurisdiction, but also irrelevant because the IRA asks whether the tribe, not its land, is under federal jurisdiction.

4. *A Remand is Futile Because the Department is bound to conclude the Nation was under federal jurisdiction in 1934*

Plaintiffs complain that the standard for determining federal jurisdiction must be something more than invoking the federal government's plenary authority over Indians, Pl. Br. n.24, and the Department agrees. See Cowlitz ROD 95-97 (rejecting tribal contention that "under federal jurisdiction" inquiry satisfied by recognition of federal plenary authority over Indians). Treaty relations, treaty obligations, a federal reservation, and federal actions to protect a tribe and its land constitute concrete examples of federal jurisdiction. See Treaty of Canandaigua, 7 Stat. 44; Sherrill, 337 F.3d at 165; Boylan, 265 F. at 174. And finally, after enactment of the IRA, the Department selected some tribes to vote on whether the statute applied to it, and for other tribes did not, even though the Constitution grants plenary authority over all Indians to the federal government. For those tribes the Secretary selected, like the Oneidas, the act of holding a vote provides incontrovertible evidence of their existence as a recognized tribe under federal jurisdiction at the time of the statute's enactment because otherwise the vote would not have occurred.

In the face of these federal actions establishing and exercising supervision, the Department clearly has the authority and obligation to accord the Oneidas the benefits of the IRA. Accordingly, the Court should dismiss Plaintiffs' third count.

B. The Department Properly Treated This as an On-Reservation Acquisition

Plaintiffs argue that the Department erred in applying its "on-reservation" regulations to the Oneida trust application, 25 C.F.R. § 151.10, instead of its "off-reservation" regulations, 25 C.F.R. § 151.11. Pl. Br. 51-55. Plaintiffs do not dispute that the Second Circuit has held that the Oneida Reservation has not been diminished or disestablished. See Oneida Indian Nation of N.Y. v. Madison County, --- F.3d ---, Docket Nos. 05–6408–cv (L), 06–5168–cv (CON), 06–

5515–cv (CON), 2011 WL 4978126, at *26 (2d Cir. Oct. 20, 2011). Instead, they argue that the Department's own regulations preclude it from treating Oneida Reservation land as on-reservation. Those regulations define reservation as the "area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f). Plaintiffs argue that, in the wake of the Supreme Court's Sherrill decision, the United States does not recognize the Oneidas as having governmental jurisdiction over its Reservation lands.

Plaintiffs are wrong. The United States recognizes the Oneidas as having governmental jurisdiction over its Reservation lands and has recognized this since the Treaty of Canandaigua. While the Supreme Court held that the Nation's ability to exercise that jurisdiction was impaired for equitable reasons, see Sherrill, 544 U.S. at 221, it did not hold the Reservation itself was disestablished or diminished. Nor did the Court hold that the Oneidas lacked governmental jurisdiction over its members within its Reservation. The Department noted the decisions of this Court and the Second Circuit recognizing the continued existence of the Oneida Reservation as the basis for concluding the application was for "on-reservation" land because reservation land, by its very nature, is land over which a tribe has governmental rights.[23] ROD at 32.

Section 151.2(f) is not meant to create a loophole by which judicially acknowledged reservations can be challenged by third parties or disclaimed by the Department. The regulation focuses on governmental jurisdiction because the question of which tribe properly has governmental rights over reservation land is not always clear. In fact, in this case, the Stockbridge-Munsee Community Band of Mohican Indians have disputed what tribe properly

[23] For purposes of judicial review under the APA, it is not necessary that this Court make a specific finding as to reservation status. Instead, the Court must merely determine that it was reasonable, under the circumstances, for the Department to treat the Oneidas' trust application as an "on-reservation" application.

exercises governmental jurisdiction over part of the Oneida Reservation, a matter on which the Department did not have to take a position. ROD at 32-33.[24] See Citizen Band Potawatomi Indian Tribe of Okla. v. Collier, 142 F.3d 1325 (10th Cir. 1998) (adjudicating dispute between tribes over which entity properly exercises jurisdiction over reservation lands). Plaintiffs' argument is not that a different tribe properly exercises jurisdiction over the Reservation land here; it is that no tribe properly exercises jurisdiction over the Indian reservation that they also argue has not been disestablished. Pl. Br. 50.[25]

Plaintiffs acknowledge that the ROD considered the application pursuant to the "off-reservation" regulations and explained that even if the "off-reservation" regulations applied, it would still acquire the land in trust. ROD at 33 n.5; Pl. Br. 51-52. Plaintiffs also acknowledge that the difference between the two criteria is that with the "off-reservation" regulation, the Department is to give "greater weight to the concerns [of state and local government]" with regard to "potential impacts on regulatory jurisdiction, real property taxes and special assessments," while also giving "greater scrutiny to the tribe's justification of anticipated benefits from the acquisition." 25 C.F.R. 151.11 (b), (d). Nevertheless, Plaintiffs complain that

[24] With regard to parcels claimed by the Stockbridge-Munsee as Reservation land, the Department avoided the dispute by only accepting parcels adjacent to undisputed Oneida lands because the regulations provide for treatment of land as on-reservation where it is "located within or contiguous to an Indian reservation." 25 C.F.R. § 151.10. The Department noted that it declined "one parcel . . . located in the Town of Stockbridge that is not contiguous to the undisputed Oneida reservation." ROD at 32-33.

[25] Although Plaintiffs are inimical to the existence of an Oneida Reservation, for purposes of the present argument they contend the Department cannot conclude the Oneida Reservation was disestablished. They need to do this because the Department regulations treat land within a "former reservation of the tribe" as "on-reservation." 25 C.F.R. § 151.2(f).

by using the "on-reservation" criteria, the Department failed to consider all the relevant factors – even though the factors are the same for both "on-reservation" and "off-reservation" criteria.[26]

Application of the "off-reservation" criteria would not significantly alter the analysis here. The off-reservation criteria merely increases the scrutiny of certain factors examined also under the "on-reservation" criteria proportionally with the distance of the proposed trust land from a tribe's reservation. Thus, for example, where a tribe seeks an out-of-state trust acquisition, the Department must give great weight to state and local government concerns. Here, by contrast, all the land is in-state and in close proximity to the 32 acres of Reservation land never lost to New York so whatever increase in scrutiny is warranted by the off-reservation criteria would not alter the Department's already thorough consideration of State and local concerns as expressed in the ROD.

Moreover, nothing in the "off-reservation" criteria mandates a specific or different result, especially here, where as the Department noted, its analysis of the Section 151 factors was painstakingly detailed and thorough, as evidenced by the ROD. Plaintiffs point to documents in the AR showing the Department believed the "on-reservation" regulations were the appropriate ones to apply, Pl. Br. 53, but they are simply irrelevant to whether the Department gave careful consideration to the State and local government comments regarding impacts on regulatory jurisdiction, real property taxes and special assessments. 25 C.F.R. 151.11 (d).

Similarly irrelevant is the March 30, 2006 Memorandum from a Department employee to the contractor which, two years before the ROD issued, offered "ideas that may be useful to keep

[26] Plaintiffs in effect acknowledge this elsewhere in their brief: "Section 151.10 lists criteria that '[t]he Secretary will consider' and section 151.11 states that the Secretary 'shall' consider those factors, affording greater weight to comments from affected governments." Pl. Br. 81.

in mind" in preparing the DEIS. ARS005037-42 at ARS005037.[27] Plaintiffs assert this document evidences a dismissive attitude towards jurisdictional concerns. Pl. Br. 54. First, the document is preliminary and deliberative in nature; it is the ROD that reflects the Department's final considered position. Second, while Plaintiffs correctly note that the Memorandum does not adopt their view that jurisdictional concerns should preclude land being taken in trust, it is not dismissive. Rather, cogent reasons are offered for the views expressed, even if Plaintiffs disagree with those views.[28] Finally, the document relied on by Plaintiffs is evidence of the Department actively engaging with and guiding the contractor, belying Plaintiffs' claim that the contractor was a mere tool of the Tribe.

Plaintiffs do not argue that the ROD is cursory in dealing with their comments or the Oneidas' need for land in trust and in the end offer the Court no real ground to require a reconsideration of the Section 151 factors even if, somehow, it could be demonstrated that the Oneidas' Reservation is not a reservation for purposes of taking land into trust.

C. Plaintiffs' Policies and Procedures Claim Lacks Merit

Plaintiffs argue the Department decision should be overturned because it marks a departure from past Department policies and procedures in three respects: (1) in taking land in trust for a financially capable tribe; (2) in not requiring the tribe to pay all outstanding taxes before taking land in trust; and (3) in not requiring the preparation of Preliminary Title Opinions. Pl. Br. 55-67. These claims of purported policy departures are premised upon obsolete APA case

[27] The bates number prefix "ARS" stands for Administrative Record Supplement.

[28] For example, while the Memorandum does find concerns regarding utilities not dispositive, that is because "Utility easements recorded with a deed are transferred with a deed when recorded by the BIA. The Nation's use of utilities can be freely negotiated with the local utility boards. The Nation has to pay for the use of utilities just like any other facility or service can be discontinued." ARS005037.

law that, according to Plaintiffs requires a court to "closely scrutinize" agency departures from prior policies. Pl. Br. 56. That disregards the Supreme Court's determination that agency changes in policy or interpretation may not be held to higher standard of review. See FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) ("the agency need not always provide a more detailed justification than what would suffice for the new policy created on a blank slate."); id. at 1813 "(the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so"). In any event, Plaintiffs' claims cannot benefit from the case law concerning reinterpretations by agencies, as the Department's action here was in no way a departure from prior policies or procedures. Moreover, the Department's interpretations of its regulations are controlling given that they are neither plainly erroneous nor clearly inconsistent with the regulations.

1. *The Department has no policy prohibiting land being acquired for financially capable tribes*

Plaintiffs unearth two Department memos from the Termination era of federal Indian policy,[29] one dating from 1959 and another from 1960, and argue these obsolete documents establish a federal policy of refusing to acquire trust land for Indians able to manage their own affairs that has been violated by the present decision. Even if this were a Department policy, it has not been followed for decades and it was not incorporated in the current policy which is memorialized in the Department regulations. They provide that land may be acquired when "the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-

[29] The Termination era spanned from 1943-1961 and was characterized by federal policies aimed at "the eventual discharge of the federal government's obligation – legal and moral – and the discontinuance of federal supervision and control" over Indians. F. Cohen, Handbook of Federal Indian Law § 1.06 (2005 ed.). The Supreme Court has acknowledged the swings and abrupt changes in Indian law and the discretion to alter past approaches. United States v. Lara, 541 U.S. 193, 202 (2004).

determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). That has been the Department policy since at least 1980 when, after providing notice and receiving public comments, the Department promulgated its land acquisition regulations. See 45 Fed. Reg. 62034, 62036 (Sept. 18, 1980) (Department land acquisition policy permits acquiring land "when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.").[30] Plaintiffs' charge of a sudden and unexplained departure from a vintage Termination era policy is meritless.

2. *Plaintiffs lack prudential standing to challenge the Department's title examination*

Plaintiffs' claims challenging the Department's compliance with its title examination procedures, both the challenge to the requiring of letters of credit and the challenge concerning Preliminary Title Opinions ("PTO"), fail as an initial matter because Plaintiffs lack prudential standing to bring them. Standing is issue-specific, and "is not dispensed in gross" or as to all issues or claims asserted in a given case. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) (internal quotations omitted). The APA requires a plaintiff to show that a final agency action injures it and that the plaintiff falls within the "zone of interests" of the statutory or regulatory provision allegedly violated. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990) (internal quotations and citations omitted). Application of the zone of interests test requires a court to "first discern the interests arguably to be protected by the statutory [or regulatory] provision at issue; [the court] then inquire[s] whether the plaintiff's interests affected by the agency action in question are among them." Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) (internal quotations and alterations

[30] These regulations were amended in 1995, 60 Fed. Reg. 32879 (June 23, 1995), although the amendments did not affect 25 C.F.R. § 151.3.

omitted); see also B.K. Instrument, Inc. v. United States, 715 F.2d 713, 720 (2d Cir. 1983) ("zone of interests" requires consideration of "applicable . . . statutes and regulations.") (internal quotations omitted).

The title examination process is separate from the process of deciding whether to accept land in trust in the first place. Title examination only begins after the Secretary has concluded he will accept land in trust. 25 C.F.R. § 151.13 (applicant required to furnish title evidence "[i]f the Secretary determines that he will approve a request for the acquisition of land"). Plaintiffs' alleged injuries here flow from the Department's decision to acquire land in trust, not from the title examination procedures underway as a result of that decision. Title examination ensures that when the Secretary formally takes title to trust land, that title is good. Plaintiffs lack standing to challenge the Department's compliance with its title examination provisions because Plaintiffs' concern about tax collection does not fall within zone of interests protected by 25 C.F.R. § 151.13. That provision is designed to protect the United States by ensuring that it acquires good title when placing land in trust. See 45 Fed. Reg. 62034, 62035 (Sept. 18, 1980) (noting that Section 120a.12 [currently designated as Section 151.13] was designed to ensure title infirmities do not "impose burdens on the United States"). Plaintiffs' lack standing to object to the Department's requiring letters of credit because those letters are designed to protect the United States, not Plaintiffs. They are the means by which the Department ensures it acquires title that is not marred by tax liens, should those liens eventually be held lawful.

Similarly, whether or not the Department should have prepared PTOs at some specific point in the administrative process is a matter that has no bearing on Plaintiffs. The only party that can be potentially harmed by the alleged failure to prepare PTOs is the United States so Plaintiffs' challenge should be dismissed for lack of standing. See Ctr. for Reproductive Law &

Policy v. Bush, 304 F.3d 183, 196 (2d Cir. 2002) (prudential standing bars claim where "plaintiffs do not assert a harm to their own interest in receiving due process of law").

3. *The Department's decision to require letters of credit comports with its regulations and was reasonable where the lawfulness of property taxes is in question*

Plaintiffs argue that the Department departed from standard practice in requiring the Nation to post letters of credit in lieu of paying off outstanding but disputed tax liens which were held unlawful at the time of the decision. The Department explained that requiring tax liens was permissible and provided a reasoned explanation of why the circumstances warranted this. ROD at 53-54. The Department noted that the taxes the Counties imposed on the Nation had been held unlawful by this Court pursuant to a New York State law prohibiting taxation of lands within Indian reservations. ROD at 41. Rather than requiring the Nation to pay taxes that had been ruled unlawful, the Department opted instead to require the Nation to post "irrevocable bank letters of credit to Madison and Oneida Counties for all of the taxes, penalties, and interest allegedly owed," with the exception of taxes assessed on tribal improvements to the lot on which their gaming facility is located.[31] ROD at 53. This measure enabled the Department to avoid forcing the Nation to pay taxes held unlawful at the time the ROD issued while, at the same time, providing for the possibility that eventually the Counties might prevail in the tax litigation.

Requiring letters of credit is a permissible way to address title infirmities under the Department's regulations. Those regulations provide that after the Department decides to acquire land in trust but before taking final approval actions (i.e., before formally accepting title

[31] The Department concluded that state or local taxes on the gaming facility would violate IGRA. Moreover, it expected that "the issue of the taxability of the casino tax lot under IGRA will be finally resolved prior to the time at which the Department may formalize acceptance of the land into trust," and if it were not, the Department retains discretion to require letters of credit at that juncture. ROD at 54.

to the land, 25 C.F.R. § 151.14), the Department "shall require elimination [of] liens, encumbrances, or infirmities [that] make title to the land unmarketable." 25 C.F.R. § 151.13. The Department is guided by the Department of Justice "Standards for the Preparation of Title Evidence In Land Acquisitions by the United States," which are cited in the same regulatory provision, in addressing how liens are to be "eliminated." The Department noted that the Department of Justice regulations require that "[p]rior to or at the time of acquisition of title to the property . . . all liens against the title must be fully paid and satisfied or *adequate provision should be made therefore*." ROD at 54 (quoting Section 6(a), Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393[32]) (emphasis added in ROD).

The Department also cited Tohono O'Odham Nation v. Acting Phoenix Area Director, 22 IBIA 220, 235 (Aug. 14, 1992), for the proposition that the "standard practice in acquisitions of title to land by the United States is to require liens to be paid or to require that adequate provision for satisfying them be made prior to trust acquisition." ROD at 54-55. Tohono O'Odham noted that the "Department of Justice title standards are explicitly incorporated into [the Department regulations] concerning trust acquisitions for Indians," and concluded that the proper way to address liens is to require the tribe for whose benefit land will be held to "eliminate the liens or make provision for satisfying them prior to trust acquisition." 22 IBIA at 235-36. Based on this, the Department reasonably concluded here that its regulations provide it with discretion to not require the Nation to pay unlawful taxes so long as it "make provisions for satisfying" outstanding liens, which it did through requiring letters of credit. The Department's

[32] The Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393, U.S. Dep't of Justice (Oct. 2, 1970), are U.S. Exh. 4 (Dkt. No. 240-7).

interpretation of its own regulation is entitled to "substantial deference" and is "'controlling unless plainly erroneous or inconsistent with the regulation.'" Gonzales v. Oregon, 546 U.S. 243, 255, 256 (2006) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)); see Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (applying "plainly erroneous or inconsistent with the regulation" standard); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (same). The 1992 IBIA Tohono O'Odham decision shows that, far from a departure, the Department's interpretation of its regulation has been longstanding.

Plaintiffs object to the letters of credit as risky and complain that "the authority of a sovereign . . . to collect lawfully-owned taxes" should not depend on the terms of a letter of credit. Pl. Br. 65. The problem is that at the time of the decision, it was not clear that the taxes in question were lawfully owed which is why the matter continues in litigation.[33] Moreover, the Department is not imposing the terms on which the Counties may, if at all, collect its taxes. The courts will do that. The title examination procedures and requirements are meant to ensure that the United States takes good title, not to ensure that the Counties get all the money they believe they are entitled to from the tribe. As the Department explained, "the requirements for acquiring title to land in trust do not call for liens to be removed to the satisfaction of the local taxing authority; liens must be addressed to the satisfaction of the Federal government pursuant to Federal title standards." ROD at 54. Moreover, there is a possibility that the tax litigation will be resolved prior to formal acceptance of land in trust, allowing the Department opportunity to require payment of all lawfully owing taxes before formal acceptance of title.

[33] The Second Circuit has vacated district court decisions holding that taxes on Oneida land are unlawful under state law and has concluded that that legal question should be resolved in state court. See Oneida Indian Nation of N.Y., 2011 WL 4978126 at *19-22. The state law questions remain unresolved at this point.

Finally, should the Court determine that requiring letters of credit to satisfy questionable liens was arbitrary and capricious, the remedy should not affect the decision to acquire land in trust. As noted above, the need to address liens and other encumbrances on property to be acquired in trust only is triggered once the Department has made a decision (memorialized here in the ROD) to accept land into trust. If the Court concludes the Department's regulations require payment of all taxes, regardless of their questionable validity, that holding will affect the Department's title examination procedures, but provides no ground to conclude that the decision to acquire land in trust is arbitrary or capricious.

4. *The Department is not required to issue preliminary title opinions before issuing the ROD*

Along similar lines, Plaintiffs also complain that the Department has not followed standard procedures because it has not required preliminary title opinions ("PTOs") for the parcels it proposes to accept in trust. Plaintiffs contend the Department opted not to acquire PTOs because it knew they would demonstrate title infirmities deriving from the Counties' tax liens. Pl. Br. 61. This argument, like that concerning the Department's requirement of letters of credit, does not directly challenge the decision to accept land into trust but, rather, alleges that the title examination process has thus far been inadequate. This claim does not appear in Plaintiffs' complaint and they offer no basis for the Court to consider it. Nevertheless, it is meritless.

Section 151.13, the applicable regulation, does not mandate the preparation of PTOs. The regulation provides: "If the Secretary determines that he will approve a request for the acquisition of land . . . he shall acquire, or require the applicant to furnish, title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice." 25 C.F.R. § 151.13. Section 151.12(b) requires the

Secretary to forego that final approval action for at least thirty days after the notice of trust decision is published. Typically, a PTO issues after the examination of the title evidence, but nothing in the regulation requires it at that point, so long as DOI examines the title evidence.[34] That was done. Decl. of John Harrington ¶ 5 (attached as U.S. Exh. 7).[35]

The remainder of the title examination procedures can post-date the ROD which, in turn, means that documents which may be created in connection with that examination need not – and should not – appear in the AR if they post-date the ROD. See 25 C.F.R. § 151.13 (elimination of liens and other encumbrances to occur "prior to taking final approval action"); 25 C.F.R. § 151.14 (land is in trust when the Secretary approves the deed); ROD at 53 (title examination need not be completed until "formal acceptance of the lands into trust"). Thus the absence of PTOs in the record means nothing. Moreover, one would not expect the AR to address their absence for the same reason that the issuance of PTOs may postdate the memorialization of the Secretary's decision in a ROD.

As the ROD noted, the Oneida application presents complicating circumstances for the title examination, namely the fact that the validity of liens on the lands to be taken into trust is seriously in doubt and the subject of litigation. The ROD therefore explained that the

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[34] Plaintiffs' proffer of checklists indicating the need to prepare PTOs is not relevant because those only provide guidelines for typical land-to-trust decisions. See Mich. Gambling Opposition v. Norton, 477 F. Supp. 2d 1, 10 n.14 (D.D.C. 2007) (noting an "agency is not bound . . . by its own internal checklists").

[35] The Declaration of John Harrington, Attorney-Adviser, Office of the Solicitor for the Department of the Interior, was originally submitted to this Court in response to Plaintiffs' motion for extra-record discovery and is already docketed as number 169-5. The Declaration was needed because the AR does not address PTOs. Harrington's Declaration is "merely explanatory of the original record and . . . contain[s] no new rationalizations," and is accordingly permissible. Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 82 (2d Cir. 2006) (internal quotations omitted).

"Department anticipates that the issue of the taxability of the casino tax lot under IGRA will be finally resolved prior to the time at which the Department may formalize acceptance of the land into trust." ROD at 54. If the tax litigation is resolved, presumably issues relating to the title examination will be clarified. Moreover, the Department anticipated that this decision would be challenged in lengthy litigation and, given that "a PTO must be based upon certified title evidence that is not more than two years old," it reasonably concluded that it was a waste "of attorney time to prepare PTO's that would only have to be updated and redone at the conclusion of litigation." Harrington Decl. ¶ 7.

Postponing resolution of title issues until formal acceptance of title is a matter of concern for the Tribe, not the Plaintiffs, because it is the Tribe that will be required to cure outstanding title infirmities to the Department's satisfaction. See id. ¶ 7 ("In any event, formal acceptance of land into trust may not be accomplished until all exceptions to title have been appropriately cured."). Although Plaintiffs contend the purpose of postponement was to evade recognizing the title problems created by their disputed tax liens, those problems were squarely addressed in the ROD and indeed resulted in the Secretary's decision to require the Nation to post letters of credit. ROD at 53-54.

Finally, Plaintiffs' challenge here, like their challenge to the Department's requiring letters of credit from the Nation, goes to whether the Department is properly following its title examination process, which process is separate from the Department's determination whether or not to accept land into trust. Any relief afforded to this claim goes to what steps the Department must take prior to formally accepting land into trust, but should not provide a basis for setting aside the ROD.

Accordingly, the decision to postpone PTOs was permitted by the Department's regulations, and moreover is one that is entirely immaterial to whether the Department's decision to accept land in trust should be set aside.

D. The Department Has Fully Complied With NEPA

Plaintiffs contend that the Department's consideration of an array of scenarios encompassing different outcomes of the on-going tax dispute between the Nation and the Counties violates NEPA, vitiates the FEIS, and undermines the ROD. Pl. Br. 67-68. The scenarios in question were meant to address the full range of possible outcomes to the dispute and played a role mainly in the Department's full consideration of potential socioeconomic impacts deriving from its choice of an EIS alternative. Plaintiffs' NEPA challenge essentially amounts to a restatement of their position that the Department should not accept land into trust for the Nation because "the OIN is financially able to pay property taxes." Pl. Br. 68. Plaintiffs have little to say about whether the Department properly considered the environmental impacts of its decision, as NEPA requires, and for the most part focus the Court on a narrow issue in the overall NEPA analysis contained in the FEIS. This narrow criticism should not obscure the larger picture: the Department complied with NEPA, and indeed went above and beyond what was legally necessary to consider the environmental impacts of the various alternatives in the FEIS.

For perspective, it is informative to note what the Plaintiffs are not challenging. They are not challenging the number or scope of alternatives. See, e.g., Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F. Supp. 2d 1069, 1088 (E.D. Cal. 2004) (rejecting evaluation of two nearly identical alternatives and no-action alternative). Nor are plaintiffs alleging the exclusion of an otherwise appropriate alternative, or even arguing directly that the Department did not fully

analyze each alternative. See, e.g., Nat'l Park & Conservation Ass'n v. Stanton 54 F. Supp. 2d 7, 23 (D.D.C. 1999) (EIS deficient where "despite the fact that Alternative B was the preferred alternative at the time the EIS was written, and the alternative ultimately chosen, a detailed analysis was not done of at least that alternative."); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 813 (9th Cir. 1999) ("Forest service failed to consider an adequate range of alternatives").

NEPA "is a procedural statute that mandates a process rather than a particular result." Coal. on W. Valley Nuclear Wastes v. Chu, 592 F.3d 306, 310 (2d Cir. 2009); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). It "does not command an agency to favor any particular course of action, but rather requires the agency to withhold its decision to proceed with an action until it has taken a 'hard look' at the environmental consequences." Stewart Park & Reserve Coal., Inc. (SPARC) v. Slater, 352 F.3d 545, 557 (2d Cir. 2003) (internal citation omitted).

Judicial review of claims brought under NEPA are subject to the APA's arbitrary and capricious standard. See Sierra Club v. U.S. Army Corps of Eng'rs, 772 F.2d 1043, 1050 (2d Cir. 1985) (NEPA compliance reviewed under APA requirement that "agency action must be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. § 706(2)(A)); see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375-76 (1989) (applying APA standard to NEPA challenge). The Court's inquiry under NEPA is "to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" Kleppe, 427 U.S. at 410 n.21 (quoting Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

NEPA provides, inter alia, that agencies must include alternatives to the proposed action. 42 U.S.C. § 4332 (2)(c)(3); see, e.g., Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975). As part of this requirement, the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). The Department considered eight alternatives, including the preferred alternative, in the FEIS and ROD. ROD at 13-19. The alternatives varied in the acreage the Department would accept in trust, with the no action alternative (G) taking no land in trust, while the proposed action alternative (A) placed it all in trust. Id. Lands placed in trust would be immune from state and local real property taxation, but it was (and is) unclear what would happen to lands not placed in trust because "[t]he future status of the lands not to be acquired in trust under this final decision ultimately will be determined by third parties, including the Nation and State and local governments and possibly the courts." ROD at 14.

The Department considered four scenarios to address potential impacts of the trust decision on lands not placed in trust: (1) Property Taxes Paid with State and local governments exercising jurisdiction over the lands ("PTP"); (2) Property Taxes Not Paid and Foreclosure ("PTNP-F"); (3) Property Taxes Not Paid and Dispute Continues ("PTNP-DC"); and (4) Casino Closes and All Enterprises Close ("CC-AEC"). ROD at 13-14. These scenarios were necessary "[i]n order to fully consider the comments of the Nation and the State and local governments, while remaining for the most part neutral on their respective legal positions during its review of the fee-to-trust request." ROD at 13. The Department did take a position with regard to the CC-AEC scenario which is premised upon "the State's comments that the Turning Stone Resort &

Casino is operating unlawfully," because the Department believes Turning Stone comports with IGRA. ROD at 14.

These scenarios were largely irrelevant to questions of environmental impacts because the acquisition involved "no physical resource-impacting projects or changes in land use." ROD at 20. The Department noted that public comments were largely confined to: (1) jurisdictional and land use regulation impacts; (2) socioeconomic impacts; (3) historic, cultural, and archaeological resource protection impacts; and (4) cumulative impacts. ROD at 20.

As to jurisdictional concerns, the Department explained that "NEPA serves to inform administrators about the environmental consequences of proposed Federal actions," but "[i]ssues concerning transfer of regulatory jurisdiction and land use control . . . are evaluated in the context of the Secretary's consideration of the impacts of acquiring land in trust under 25 C.F.R. Part 151." ROD at 20. In order to address the concerns of commenters, the Department considered jurisdictional concerns in its examination of the NEPA alternatives. The tax scenarios largely played no role in that analysis except for a passing comment that the No Action alternative would "not necessarily produce the jurisdictional results [State and local governments] seek" because under the PTNP-DC scenario jurisdiction would continue to be disputed. ROD at 22. In any event, the Department made clear that the No Action alternative was not acceptable because it "would not meet the purpose and need for the action." ROD at 22.

The tax scenarios similarly played little role in the Department's consideration of historic, cultural, and archaeological resource impacts. ROD at 26-27. The Department noted that for lands not placed in trust, under the PTNP-F scenario or the CC-AEC scenario, "the Nation would not have its primary source of revenue that enables the Nation to maintain historic, cultural, and archaeological assets and programs," but also noted that under other scenarios, the

Nation would simply "continue to apply its own Cultural, Historical or Archeological Resources Ordinance" to lands not placed in trust. ROD at 27.

The analysis of cumulative impacts likewise relegated the tax scenarios to a minor role, assigning them one paragraph, noting that under the PTNP-F scenario and CC-AEC scenario there could be increased unemployment and other burdens on State and local governments resulting from lands not placed in trust. ROD at 28. They were not mentioned in the consideration of cumulative environmental impacts, however. Id.

The tax scenarios had their main application in the Department's consideration of the socioeconomic impacts of its decision. ROD at 22-25. The Department noted that "[u]nder NEPA, economic or social effects of a proposed action 'are not intended by themselves to require preparation of an environmental impact statement.'" ROD at 22 (citing 40 C.F.R. § 1508.14). Instead those impacts are properly considered under 25 C.F.R. § 151.10(e), the land-to-trust regulation addressing the impact of removing lands from tax rolls. ROD at 22. There the CC-AEC and PTNP-F scenarios figured most prominently but only because those were the only scenarios where one would expect socioeconomic impacts to result from not taking lands into trust.

Finally, the tax scenarios did not dictate the Department's decision to implement its chosen alternative. That decision, as the Department explained, was motivated by a desire to "balance . . . the Nation's needs against the potential jurisdictional, socioeconomic, and environmental impacts of placing the Nation's lands into trust," ROD at 31, not by a belief that one or another tax scenario might eventually play out:

> Also, the Department emphasizes that this decision is to implement the Preferred Alternative . . . regardless of whichever taxation/jurisdiction scenario(s) ultimately would occur with respect to lands not acquired in trust. Put another

> way, while this decision was made after consideration of all of the possible scenarios, this decision neither assumes nor is dependent upon the future occurrence or non-occurrence of any particular scenario(s).

Id.

1. *The CC-AEC scenario was not irrational and did not control the Department's decision*

Plaintiffs contend the CC-AEC scenario (Casino Closes and All Enterprises Close) is irrational because the Nation could pay taxes assessed on the casino by the Town of Verona. Pl. Br. 71. However, whether the Nation can pay taxes on Turning Stone is beside the point. If it operates illegally under IGRA, it must close. In such case, according to the Nation, "the Nation would not have revenue to pay taxes and that all of the 17,370 acres might be foreclosed upon or sold in advance of foreclosure." ROD at 14. Plaintiffs assert that instead of closing, the Nation could operate the casino "within the confines of State and local laws," Pl. Br. 72, although they do not suggest which state and local laws permit gaming at Turning Stone. Plaintiffs argue that the Department's analysis of Alternative G (no-action) unduly relied the CC-AEC scenario. However, the Department was clear that the no-action alternative was rejected because it "would not meet the purpose and need for action." ROD at 30. Thus even assuming the Department should have assumed that the Nation would negotiate a deal with the State to keep its casino functioning, that was irrelevant to the analysis of environmental impacts and, at the end of the day, not the reason why the Department rejected the no-action alternative.

2. *The PTNP-DC scenario was not irrational and did not control the Department's decision*

Plaintiffs allege the PTNP-DC scenario (Property Taxes Not Paid and Dispute Continues), under which jurisdictional disputes continue, is irrational because the disputes cannot continue indefinitely. Pl. Br. 73. However, most of the discussion on this point is

devoted to portraying the Nation as lawless because it contested State and local jurisdiction over its lands. Pl. Br. 73-76. As to the continuation of jurisdictional disputes, Plaintiffs are correct that at some unspecified point in time, with enough litigation, all questions of jurisdiction may be resolved. But they are incorrect in asserting that Sherrill resolved all jurisdictional disputes. As Justice Stevens explained in his dissent, Sherrill involved "an Indian tribe's claim to tax immunity," but it did not "implicate the tribe's immunity from other forms of state jurisdiction, nor does it concern the tribe's regulatory authority over property owned by non-Indians within the reservation." 544 U.S. at 222. Plaintiffs no doubt dispute this and contend for a broader reading of Sherrill's holding, but that is the point: disputes continue. The Department is not in a position to know when all disputes concerning the Oneida Reservation will be resolved and at this juncture, almost seven years out from the Supreme Court's Sherrill decision, and almost four years out from the Department's decision, the PTNP-DC scenario is the appropriate scenario to characterize the future status of lands not taken in trust.

Plaintiffs' argument on this point is largely focused on alleging that the Nation should have known from the outset the outcome of Sherrill, and the Department should have treated the Nation as lawless. This argument forgets that in Sherrill, the Supreme Court reversed the Second Circuit which held that Plaintiffs' conduct, in attempting to tax Reservation land, was unlawful. Sherrill, 337 F.3d at 167. Moreover, as Justice Stevens noted in dissent, the Court decided the case on novel grounds, "[w]ithout benefit of relevant briefing from the parties," and "[w]ithout questioning the accuracy of [the Second Circuit's] conclusion" regarding the status of the Oneida Reservation. Sherrill, 544 U.S. at 223-24.

Finally, Plaintiffs retail a list of complaints about how the Nation has governed its land in the past. Pl. Br. 75-76. The Nation's past management of its lands is relevant to – and addressed

in – the Department's discussion of potential jurisdictional impacts under 25 C.F.R. §151.10(f), but the NEPA inquiry is addressed to the foreseeable environmental impacts of placing land in trust. Plaintiffs are effectually asking the Department to adopt a premise that the Nation is environmentally irresponsible and therefore to speculate on future environmental impacts the Nation may cause. Where there is uncertainty regarding the potential effects of an agency action, "speculation in an EIS is not precluded, [but] the agency is not obliged to engage in endless hypothesizing as to remote possibilities." Fund for Animals v. Kempthorne, 538 F.3d 124, 137 (2d Cir. 2008) (citing County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1379 (2d Cir.1977)); N.J. Dep't of Envtl. Prot. v. U.S. Nuclear Regulatory Comm'n, 561 F.3d 132, 139-40 (3d Cir. 2009) (causal chain linking an aircraft terrorist attack to a nuclear plant is too attenuated to require considerations of these effects in an EIS). Here, Plaintiffs offer no concrete imminent environmental impact for the Department to consider. They merely assert that something may happen at some point and that is not enough to support a claim that a relevant environmental impact was ignored.

3. *The PTNP-F scenario was not irrational and did not control the Department's decision*

Plaintiffs object to the PTNP-F scenario (Property Taxes Not Paid and Foreclosure) on the ground that no one would choose to have land foreclosed when they could pay the property taxes. Pl. Br. 76-79. The Department, as it made clear, is not in a position to know what third parties will do. That is why it created the full spectrum of tax scenarios. It is clear that the Nation and Plaintiffs are not situated toward one another as a normal taxpayer is with the tax collector. Paying taxes means, on some level, conceding an aspect of the Nation's sovereignty over its land and assuming the status of a private taxpayer in relation to government entities that have been consistently hostile towards any assertion of tribal self-determination or sovereignty.

The Department is not in a position to know how the Nation would act in such circumstances. In any event, Plaintiffs do not show how this tax scenario influenced the Department's decision process other than making it able to consider the full spectrum of potential resolutions of the tax dispute.[36]

E. The Department Properly Considered the Nation's Need for Land

25 C.F.R. § 151.10(b) requires the Secretary to consider "[t]he need of the individual Indian or the tribe for additional land." 25 C.F.R. § 151.10(b). Plaintiffs rest their claim that the Department failed to consider the Nation's need for land on the ground that the Nation's financial state does not necessitate placement of land in trust because the Nation is able to pay their taxes and run their businesses. Pl. Br. 85. Plaintiffs proceed as if this were dispositive and conclude that justifications based on tribal self-determination and self-government are inadequate fall-back positions in the face of the Nation's ability to pay taxes.[37] To the extent they are willing to countenance the notion that other factors besides a tribe's economic state may be relevant to the question, they urge that the acreage accepted into trust be limited to those parcels containing Nation facilities for providing services to its membership. Pl. Br. 87.

Plaintiffs' contention that the Nation does not need land shielded from state and local taxes through trust status is irrelevant because in addressing a tribe's need for land, the

[36] Plaintiffs also contend that the tax scenarios prejudiced the Department's analysis outside the NEPA context. Pl. Br. 79-80. However, that allegation must be demonstrated, not asserted. As discussed below, Plaintiffs' challenges to the Department's Part 151 analysis are meritless.

[37] In support of their arguments concerning the Nation's ability to pay taxes, Plaintiffs have prepared a second undisclosed expert report by Gregg Jarrell dated November 8, 2011. Pl. Exh. II (Dkt. No. 241-1). This report is not before the Court for the same reasons as Plaintiffs' other newly prepared and undisclosed expert report. It is not part of the AR in this APA record review case. To the extent it was prepared solely for litigation purposes, it should have been disclosed in accord with the protocols of the Federal Rules of Civil Procedure.

Department does not have to address why the land is needed specifically in trust rather than fee. It is enough to conclude the Nation needs the land. See South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 801 (8th Cir. 2005) ("We agree with the district court that it would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance.").

In this case, however, there is a specific need for the Nation to have land placed in trust, rather than fee, status and it has nothing to do with whether the Nation can afford to pay County taxes. In the ROD, the Department acknowledged the State and Counties' view that no land is needed because, if the lands remain in fee, the Nation can "continue to apply its business acumen and operate like a private landowner or corporation." ROD at 36. It is precisely because the State and Counties aspire to reduce the Nation to a private corporation that land is needed in trust:

> The basic feature of trust status (*i.e.*, application of tribal sovereignty and jurisdiction over the land to the exclusion of state and local control, immunity from state and local property taxation, protection of the land against alienation, and application of Federal laws unique in their application to trust lands) are largely uncharacteristic of lands held by private individuals or corporations . . .

but they are characteristic of a sovereign, self-governing tribal entity which is what the Nation is. ROD at 36.

> When Congress provided in [the IRA] for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation.

Chase v. McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978). "Land held in trust is generally not subject to (1) state or local taxation [or] (2) local zoning and regulatory requirements . . . ." Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 85-86 (2d Cir. 2000).

"Within Indian country the federal and tribal governments have exclusive jurisdiction over the conduct of Indians and interests in Indian property." Buzzard v. Okla. Tax Comm'n, 992 F.2d 1073, 1077 (10th Cir. 1993). Plaintiffs are well-aware of this basic principle, which is of course why they object to the Department's action.

While Plaintiffs calculate that only lands containing tribal facilities need be placed in trust to provide for self-government, they ignore the fact that absent placing land in trust, tribal facilities have no land base to govern since the State and Counties will doubtless contest any assertion of tribal jurisdiction over fee lands. "The Nation's ability to exercise governmental authority over the lands and its uses, and to protect it for future generations, will promote the health, welfare, and social needs of its members and their families." ROD at 36.

Plaintiffs object that the Department needs to enumerate how each parcel placed in trust would promote these ends. That is not required. "It was sufficient for the Department's analysis [of § 151.10(b)] to express the Tribe's needs and conclude generally that IRA purposes were served." South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 801 (8th Cir. 2005). It is enough, in other words, for the Department to conclude that placing the subject lands in trust will allow the Nation – as opposed to the State and Counties – to take responsibility for its member's health, welfare, and social needs as participants in a self-governing tribal community. See ROD at 37 (describing the "Nation's uses of the Subject Lands to promote the health, welfare, and social needs of the Tribal community"). The Department also noted that

> [i]n addition, the Nation has sought to diversify its economy and land base so that it is not as heavily dependent on its gaming enterprise, which is not a guaranteed future source of revenue. Placement of non-gaming lands into trust will support those efforts and provide lands for other member needs, thereby protecting tribal self-determination and bringing stability to the Nation.

ROD at 36-37.

Finally, Plaintiffs contend that the Department was predisposed to accept significant land into trust before analyzing the tribe's need, relying upon a 10,000 acre figure that appears a couple times in emails authored by one Department employee. Pl. Br. 84. The AR, however, makes clear that the outcome of the Department's decision process was never certain. ARS000903-08 at ARS000904 (Department employee email, March 4, 2008) ("The Oneida Indian Nation is semi-pleased with the 13,003.9 acres of Alternative I, having been afraid of not getting anything but the casino, as it looked at one point.").

Plaintiffs made much of one email containing the 10,000 acre figure in briefing before the Magistrate Judge, arguing that it demonstrated bad faith.[38] They appear to have abandoned the bad faith claim, but have recycled this contention in support of their attack on the Department's consideration of the Nation's need for land. Plaintiffs' argument rests upon misconstruing what is expressed as a clear limit on the acreage the Department is willing to consider for trust purposes as a floor: "Jim Casson [sic.] told the Oneida to prioritize their properties for the fee-to-trust process. He said he only felt comfortable bringing in 10,000 of the 17,000 plus acres at this time so the Oneida have about 10,000 in their Groups 1 & 2 priority properties." AR008341. The Magistrate Judge's Order releasing documents formerly subject to the deliberative process privilege yielded a couple more emails which further undermine Plaintiffs' attempted reading of this language, as Plaintiffs concede, by noting that the number is a limit. Pl. Br. 84 ("The 10,000 acre figure would later be referred to by the DOI as a 'limit' or 'direction.'"). The purpose of the 10,000 acre limit was to put the Nation on notice that the Department was not going to simply approve the entire acreage proposed for trust status. The

[38] For prior briefing of the issue, United States Memorandum of Law, April 15, 2010 (Dkt. No. 185-1) at 13-15.

Nation, therefore, was requested to begin a conversation with the Department about which parcels it regarded as most urgently needing trust status.[39] Thus, this evidence does not cut Plaintiffs' way because it shows the Department scrutinizing the Nation's need for the land requested and demanding that the Nation break the land down into groups that can be individually assessed by the Department.[40]

F. The Department Fully Considered the Tax Impacts of the Trust Decision

Plaintiffs contend the Department did not comply with 25 C.F.R. § 151.10(e), which 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." The purpose of this provision, as with the other provisions of Part 151 enumerating factors for consideration, is to ensure that the Secretary is fully aware of the relevant impacts of a decision to accept land into trust before he exercises the discretion committed to him by the IRA. Section 151.10(e) does not mandate any particular result in light of the Secretary's consideration of potential impacts. See City of Lincoln City v. U.S. Dep't of Interior, 229 F. Supp. 2d 1109, 1125 (D. Or. 2002) ("the regulations require BIA to

[39] AR008341, ARS001411 ("Jim Casson [sic] told the Oneida to prioritize their properties for the fee-to-trust process. He said he only felt comfortable bringing in 10,000 of the 17,000 plus acres at this time . . . ."); ARS001065-66 at 65 (10,000 acres "that Mr. Casson considered his limit of being comfortable with at this point in time"); ARS001352 (Pl. Exh. WWW; Dkt No. 244-6) ("Tom has come up with 3 options that he hopes Mr. Cason to choose from. All are close to the 10,000 acres that he told the tribe would be the most to expect . . . .").

[40] The State also complains that the AR contains statements indicating at least one Department employee regarded New York's unlawful acquisition of Oneida lands as unjust. Pl. Br. 87. It also points to an email by the same employee indicating he believes Indians face antagonism and even racial prejudice in New York. Pl. Br. 88. While New York's past conduct in dispossessing the Oneidas is a significant factor contributing to the need to have reservation land placed in trust, these comments, as part of the deliberative process, are nothing more than the opinions of one employee in the Department and provide no basis to contend that the Department does not mean what it says in the ROD with regard to the Nation's need for land.

'consider' this factor, but the regulations do not require the Tribe to agree to reimburse the City for revenues that might be lost due to a fee-to-trust transfer, and do not require the BIA to deny the application for a fee-to-trust transfer merely because a potential impact exists"). All that is required is that the Secretary, in light of his consideration of this factor, reach "a rational decision supported by the record." South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1008-09 (D.S.D. 2005). Accordingly, the fact of Plaintiffs vigorous disagreement with the Secretary's decision is not enough to warrant overturning that decision under the APA's arbitrary and capricious standard, provided the Secretary considered the potential impacts of his decision. The ROD's lengthy discussion of tax impacts bears out the Department's careful consideration of potential tax impacts. ROD at 40-53.

1. *The Department properly considered the overall fiscal impacts of the trust acquisition*

As part of its assessment of the tax impacts of taking land into trust, the Department considered "the overall fiscal impacts of trust acquisition" which "includes the degree to which the tribe's ongoing business activities generate economic and tax benefits to the local community that offset the taxes that would be lost as a result of trust acquisition." ROD 47. This approach, as the ROD noted, has been utilized by the Department in other fee-to-trust acquisitions. Id. See County of Sauk v. Midwest Regional Dir., BIA, 45 IBIA 201, 214 (Aug. 31, 2007) (considering "the aggregate of all types of contributions and benefits flowing from the [tribe] to the local units of government") (internal quotations omitted); Rio Arriba v. Acting Sw. Regional Dir., BIA, 38 IBIA 18, 25-26 (July 24, 2002) (consideration of total revenues, including "economic and tax benefits" generated by tribe and flowing to local governments "in relation to tax losses resulting from the trust acquisition" not "unreasonable"). The Department's interpretation of its own

regulation, as noted above, is entitled to substantial deference and is controlling absent any plain error or inconsistency with the regulation. Auer, 519 U.S. at 461.

Despite the fact that the Department's view is entitled to substantial deference, Plaintiffs nonetheless object to this methodology, arguing the Department should not consider taxes paid by Nation employees (property, sales, and income) as well as payments to the State pursuant to its gaming compact with the Nation as tax payments because this money "will be paid regardless of whether land is taken in trust." Pl. Br. 93; 93-95. The Department is, however, free to select its own methodology provided it is reasonable, even if another approach might be reasonable as well. See Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 289 (4th Cir. 1999) ("Agencies are entitled to select their own methodology as long as that methodology is reasonable."); Sierra Club v. Marita, 46 F.3d 606, 621 (7th Cir. 1995) (Agency "is entitled to use its own methodology, unless it is irrational"); Envtl. Action, Inc. v. FERC, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (agency economic prediction "deserves our deference notwithstanding that there might also be another reasonable view"). Here the Department's approach is reasonable. Plaintiffs, therefore, are not free to ask the Court to choose a different approach more to their liking.

Plaintiffs' approach would limit the Department's analysis to consideration of whether local governments' lost property taxes are offset by revenues they would not collect but for the trust decision. To be sure, the Department does – and did here – consider the amount of property taxes local governments stand to lose as a result of the trust decision. However, the Department counterbalances that consideration with an assessment of the overall economic benefits the presence of a given tribe in the region brings. Here, the Department analyzed Nation contributions for the year 2005, including Nation employee property taxes, income taxes, as well

as tax payments stimulated by Nation employee spending, and Nation payments to New York for services provided at Turning Stone. ROD 47-48. The Department concluded that the Nation contributed, directly and indirectly, $24.29 million to the State and local governments. ROD at 48. After subtracting costs imposed by the Nation on those governments for services, the net beneficial contribution was $16.76 million. ROD at 48; FEIS at 4-201, AR021180 (table laying out 2005 Nation contributions and costs); FEIS at Appendix E-3, AR021906-54 (tables showing effects on individual jurisdictions).

The Department's approach is reasonable because it avoids reducing the analysis to a question of whether taking land off the tax rolls by placing it in trust yields local governments a net gain or loss in tax receipts, i.e., whether the decision yields the local governments a profit or loss. Instead, the Department assesses the overall fiscal impact of the tribe on the local region in order to provide a context by which it can then consider the tax losses placing land in trust will incur on local and state government. Such an approach is fair to the tribal applicant which may contribute in significant ways to the tax-generating local economy beyond simply paying property taxes and which may aspire to be more than a private corporate entity on fee land. In this case, the Department concluded that the Nation's presence in Oneida and Madison Counties provides significant economic benefits to the region reflected in a net beneficial contribution of $16.76 million. The Department properly considered that contribution alongside the potential tax impacts[41] of placing land in trust order to determine whether, even with land in trust to meet

[41] Tax impacts were potential not least because at the time the ROD issued it was unclear whether any taxes levied on Nation land were lawful. That matter remains in litigation today.

the Nation's need for self-government, the Nation would remain a net fiscal contributor to the region.[42]

2. *The Department properly considered the Nation's history of grants and payments to local governments*

Although the Department's consideration of the net fiscal impacts of taking land in trust focused on the economic impacts of the Nation in 2005 (as well as projection of the Nation's impacts in 2011), it also noted that the Nation has made payments to local governments totaling $38.5 million since 1995 and concluded that "[i]t can reasonably be expected that the Nation will continue to pay local governments for services provided." ROD at 47. Plaintiffs object and argue that instead the Department should have "considered a scenario where the OIN decided to stop making such payments or decrease them." Pl. Br. 92, 90-93. Plaintiffs base this on the fact that the Nation discontinued "Silver Covenant" payments in 2005.

The Nation instituted the Silver Covenant Grant Program in 1996 as a vehicle to provide funds to local school districts to pay for school salaries, equipment, programs, and services. FEIS at 3-343-44, AR020635-36; 3-347, AR020639. The program was extended in 1998 to provide funds to municipalities. FEIS 3-343, AR020635. Between 1996 and 2005, the Nation voluntarily contributed $7.7 million to local schools and government. Id. Plaintiffs note the program was "unilaterally ended" after the Supreme Court handed down Sherrill. Pl. Br. 92. They fail to mention that local governments responded to Sherrill by seeking to foreclose on

[42] Plaintiffs later argue that the Department's analysis of whether the Oneidas provide a net fiscal benefit to the region is flawed because it counts items like gaming compact payments and Nation employee tax payments. Pl. Br. 98-99. That argument is premised upon the present argument that the Department should be precluded from considering revenue flowing directly or indirectly from the Nation that would flow regardless of whether land is placed in trust. It fails for the reasons described above.

Nation lands that year for failure to pay taxes. Those same governments, while benefitting from the Nation Silver Covenant payments, did not credit those payments against the taxes they demanded from the Nation. FEIS at 3-344, AR020636.

Plaintiffs also premise their argument on the fact that the Verona Fire Department believes that its current fire protection agreement with the Nation leaves it under-compensated given the current size of the Turning Stone resort. Pl. Br. 91. Plaintiffs do not mention that on top of the $100,000 annual negotiated payment to the Verona Fire Department, the Nation, with a BIA grant, is helping to fund a fire safety and training program for all fire departments participating in the Fire/Rescue Mutual Aid Plan established by the Verona Fire Department to respond to emergencies at Turning Stone.[43] FEIS at 3-355, AR020647.

In any event, Plaintiffs' objections cannot gainsay the fact that the Nation has a clear history of making significant voluntary payments to local governments. The incentives for making such payments do not dissolve after the land goes in trust.[44] The same incentives that compelled the voluntary payments in the past will compel them in the future – the fact that the Nation must live with its neighboring governments. Accordingly, the Department reasonably concluded that one could expect the Nation's history of making voluntary payments to continue into the future.

3. *The Department properly considered taxes assessed on Turning Stone*

[43] The Nation has paid $652,978 to the Verona Fire District since 1993. FEIS at 3-354, AR020646. The Nation's agreement with the Fire District initially provided for $10,000 in 1993 but has increased over the years to its 2004 figure of $100,000. Id.

[44] In fact, the opposite is true with regard to Silver Covenant payments since the Nation has obviously no incentive to make contributions to local school districts in lieu of paying taxes when the local governments seek to levy property taxes on the Nation.

Plaintiffs challenge the Department's position that taxes assessed on the Nation's gaming resort are unlawful and attempt to argue that IGRA does not prohibit such taxes. Pl. Br. 95-98. This argument is moot because, although the Department regards such taxes as unlawful, it considered them nevertheless as one of three possible scenarios for assessing the loss of property tax revenues. See ROD at 49; U.S. Mem. Of Law in Support of Summ. J. at 54-55 (Dkt. No. 240-1). In the first scenario, the Department excluded taxes assessed on the casino tax lot; in a second scenario, the Department included the casino tax lot but valued it for non-gaming uses based on non-gaming uses of land at comparable locations; and in a third scenario, the Department simply accepted at face value the taxes currently assessed on the tax lot. ROD at 49. The Department concluded that in all scenarios, the net impact on individual jurisdictions was positive except that, when accepting the assessed taxes on the casino lot at face value, Oneida County, the Town of Verona and the Vernon Verona Sherrill School ("VVS") District would experience a net loss.[45] ROD at 49; see also FEIS 5-6, AR021392 (projecting net benefits to the State and local governments even assuming lawfulness of taxes assessed on casino lot); FEIS 5-5, AR021391 (Table 5.2-1 "Summary of 2011 Net Revenues from Five Comparative Analyses of Nation Payments vs. Government Costs or Lost Property Taxes").

Because the ROD and FEIS clearly demonstrate the Department considered the taxes assessed on Turning Stone, even as it also concluded they were prohibited by IGRA, Plaintiffs are reduced to asserting that if the Department had really considered the hefty taxes assessed on Turning Stone it would have arrived at a different decision. Pl. Br. 97. But, even with those unlawful taxes, the Department still found a net benefit to the State and local governments from

[45] The Department also noted that the VVS District experienced a net loss in all the scenarios, with the magnitude of the loss increasing depending on the amount of assessed taxes on the casino lot. ROD at 49.

the Nation's presence in the region, even though the fiscal impacts on a number of individual jurisdictions become negative when it is assumed that but for placing land in trust they could farm taxes from gaming pursuant to IGRA.

Plaintiffs apparently believe the only reasonable path for the Department is to conclude that the tax revenues that local jurisdictions seek to harvest from Turning Stone are too significant to permit placing the casino lot in trust. However, Turning Stone operates pursuant to IGRA and IGRA is designed to ensure Indian gaming promotes the Federal Indian policy goal of fostering "tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), not the economic well-being of local jurisdictions seeking access to gaming revenues through taxation. The Department noted that the "underlying facts concerning the Town of Verona's assessment of the casino tax lot demonstrate the need for Federal protection of tribal gaming enterprises that is provided by IGRA." ROD at 52. The Nation relies on Turning Stone as its "primary economic engine through which it funds essential government services and programs for its members and their families," and "has invested significantly in the casino and now services a $300 million plus debt." ROD at 52. The Department further noted that in the month following Sherrill "the Town of Verona has imposed a taxable assessed value on the casino tax lot that exceeds the municipal taxable value for the entire Town of Verona's remaining 3,300 tax lots." ROD at 52. Thus it is not surprising that, after considering the taxes Verona would assess on the Nation, the Department concluded that the casino lot should be placed in trust.[46]

[46] The Court need not consider whether the aftermath of Sherrill has created a situation where, as Plaintiffs claim, gaming under IGRA can be taxed. Nevertheless, assuming without conceding that IGRA does not expressly bar state taxes and that the casino parcel cannot be treated as reservation land for purposes of applying the preemption test spelled out in White Mountain

G. The Department Properly Considered Potential Jurisdictional and Land Use Conflicts

The Department's regulations require it to consider "[j]urisdictional problems and potential conflicts of land use which may arise" from the trust decision. 25 C.F.R. § 151.10(f). The regulation requires the Department to inform itself of potential jurisdictional issues and land use conflicts but does not preclude accepting land into trust if such potential issues are not solved. South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d at 1009 ("This consideration of relevant information is all that is required by § 151.10(f)."); City of Lincoln City, 229 F. Supp. 2d at 1124-25 (D. Or. 2002) (Department only required to "undertake an evaluation of potential problems," not to "resolve all potential issues.").

In this case the Department went much farther than considering potential jurisdictional problems. The determination of which lands to place in trust was guided by a concern to minimize the jurisdictional problems complained of by Plaintiffs. "Most relevant to this determination was the local governments' stress on contiguity, and their request . . . to focus any trust acquisition on the Casino-Resort and Government-Cultural areas." ROD at 56. The

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Apache Tribe v. Bracker, 448 U.S. 136 (1980), taxes would nevertheless be barred through application of traditional preemption principles. The Ninth Circuit has concluded that the federal interest in IGRA of ensuring "that the Indian tribe is the *primary beneficiary* of the gaming operation" precludes taxation of gaming. Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433 (9th Cir. 1994) (quoting 25 U.S.C. § 2702(2)). Even outside the Bracker context of attempted state regulation of on-reservation conduct, state laws and regulations that interfere with federal laws and regulations are subject to preemption. See Goodspeed Airport LLC v. East Haddam Inland, 634 F.3d 206, 211 (2d Cir. 2011) ("The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted.") (internal quotations omitted). The federal purposes of IGRA would be sufficiently frustrated by the creation of a Sherrill loophole allowing an IGRA-sanctioned gaming enterprise to be farmed for taxes by local governments as to warrant federal preemption of the offending tax scheme.

Department selected parcels such that 211 of the 234 chosen are contiguous to another parcel and "many others are separated by only a few non-Nation properties." Id. Thus Plaintiffs' complaint that the Department failed to consider jurisdictional problems is belied by the fact that the determination of which parcels to accept and which parcels to reject was guided in prominent part by the Department's desire to minimize the potential for jurisdictional problems in the wake of the trust decision. Compare FEIS at 2-10, AR020220 (map of Nation lands proposed for trust acquisition) with FEIS 2-44, AR020254 (map of Nation lands selected for trust acquisition with rejected parcels outlined in gray and not colored).

1. *The Department considered and addressed the fact that the Nation will govern its lands according to Nation and federal laws*

Plaintiffs contend that the Department places undue reliance on federal law to resolve jurisdictional problems because state law is often more proscriptive than its federal counterpart. Pl. Br. 100. Federal environmental and other laws apply equally to state and tribal land and thus ensure uniform standards regardless of whether the Nation or the State exercises jurisdiction over the land. The State and Nation are free, of course, to establish more protective environmental standards and they are free to cooperate where achieving environmental aims is best secured through such cooperation. The Department, recognized, of course, that State, tribal, and federal standards may differ which, again, is why the "Subject Lands that will be acquired in trust are highly contiguous and compact, thereby minimizing these concerns." ROD at 61.

At the same time, the Department cannot sacrifice the Nation's right to self-government in order to ensure uniform compliance with state-law standards. The Department explained: "Congress only requires trust lands to comply with Federal and tribal standards. It would undermine tribal self-governance to compare and contrast tribal laws against state and local laws,

and require equivalency between them as a prerequisite for placing land into trust." Id. at 66. The Department further recognized that comments to the effect that Nation lands will not be required to conform to state environmental laws "are, in part, arguments about which government should have jurisdiction over the Nation's lands and are not grounded in significant actual deficiencies in the Nation's past administration of its lands."[47] Id. at 67.

The State alleges that the Nation's Atunyote golf course encroaches on what would be wetlands under state law but not federal law as an example of the kinds of potential jurisdictional problems that may arise if the Nation is not subjected to state law. Pl. Br. 101-02. No concrete environmental problem is identified based on this alleged non-compliance with state law other than an assertion that it "poses potential storm water impacts." Pl. Br. 102. Nor does the State note that impacts on wetlands of Nation activities were considered in detail in the FEIS. FEIS 3-57-58, AR020344-45. The FEIS specifically addresses the Storm Water Control Measures utilized in the construction of Nation golf courses and noted that "[f]or some of the Nation's golf courses [including Atunyote, FEIS 3-65, AR020352] the performance of storm water mitigation measures is monitored, reviewed annually, and certified under the Audubon International Signature Program" which "signifies the Nation's attitude toward protecting the environment for future generations." FEIS 3-58, AR020345.

[47] Plaintiffs allege that the Department denigrated state and local regulations, but do not cite to the ROD which expresses the considered Department position in this matter. Instead they cite to informal and preliminary comments by one Department employee. Pl. Br. 101 (citing Pl. Exh. VV). In fact this one document, an informal but voluble memorandum dated March 30, 2006 by a Department environmental scientist is cited repeatedly by Plaintiffs in their brief and given prominence far exceeding its actual importance in the lengthy administrative process. ARS005037-42. This memorandum, as with much of Plaintiffs' evidence, does not represent the position of the Department.

Plaintiffs also note that state law air standards differ from federal standards and again allege potential impacts deriving from the discrepancy, rather than concrete imminent problems. Pl. Br. 102. The cogeneration plant Plaintiffs complain of is discussed in the FEIS where it is noted that the plant operates with all the appropriate federal permits. FEIS 3-83, AR020370. Similarly, Plaintiffs object that the Department has failed to compare Nation ordinances with State ordinances, presumably to itemize divergences as deficiencies. Pl. Br. 103. As noted above, the Nation is entitled to regulate its lands differently from the State and both the FEIS and the ROD demonstrate that the Nation is an environmentally conscious steward of its land. Regulatory differences, absent concrete or imminent problems deriving from them, are beside the point. No such concrete problems are on offer in the State's brief.

2. *It is not reasonable to assume the Nation will disregard its agreements*

Plaintiffs object that the Department cannot presume that the Nation will abide by its agreements with local governments and complains that the Nation has not entered into a water quality agreement with the State. Pl. Br. 103-04. Like the other State jurisdictional comments, at heart this is an objection to Nation self-governance with Plaintiffs objecting to having to deal with and rely upon the Nation with regard to environmental and other matters that implicate both state and tribal jurisdiction. The Department considered the Nation's history of making agreements with its neighbors. FEIS 3-345-56, AR020637-48; ROD at 57-59. Based upon that history and demonstrated willingness to cooperate with neighbors, the Department reasonably concluded that government-to-government agreements, combined with Federal and Nation oversight, will "avoid any potential adverse consequences of placing the Subject Lands into

trust." ROD at 68.[48] Finally, the Department is not required to speculate about the Nation's future conduct and jurisdictional problems that might result. See Kansas v. Acting Southern Plains Reg'l Dir., BIA, 53 IBIA 32, 38 (Feb. 11, 2011) ("The State's fear that zoning may change in the future is entirely speculative, and the Regional Director cannot rest his decisions on matters of speculation.").

3. *The Department did not dismiss jurisdictional issues*

Plaintiffs argue that the Department "dismissed the very concept of jurisdictional issues" based on predecisional Department correspondence noting a need for various government entities to cooperate regardless of whether land is placed in trust. Pl. Br. 105-06. The ROD spends fourteen pages and the FEIS much more addressing jurisdictional concerns.[49] ROD at 55-69. If Plaintiffs wish to challenge the Department's analysis as arbitrary and capricious, the ROD is the place to begin, not random, predecisional snippets from the AR.[50]

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[48] Moreover, if the State believes the Nation and State should enter appropriate agreements on regulatory matters, nothing prevents it from initiating reasonable negotiations on such matters.

[49] Plaintiffs allege the Department dismissed Plaintiffs' comments about the past destruction of state law protected wetlands. Pl. Br. 106. But the Department noted that the Nation has established a 75 acre wetlands mitigation bank to address wetlands impacts, ROD at 61, and considered the Nation's management of wetlands in detail in the FEIS. FEIS 3-64-67, AR020351-54. The State commented that the Nation's pesticide use was responsible for damaging the wetlands. Pl. Br. 106. The Nation's policy for managing pests was considered by the Department. FEIS 3-59, AR020346 (Nation uses "Integrated Pest Management" which "involves establishing criteria for the level of pest infestation that must be observed before action is taken to control pests . . . and utilizing organic methods of weed and insect control"); ROD at 65 (noting that the Nation controls pests in accordance with Federal regulations).

[50] Again, Plaintiffs resort to the same March 30, 2006 Department memorandum they reference throughout their brief, this time to assert the Department dismissed State jurisdictional concerns from the outset. Pl. Br. 105 (quoting Exh. DD (Dkt. No. 239-15)). The context of the quoted language makes clear that the state jurisdictional issue at hand concerns the State's inability to monitor and enforce regulatory compliance on trust lands. ARS00537-38. The memorandum then explains that trust lands do not exist in a regulatory vacuum but are subject, at a minimum,

4. *The Department properly considered the Nation's past governance of its lands*

The State argues that the Nation's past history of non-compliance with State and local law augurs future environmental problems if the land is placed in trust. Pl. Br. 107-08. The Nation's purported disregard of State law derived from the fact that, prior to Sherrill, the Nation believed itself entitled to and did in fact exercise regulatory jurisdiction over its reacquired Reservation lands. Until Sherrill overturned the Second Circuit, the Nation's governance of its own land was sanctioned by Second Circuit precedent. Accordingly, the State cannot now pretend the dispute over jurisdictional authority on Nation lands was not real or that the Nation and everyone else knew that the Oneidas were obligated to comply with State law but disregarded that obligation. The Department considered the period preceding 2005 during which the Nation governed its land, and noted "few actual issues." ROD at 60; see also FEIS 4-288, AR021267.

Moreover, this argument, like the State's other jurisdictional arguments, boils down to an assertion that in the absence of state and local regulation, Oneida lands will be environmentally mismanaged. Pl. Br. 107-08 ("removing land from local land use laws will disrupt safety, quality of life and provision of services in bordering parcels"). The Department has considered the Nation's land use and noted that "about 90 percent of the [Nation's] land usage is agricultural, residential, or vacant." FEIS 4-290, AR021269. Nation non-conforming land use centers primarily around the Turning Stone resort and member housing. FEIS 4-291, AR021270. Moreover, "where zoning non-conformance has occurred there has been no adverse effects

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to federal environmental law and agency oversight: "For trust lands the US Environmental Agency (EPA) administers all of the environmental regulations directly, and the US Fish and Wildlife Service (FWS), in consultation with tribes according to Secretarial Order 3206, monitors fish and wildlife populations." ARS005037.

evident on adjacent land uses." Id. Accordingly, the Department could reasonably conclude that "[t]he present use and condition of Nation lands is representative of conditions in the reasonably foreseeable future." Id.; see also ROD at 59 (discussing consistency of Nation land use).[51]

The State objects to the Department's conclusion that placing land in trust resolves jurisdictional disputes over that land. The Department explained:

> Placement of the Subject Lands into trust under this final determination is anticipated to address [jurisdictional disputes and checkerboarding problems]: first, this final decision will settle jurisdiction in favor of the Nation over areas where the Nation's development is focused and its presence is most pronounced, and second, the Subject Lands are highly contiguous and compact, thereby facilitating the Nation's successful governance and minimizing potential impacts to the State and local governments.

ROD at 69. The State contends that once land is under Oneida jurisdiction, the Nation will likely make "major changes to its current land uses," although it fails to offer anything more than speculation in that regard. Pl. Br. 109. The Department considered the Nation's land ordinance and noted that it "prohibits existing land uses from being substantially changed or altered without a Land Use Permit." ROD at 60. Thus land use conformity will continue to be monitored and enforced for lands placed in trust.

5. *The Department properly considered the impact of the decision on easements and rights of way*

Plaintiffs allege the Department failed to address comments submitted by the City of Oneida and National Grid regarding easements and rights of way. Pl. Br. 111. That is incorrect. The ROD specifically acknowledges receipt of their comments and responded: "Placement of the

[51] With regard to Turning Stone, the Department recognizes that it is "not congruous with surrounding land uses," FEIS 4-299, AR021278, but also recognizes that "this facility was constructed prior to *City of Sherrill* and that it is a key aspect of an enterprise that is essential to the self-sufficiency of the Nation and to the economic well-being of the surrounding community." ROD at 59.

Nation's lands into trust will not affect any valid existing rights-of-way that are properly recorded." ROD at 65. The Department also explained that federal law provides a means for acquiring rights-of-way even after lands are placed in trust should they be needed. Id. at 66 (citing 25 C.F.R. Part 169).

Plaintiffs specifically complain that the Department has not investigated allegations by the City of a number of instances in the past where the Nation allegedly has not respected its easements and rights of way. Pl. Br. 110. The Department is not required to investigate past disputes and determine who was at fault. Rather, it explained that it "is in the Nation's best interest to work collaboratively with the local governments and service providers to improve the existing infrastructure system, grant any necessary rights-of-way, and address any other infrastructural issues, because the Nation's government, enterprises, and other endeavors are dependent upon such systems being adequate and well-maintained." ROD at 66.

The State's complaint raises additional allegations about the Nation's conduct with regard to easements and rights of way held by National Grid on Nation lands, but leaves those to a footnote in its brief. Pl. Br. 110 n.75. This is because the Nation and National Grid have arrived at an agreement to resolve the utility provider's concerns about infrastructure located on Nation land. Stipulation of Joinder, Stipulation of Voluntary Dismissal, and Order of Dismissal, Niagara Mohawk Power Corporation d/b/a National Grid v. Salazar, 5:08-cv-649 (LEK/GJD) (N.D.N.Y. July 28, 2009), Dkt. No. 45 (also U.S. Exh. 6; Dkt. No. 240-9). This belies the State's contention that the Nation will violate lawful easements and rights-of-way on its land and bears out the Department's view that the Nation and its utility providers share a mutual interest in cooperatively working out any concerns about easements and rights-of-way on Nation lands.

H. The Department Properly Considered Its Ability to Supervise the Lands to Be Acquired in Trust

25 C.F.R. § 151.10(g) requires the Department to consider "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status." The IBIA has recognized that this provision implicates a "managerial judgment that falls within BIA's administrative purview" and accordingly "do[es] not construe § 151.10(g) to necessarily require BIA to include in the record specific evidence . . . to demonstrate that BIA will be equipped to handle additional responsibilities associated with a trust acquisition." Kansas, 53 IBIA at 39. "The burden . . . is on [plaintiffs] to demonstrate error in the Regional Director's decision [regarding BIA's management ability]." South Dakota v. Acting Great Plains Reg'l Dir., BIA, 49 IBIA 84, 109 (Apr. 16, 2009). "BIA is uniquely qualified to know what additional responsibilities it will have to assume in relation to land acquired in trust." Iowa v. Great Plains Reg'l Dir., BIA, 38 IBIA 42, 54-55 (Aug. 7, 2002).

The Department considered the responsibilities posed by this acquisition and judged them to be minimal. ROD at 69-70. The land is not being acquired in trust as the precondition of a new tribal economic venture or social development project that might require BIA resources. Rather, the Department noted, "The Nation will continue its existing uses of the Subject Lands, which uses the Nation conducted prior to applying for acquisition of the lands in trust." Id. at 69. Because the Department declined to accept parcels that "are less contiguous and located farther from the Turning Stone Resort & Casino properties in Oneida County and the Nation's center of government in Madison County," it expected minimal "administrative burdens on the BIA if and when on-site visits are necessary." Id.

Plaintiffs contest this managerial judgment because (a) the trust decision places significant land in trust; (b) the Nation's sovereignty over the area is impaired per Sherrill; (c) it

took the Department a lengthy period of time to acknowledge transfer of an 18 acre parcel of federal land from the General Services Administration; (d) the Nation will engage in commercial activities on the land; and (e) the Eastern Regional Office is in Nashville. Pl. Br. 112-113. As the Department noted, the trust decision ensures the Nation can exercise its sovereign authority over its Reservation land held in trust. Moreover, as Plaintiffs argue elsewhere, the Nation has successfully operated commercial enterprises without significant Department oversight in the years since it has reacquired its Reservation lands in fee. The Department's acknowledgement of the 18 acre parcel is irrelevant to the question of whether it has the resources for effective oversight of the Nation's trust land. Finally, as to travel distances, the Department specifically considered the burdens of on-site visits, as noted above.[52]

VII. CONCLUSION

For the reasons stated above, the United States should be granted summary judgment on all Plaintiffs' surviving claims and their complaint should be dismissed.

[52] Plaintiffs cite Miami Tribe of Oklahoma v. Muskogee Area Director, 28 IBIA 52, 54 (June 8, 1995), for the proposition that a 500 mile travel distance warrants denial of a trust application. Pl. Br. 113. However, that case is off-point because the acquisition was for land in Indiana to be placed in trust for an Oklahoma tribe. Miami Tribe, 28 IBIA at 52. The land was located off-reservation "and well outside the former reservation and current jurisdictional boundaries" of both the tribe and the BIA agency tasked with supervising the tribe. Id. (quoting Area Director's decision). By contrast, the Oneidas are under supervision of the Eastern Regional Office and the travel logistics involved with its supervision of the Oneidas remain the same regardless of whether land is placed in trust.

DATED: January 30, 2012

Respectfully submitted,

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