UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK; ANDREW M. CUOMO, in his capacity as Governor of the State of New York; ERIC T. SCHNEIDERMAN, 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' REPLY
IN SUPPORT OF 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 Reply in Support of the United States' Motion for Summary Judgment against Plaintiffs 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. APPLICABLE STANDARD OF REVIEW

In the Administrative Procedure Act ("APA") context the Court "sits as an appellate tribunal," not a fact finder of the first instance and there are no factual questions because the "'entire case' on review is a question of law." Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Plaintiffs seek to escape the narrow confines of judicial review under the APA, alleging "issues of material fact" based on "relevant non-record facts" produced for the first time before this Court. Pls.' Mem. Of Law in Opp'n to United States' & Def.-

Intervenor's Mots. for Summ. J. (Opp'n) 2 (Dkt. No. 259).[1] Such evidence should have been placed before the Department, the administrative agency tasked by Congress with making the factual findings relating to, as well as the final decision concerning, the Nation's application to have land placed in trust for its benefit. Plaintiffs also appear to raise factual disputes with the agency record. Opp'n 1. However, "courts should not substitute their judgment for that of the agency," and an agency decision will be upheld "so long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made." Karpova v. Snow, 497 F.3d 262, 267-68 (2d Cir. 2007). The only question before the Court at present is a legal one: whether the Department's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 267 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (internal quotation marks omitted). Demonstrating this is Plaintiffs' burden. See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 37 (D.C. Cir. 1986) ("the party challenging an agency's action as arbitrary and capricious bears the burden of proof").

Evidence, such as Plaintiffs' "expert" reports, not placed before the agency and claims, like their Carcieri argument, not meaningfully elaborated or pressed before the agency are deemed waived. "Persons 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.

[1] Pls.' Mem. Of Law in Supp. of Mot. for Summ. J (Dkt. No. 237-1) hereinafter referred to as Pl. Br.

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."). Thus, as to Plaintiffs' proffer of disputed facts, the question is not whether the disputed fact precludes summary judgment, but rather whether the evidence and argument derived from that evidence was properly placed before the Department during agency proceedings. If it was before the Department, then the Court reviews the Department's assessment of the evidence and arguments under the APA's arbitrary and capricious standard. If it was not before the Department, then the Court should deem such evidence and arguments as waived by the Plaintiffs.

III. ARGUMENT

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

1. *Plaintiffs have waived their claim*

Relying on extra-record evidence never presented to the Department, including a purported expert report prepared solely for purposes of the present litigation, Plaintiffs ask the Court to make factual findings on whether the Nation was a "recognized tribe now under Federal jurisdiction" as that phrase is used in the Indian Reorganization Act's ("IRA") definition of "Indian." 25 U.S.C. § 479. However, "[i]t is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency . . . in order for the court to consider the issue." Appalachian Power Co. v. EPA, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (internal quotations and brackets omitted); see, e.g., Otter Tail Power Co. v. Surface Transp. Board, 484 F.3d 959, 963 (8th Cir. 2007) ("two generalized and undeveloped statements" "provide an insufficient record that the principal issue raised on appeal was adequately raised to the administrative body below"); Nat'l Mining Ass'n v. U.S. Dep't of Labor, 292 F.3d 849, 874 (D.C. Cir. 2002) (quoting Nat'l Recycling Coal., Inc. v. Reilly, 884 F.2d 1431, 1437

(D.C.Cir.1989)) (a commenter's "general claim falls well short of providing the agency with the required 'adequate notice' [of commenters'] specific claim").[2]

Waiver is especially proper where a plaintiff reserves a statutory claim since "permitting a petitioner to bring a statutory challenge to an agency's action directly to this court would infringe on agencies' rightful role in statutory construction under the Chevron framework." USAir v. U.S. Dep't of Transp., 969 F.2d 1256, 1260 (D.C. Cir. 1992) (internal quotations omitted); Northwest Airlines, Inc. v. FAA, 14 F.3d 64, 73 (D.C. 1994) ("a party's failure to raise an issue in the context of an administrative proceeding will not be excused merely because the litigant couches its claim in terms of the agency's exceeding its statutorily-defined authority or 'jurisdiction'").

Plaintiffs' sole effort to put the Department on notice of this claim was a footnote that offered an aside to their main argument about whether the Indian Land Consolidation Act applied to the Oneidas. AR000286 n.2. That footnote first quoted the IRA's definition of "Indian," and then commented that "[t]here are serious questions as to whether in 1934 the DOI recognized the Oneidas in New York as a tribe." Id. Nothing in the footnote hints that Plaintiffs do not believe the Nation was under federal jurisdiction in 1934. Moreover, the "serious questions" alluded to by Plaintiffs are nowhere elaborated in the record, beyond the cite in the footnote to the 1914 Reeves Report indicating that the Nation had sold its land and is not known as a tribe anymore in New York. Id. Plaintiffs do not explain why the Department should grant

[2] National Mining Ass'n also made clear that the question of waiver is distinct from the question of whether a plaintiff has exhausted their administrative remedies and rejected a plaintiff's attempt to salvage a waived claim by resort to cases addressing when administrative remedies need be exhausted. Id. See also Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 562 (D.C. Cir. 2002) (citation to case that "addresses exhaustion of administrative remedies, not waiver of claims . . . wholly inapposite").

this report significant weight, particularly given that their own comments, above the footnote and on the same page, devote a paragraph to asserting that the Secretary called a vote by the Nation on the applicability of the IRA subsequent to its passage in 1934. Id. Nor did Plaintiffs provide any hint that they had additional documents that warranted a detailed inquiry into whether the Nation was a "recognized tribe under federal jurisdiction" in 1934. Thus, the first question for the Court is whether Plaintiffs have waived this claim.

Even if the Court decides that Plaintiffs' vague assertion about "serious questions" sufficiently alerted "the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration," Public Citizen, 541 U.S. at 764, the question before the Court remains one of law, not fact. That question is whether a remand to the agency requiring it to consider Plaintiffs' contention is futile because the Nation was clearly under federal jurisdiction in 1934. See U.S. Mem. Of Law in Supp. of Mot. for. Summ. J. (U.S. Br.) 25-27 (Dkt. No. 240-1) (discussing the ordinary remand rule and the principle of futility in APA cases).[3]

2. *The Nation was under federal jurisdiction in 1934*

Plaintiffs allege that the United States reads "under federal jurisdiction" so broadly that it renders the test meaningless. Opp'n 19. To the contrary, the Federal Defendants do not believe it is necessary for the Court to parse the meaning of "under federal jurisdiction" in this case. There may be tribes whose status in 1934 is so ambiguous that close scrutiny of the IRA's language is necessary, but this is not one of them. The Oneidas present such an easy case that it is Plaintiffs who are forced to construct an artificially narrow and nonsensical reading of "under

[3] Even if this claim is not waived, Plaintiffs' expert reports should not be considered by the Court because Plaintiffs failed to disclose their experts in accordance with Local Rule 26.3.

federal jurisdiction" in order to sustain their litigation position. We briefly itemize some of the contortions of Plaintiffs' "test" below.

a. *Voting on the IRA*

Being a member of a recognized tribe under federal jurisdiction at the time of the IRA's enactment was one of the prerequisites for being considered an "Indian" within the terms of the IRA. 25 U.S.C. § 479. Persons meeting the IRA's definition of Indian were entitled to vote on whether the IRA would apply to their Reservation at a vote called by the Secretary. 25 U.S.C. § 478.[4] The fact that the Secretary called such a vote by a tribe constitutes dispositive evidence that a tribe was under federal jurisdiction at the time of the IRA's enactment. The set of tribes for whom the Secretary called votes is limited, but, unfortunately for Plaintiffs, the Nation falls within it. Accordingly, Plaintiffs are forced to contend that the fact that the Department treated a tribe as eligible to vote on the IRA by virtue of meeting that statute's definition of Indian does not mean anything at all unless the tribe voted to accept application of the IRA to itself. Opp'n 16, 21.

Plaintiffs' position makes a hash of the IRA, and, although they do not appear to understand its implication, they effectually (and nonsensically) read the IRA as giving the Secretary authority to constitute random groups of people as tribes provided the group votes to accept the IRA. Plaintiffs argue the Oneidas were "scattered Indians" who were "non-tribal" and not under federal jurisdiction. Opp'n 16. Accordingly, the Secretary should not have been authorized to apply the IRA to them by calling an IRA vote. But, on Plaintiffs' account, the Oneidas could be reconstituted as a tribe by virtue of the IRA vote, provided, of course, the

[4] Provisions of the IRA "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." 25 U.S.C. § 478.

Oneidas assented to coming under federal jurisdiction. Opp'n 16. Section 478, however, provides the Secretary no power to establish new tribes under federal jurisdiction but instead limits the universe of individuals able to qualify as "Indians" under the terms of the IRA. To push their view, Plaintiffs turn away from the statute's language and instead rely on a letter by John Collier, but that letter itself belies Plaintiffs' contention that the Nation was under state jurisdiction in 1934, because it indicates that the New York Indians (including the Nation) were the recipients of treaty annuities and moreover were protected, as needed, by the United States, when the State or other parties infringed on their rights, all of which provides powerful evidence that the Nation was under federal jurisdiction.[5]

Finally, Plaintiffs acknowledge that the Interior Board of Indian Appeals ("IBIA") has held that the fact that the Secretary called a vote for a tribe on the IRA is conclusive proof of "federal jurisdiction" as that term is understood in the IRA. Shawano County v. Acting Midwest Reg. Dir., BIA, 53 IBIA 62, 71-72 (Feb. 28, 2011). Plaintiffs incorrectly urge that no deference is due this decision, Opp'n at 22, but an agency interpretation of an ambiguous statute is entitled to deference, and the meaning of "under Federal jurisdiction" is ambiguous. See Chevron U.S.A., Inc. v. N.R.D.C., Inc., 467 U.S. 837, 843 (1984) (deference to agency interpretation due where "the statute is silent or ambiguous with respect to the specific issue"). As Plaintiffs recognize, Opp'n 25, all Indians could be said to be under federal jurisdiction in the sense that the Constitution has given the federal government plenary authority over Indians. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996). However, the phrase, as used in the IRA, was

[5] Pl. Exh. EEE (February 19, 1938 letter of John Collier) at 3 (Dkt. No. 249-13) (identifying federal services to New York Indians, including "Payment per capita of certain annuities, pursuant to early treaties with the Six Nations," and "Instigating litigation, through the Department of Justice, if and when it appears that the rights of the Indians are being invaded or that the State is exceeding its authority and jurisdiction in the premises.").

meant to limit the set of tribes to which the IRA would apply, so some more specific indicia of a tribe's relation with the federal government is needed. 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 (Dec. 17, 2010) ("Cowlitz ROD") at 95 (U.S. Exh. 3; Dkt. No. 240-6). The IBIA reasonably concluded that it need not address what minimum contacts with the federal government are needed to establish a tribe as under "federal jurisdiction" where a tribe was one of those selected by the Secretary to vote on the IRA in the wake of that statute's enactment, and that conclusion is entitled to deference. South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1008 (D.S.D. 2005) (IBIA rulings "entitled to substantial deference").

b. *Boylan demonstrates federal jurisdiction over the Nation*

Another fact demonstrating federal jurisdiction over a tribe is the existence of federally protected Reservation land. Not only does the Nation have treaty-recognized and protected Reservation land, but United States v. Boylan, 265 F. 165 (2d Cir. 1920), provides incontrovertible evidence of the United States acting to protect its land. Fourteen years before enactment of the IRA, the United States appeared in the Second Circuit and asserted that the Nation is a tribe under the protection of the United States and that the State and other entities are without power to take the Nation's federally protected Reservation lands from it. Moreover, the Second Circuit agreed and established binding Circuit precedent to that effect. There may be tribes for whom the question of federal jurisdiction is close, but the Nation need only point to Boylan to show (a) concrete federal dealings in the years before enactment of the IRA; (b) federally protected Reservation land; and (c) that its status as a recognized tribe was both asserted by the United States and affirmed by the Second Circuit.

Attempting to explain Boylan away forces Plaintiffs' argument into strange contortions. Their main argument is that the Court should disregard binding Second Circuit precedent because the Department does not appear to have sanctioned the Boylan litigation. In order to convince this Court to look behind the United States' position in Boylan and the Second Circuit's holding, Plaintiffs assert that: "[u]nder delegated authority from Congress, the DOI was tasked with determining which Indians were under its jurisdiction in 1934, and thus were eligible to receive IRA benefits. In doing so, DOI applied established federal Indian law and policy." Opp'n 24 n.15. Plaintiffs are correct on this point and, in fact, in 1936, the DOI determined the Nation was under its jurisdiction in 1934 and called a vote by the Oneidas on whether they would accept application of the IRA.[6] But the United States can exercise jurisdiction over Indians by other means, including through litigation brought by the Department of Justice on behalf of the United States for the benefit of Indians to vindicate tribal rights to federally protected Reservation land.[7]

Plaintiffs also attempt to evade Boylan by noting that the eviction that triggered the United States' intervention occurred in 1906. Opp'n 23. The relevant time-frame, however, is when the United States acted, demonstrating its supervision over the Nation and its land. As of 1920, the United States asserted its right in the Second Circuit to litigate on behalf of the Oneidas, asserted that the Nation was a tribal entity under federal protection, and asserted that

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[6] Plaintiffs unwittingly affirm the Department's authority to determine who is under federal jurisdiction in the context of disavowing any relevance of Boylan. When they discuss the fact that the Nation voted on the IRA, their story changes to assert that it was the Indians themselves, according to how they voted, who determined whether they were under federal jurisdiction, not the Department.

[7] Plaintiffs' own extra-record evidence makes that clear. See Pl. Exh. EEE (Dkt. No. 249-13) (February 19, 1938 letter of John Collier) at 3 (noting that Department of Justice also acts on behalf of Indians by bringing litigation to protect their rights).

the Nation's land was subject to federal protection. Plaintiffs' "evidence" that subsequent to Boylan a Mr. Rockwell occupied the 32 acre parcel of Nation Reservation land in "fee" is similarly irrelevant. Id. The very point of Boylan was that conveyances by tribal members pursuant to State law were invalid because the land is tribal land subject to federal protection:

> Congress has never legislated so as to permit title to pass from the Indians to the lots of land here in question. A transfer of the allotment to aliens is not simply a violation of the proprietary rights of the Indians; it violates the government rights of the United States.

Boylan, 265 F. at 173. In other words, even if Mr. Rockwell believed otherwise, the thirty-two acre parcel was not held in fee under State law. As the Second Circuit explained, absent Congressional action, that land was and remained tribal reservation land subject to federal protection. "A tribe could not sell, nor could the individual members, for they have not an undivided interest in tribal lands, nor alienable interest in any particular tract." Id. at 174. Regardless of what Mr. Rockwell or Plaintiffs may believe about his occupation of Nation land, that land remained – and remains today – Nation Reservation land subject to federal supervision and protection.

Plaintiffs' finally object that Boylan applied the wrong standard for determining whether Indians constitute a tribe, as if this Court were free to join Plaintiffs in arguing with binding Circuit precedent. Opp'n 24. As Plaintiffs concede, whether the United States regarded the Nation as a tribe under its protection is really a quasi-political question over which a Court should not take jurisdiction, Opp'n 24, and that is why the Second Circuit explained that "it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms." Boylan, 265 F. at 171. But this gets Plaintiffs nowhere because the upshot is that it is for Congress, not

the courts, to determine whether the Nation ceased to be a tribe under federal protection, and until Congress so acts, the Nation must be regarded as a tribe.

While Plaintiffs argue with Boylan, the Second Circuit has recently reaffirmed it, along with the continued existence of the Oneida Reservation. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003) rev'd on other grounds by 544 U.S. 197 (2005). The Second Circuit both reaffirmed the continuous existence of the Oneidas as a tribe, id. at 166 ("even if continuous tribal existence were required, the record before us shows it"), and the continuous existence of its federally protected Reservation, id. at 159-65. If the Nation's Reservation has existed under federal protection since the Treaty of Canandaigua, the tribe for whose benefit federal protection is extended has also been under federal jurisdiction since that time.

c. *Treaty of Canandaigua*

Another, and also insurmountable, indicator of federal jurisdiction over a tribe would be if that tribe had treaty relations with the United States, as the Oneida did based on the Treaty of Canandaigua in 1794. Plaintiffs assert that the Oneidas that were party to the Treaty of Canandaigua no longer exist. Opp'n 25. However, as noted above, it is for Congress, not Plaintiffs, to say when the tribal party to a federal treaty has ceased to exist. Boylan, 265 F. at 171 ("it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated"). Moreover, the Second Circuit acknowledged the United States' history of making treaties with the Oneidas and other New York Indians and of providing funds and appropriations pursuant to those treaties.[8] Id. Thus Plaintiffs are again arguing with the Second

[8] Plaintiffs rely on a 1982 Department memorandum to argue against the significance of the United States' continuous provision of treaty cloth pursuant to the Treaty of Canandaigua, Opp'n

Circuit, which recognized that the tribe whose land was under federal supervision and restored by the United States in 1920 had had treaty relations with the United States since at least 1794. Id.

3. *Question of federal recognition*

Plaintiffs argue that IRA eligibility requires a showing that a tribe was both "federally Recognized" at the time of the IRA's enactment as well as under federal jurisdiction. Opp'n 17-19. The language of the IRA does not support this view, nor does Carcieri, but even if Plaintiffs were right, it does not matter because the Nation has been in a government-to-government relation with the United States since at least 1794. The Department, in a response to comments in the AR characterizing the Indians of New York as tribal remnants, went so far as to point out that the Nation has been federally recognized at least since 1920: "In United States v. Boylan the Oneida Nation was firmly established as a federally recognized tribe, not a tribal remnant." AR010877-79 at AR010879 (comment letter dated December 14, 2006 and BIA response).[9] As a result, the Nation was both federally recognized and under federal jurisdiction in 1934.

Plaintiffs' reading of the IRA's language is unpersuasive because evidence establishing federal recognition of a tribe at a given point in time also establishes that a tribe is under federal jurisdiction.[10] "Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and

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26, but that internal and deliberative document does not express any official Department position.

[9] Thus, with regard to the question of federal recognition, there is no need for remand because the AR shows the Department has answered the question of whether the Nation was federally recognized at the time of the IRA's enactment.

[10] The converse is not, however, true. Evidence of federal jurisdiction over a tribe does not necessarily establish that the tribe was federally recognized and in a government-to-government relationship.

institutionalizing the government-to-government relationship between the tribe and the federal government." F. Cohen, Handbook of Federal Indian Law § 3.02[3] (2005 ed.). Section 479 defines Indians as members of "any recognized Indian tribe now under Federal jurisdiction." Accordingly, Plaintiffs' attempt to read "recognized tribe" by inserting the word 'federally' results in the remainder of the phrase becoming superfluous because a federally recognized tribe in 1934 is one that has a political relationship with the United States in 1934 and therefore is also "under federal jurisdiction" in 1934. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").[11] Justice Breyer noted as much in his concurrence in Carcieri, where he explained that the evidence that establishes federal recognition can also establish federal jurisdiction as of 1934 depending on when federal recognition was established: "The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855. Consequently, the Department concluded land could be taken in trust for the Tribe." 555 U.S. at 1070.[12]

[11] Carcieri lends no support to Plaintiffs' interpretation because it did not address the meaning of the term "recognized" in Section 479. Carcieri held that only those tribes that were under federal jurisdiction in 1934 are eligible for the benefits of the IRA. Nowhere in Carcieri did the Court determine that a tribe must have been federally recognized in 1934. Indeed, the Naragansett's case did not fail because they were federally recognized after 1934. It failed because they conceded they were not under federal jurisdiction in 1934. Carcieri, 555 U.S. at 383 ("the record in this case establishes the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted . . . .").

[12] To be sure, Justice Breyer reads "recognition" as meaning federal recognition, a position the Department has not adopted. His reading, in any event, avoids rendering "under federal jurisdiction" superfluous because he does not read "recognition" as modified by "now": "The statute, after all, imposes no time limit upon recognition." Id.

The Department's own reading of the relevant IRA language, as set forth in its Cowlitz ROD avoids the problem created by Plaintiffs' proposed interpretation of "recognized" as having political implications associated with federal recognition:

> The members of the Senate Committee on Indian Affairs debating the IRA appeared to use the term "recognized Indian tribe" in the cognitive or quasi-anthropological sense. For example, Senator O'Mahoney noted that the Catawba would satisfy the term "recognized Indian tribe" even though"(sic)[t]he Government has not found out that they live yet, apparently." In fact, the Senate Committee's concern about the breadth of the term "recognized Indian tribe" arguably led it to adopt the phrase "under federal jurisdiction" in order to clarify and narrow that term. There would have been little need to insert an undefined and ambiguous phrase such as "under federal jurisdiction" if the IRA had incorporated the rigorous modern definition of federally recognized Indian tribe.

Cowlitz ROD at 88 (quoting To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing before the S. Comm. on Indian Affairs on S. 2755, 73rd Cong. 261-67 (1934) (Pl. Exh. A; Dkt. No. 247-1)).[13]

Plaintiffs' argument that the Nation must show it was federally recognized in 1934, not 2008 (when the ROD acknowledged the Nation's federally recognized status) gets them nowhere because the Department's own tribal acknowledgement regulations provide that "previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment."[14] 25 C.F.R. § 83.8(a). In other words, the

[13] Plaintiffs oddly contend that in Carcieri the Department "steadfastly read the IRA to require both federal recognition and jurisdiction in 1934." Opp'n 17-18 & 18 n.11. That in fact was precisely the position opposed by the Department in Carcieri. The Supreme Court in Carcieri did not address whether federal recognition as of 1934 was an IRA prerequisite.

[14] The terms "acknowledge" and "recognize" are often used interchangeably but they both have the same import. "Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society." Cohen § 3.02[3] at n.25.

Department will not look behind prior federal recognition, and for good reason where such recognition is based upon "treaty relations with the United States," an "Act of Congress or Executive Order," or "[e]vidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds." 25 C.F.R. § 83.8(c)(1)-(3).[15] Neither should the Court and, in fact, courts typically decline to decide whether a tribe is federally recognized. "It comes as no surprise, therefore, that 'the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'" Miami Nation of Indians of Ind. v. U.S. Dep't of Interior, 255 F.3d 342, 347 (7th Cir. 2001) (quoting William C. Canby, Jr., American Indian Law in a Nutshell 5 (3d ed. 1998)).

The exception to this rule of judicial abstention from questioning federal recognition, as explained by the Seventh Circuit, is where tribal recognition occurs by an administrative process because by "promulgating such regulations [addressing how a tribe may become federally acknowledged] the executive brings the tribal recognition process within the scope of the Administrative Procedure Act." Id. at 348. However, as Plaintiffs note, the Nation never went through the federal acknowledgement process, Opp'n 14 n.9, so the fact that it appears repeatedly on lists of federally recognized tribes promulgated by the Department is based on its prior dealings with the United States, which the Court may not look behind, rather than an administrative proceeding subject to judicial review under the APA.[16] In short, when the Record

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[15] The Treaty of Canandaigua, of course, provides a basis for finding the Nation has treaty relations with the United States. Boylan is an example of the Federal Government treating the Nation as having collective rights in its remaining intact Reservation land, as is the fact of the Secretary calling an Oneida vote on the IRA since such votes determined whether or not the IRA shall "apply to any reservation" based on the vote of eligible Indians. 25 C.F.R. § 478.

[16] The Department's regulations preclude administrative review of whether a tribe is federally acknowledged where the tribe is "already acknowledged as such." 25 C.F.R. § 83.3(b). In other

of Decision[17] ("ROD") states that the Nation is federally recognized, ROD at 32, that recognition is based on an historical course of dealings between the Nation and the United States, and neither the Department nor this Court are free to look behind that recognition and determine whether it is valid. "Once a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government, not the courts." Sherrill, 337 F.3d at 166. Furthermore, because federal jurisdiction inherently exists over a federally recognized tribe, the evidence showing federal recognition since at least 1920 (Boylan), noted by the Department in the AR, AR010879, is also evidence of federal jurisdiction since 1920 in the absence of anything showing subsequent termination of federal recognition by Congress after 1920, and this, in turn, provides another basis for dismissing Plaintiffs' Carcieri claim.

B. Count Four: Plaintiffs' policy and procedures claim

Plaintiffs allege the Department has departed without explanation from prior policies. No such departure has occurred, but even if it had, Plaintiffs' cases show departures are permissible so long as the reasons for them are clear. "Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). Plaintiffs try to manufacture prior agency policies and then seek remand for purported departures. The policies they invoke do not exist. The Department explained its approaches in

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words, the Department, like the Court, is not free to second guess federal recognition of the Nation.

[17] Record of Decision, Oneida Indian Nation of New York Fee-to-Trust Request. See U.S. Exh. 1 (Oneida Record of Decision) (Dkt. No. 240-4).

the ROD, with citations to agency precedent justifying its present action. Accordingly, Plaintiffs' claim is meritless.

1. *The Department has no policy preventing self-sufficient tribes from placing land in trust*

Plaintiffs rely on two memoranda issued over fifty years ago to contend the Department has a policy of not taking land in trust for financially self-sufficient tribes. As discussed in the United States' Opposition, the outdated documents Plaintiffs rely on derive from a prior era of federal Indian policy. United States' Mem. Of Law in Opp'n to Pl. Mot. for Summ. J. (U.S. Opp'n) 42-43 (Dkt. No. 261). The Department addressed this contention in the ROD and disclaimed any prohibition on placing land in trust for self-sufficient tribes. ROD at 35 ("As a threshold matter, the Department finds that the Nation's wherewithal and competence to manage its affairs do not render it ineligible for placement of land into trust. . . . financial difficulties are not a prerequisite for[] acquisition of land in trust."). Ample agency precedent supports that view and simultaneously documents a longstanding Department practice and policy quite different from what Plaintiffs here seek to foist on the Department. <u>See</u> <u>County of Sauk, Wis. v. Midwest Reg'l Dir., BIA</u>, 45 IBIA 201, 209-11 (Aug. 31, 2007) ("The Board has held that a tribe need not be landless or suffering financial difficulties to need additional land. . . . financial status is not dispositive of whether it needs additional land"); <u>South Dakota v. Acting Great Plains Reg'l Dir., BIA</u>, 39 IBIA 283, 290 (Apr. 6, 2004) (Board has "previously rejected an argument that a tribe's casino income disqualified it from further acquisition of land in trust."); <u>County of Mille Lacs, Minn. v. Midwest Reg'l Dir., BIA</u>, 37 IBIA 169, 173 (Mar. 25, 2002) (rejecting argument that "a tribe must show that it needs to be protected against its own improvidence or that it is not competent to handle its own economic affairs in order to have land taken in trust for

it"); Avoyelles Parish, La. v. E. Area Dir., BIA, 34 IBIA 149, 153 (Oct. 27, 1999) ("Nothing in 25 C.F.R. § 151.10(b), however, suggests that the only legitimate need for additional land is one which stems from financial difficulties.").[18] The Department's decision comported with this long line of agency precedent.[19]

2. *The Department complied with its title examination policies*

a. *The alleged irregularities with the Department's title examination do not warrant remand*

Plaintiffs allege the Department has departed without explanation from its title examination procedures. Title examination only occurs in the event the Department concludes it will accept land in trust. Accordingly, any relief Plaintiffs may acquire from this claim should only be directed towards specifying what steps the Department still needs to undertake prior to formally accepting title to the land proposed for trust acquisition. In other words, Plaintiffs' challenge to the Department's title examination process provides no ground for setting aside the ROD and overturning the Department's decision to acquire land in trust. For example, Plaintiffs

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[18] Plaintiffs attempt to distinguish Mille Lacs and Avoyelles by asserting that in those cases the Department still found "an actual economic need for land to be taken in trust." Opp'n 32. But, according to Plaintiffs, the controlling question is whether a tribe is "self-sufficient," not whether the tribe can put the land to economic use. Opp'n 29. As noted above, both Mille Lacs and Avoyelles squarely reject the notion of tribal self-sufficiency as a bar to land acquisition.

[19] The only thing Plaintiffs have suggesting these vintage memos are relevant to contemporary Department practice is an excerpt from a 1984 BIA Manual. That document reiterates a Department requirement to consider the ability of individual Indians (as opposed to tribes) to manage land proposed for trust acquisition, consistent with 25 C.F.R. § 151.10 (d), but does not speak to the ability of tribes to manage their finances. See Pl. Exh. C (Dkt. No. 259-4) at 9 (land not be placed in trust for "an Indian quite able to successfully manage his own affairs" including Indians who "are highly successful through their own efforts in a business or a profession or as a farmer or cattleman with large holdings."). Moreover, the 1984 Manual excerpt is superseded by current agency policy and practice as set forth in the IBIA decisions in the years preceding the ROD.

read the Department's regulations as requiring it to eliminate all liens making title unmarketable prior to publishing notice of its decision to accept land into trust pursuant to 25 C.F.R. § 151.12(b). Opp'n 34-35. Assuming for the moment Plaintiffs are correct, such error would be harmless because prior to undertaking title examination procedures, the Secretary must determine "that he will approve a request," with such decision being memorialized in the present ROD. 25 C.F.R. § 151.13; see also Ziebach County, S.D. v. Acting Great Plains Reg'l Dir., BIA, 38 IBIA 227, 232 (Dec. 2, 2002) (under 25 C.F.R. § 151.13 "title information is not required until after BIA makes a favorable decision on the trust application request"); Avoyelles Parish, 34 IBIA at 154 ("unpaid taxes may affect acquisition of title under 25 C.F.R. § 151.13" but "[w]hether or not the Tribe is presently current in its property tax payments is not one of those factors" the Department must consider pursuant to 25 C.F.R. § 151.10).

Thus there would be no basis to remand for reconsideration of the Department's decision because compliance with the Department's title examination regulations is not material to its decision on whether land should be placed in trust – it is only material as to when such land may be formally accepted by the Department without burdening the United States with title defects. The Department's alleged failure to comply with its title examination procedures does not prejudice Plaintiffs because the alleged failure did not affect their ability to participate in agency proceedings and it did not influence (and is not supposed to influence) the Department's decision about whether to place land in trust. See Ali v. Mukasey, 524 F.3d 145, 149 (2d Cir. 2008) ("we conclude that a remand for further fact-finding is unnecessary because – even assuming the truth of these allegations – petitioners have not demonstrated that this conduct caused them any prejudice").

b. *Plaintiffs lack standing to challenge the Department's compliance with its title examination procedures*

Along similar lines, because the title examination procedures are designed to protect the United States from taking defective title, Plaintiffs lack prudential standing to challenge whether the Department has properly followed its title procedures. As discussed in the United States Opposition Brief, U.S. Opp'n 43-45, the Department's title examination procedures are designed to protect the interests of the United States. 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"). They provide no participatory role for Plaintiffs or other third parties to involve themselves in deciding whether the Department should be satisfied with title. The only party with a conceivable interest in, or standing to challenge, the process might be the applicant tribe which is tasked with providing the title evidence the Department will consider and which will not see the benefits of a favorable Department decision until all title infirmities are addressed to the Department's satisfaction. Even then it seems unlikely a court would conclude an applicant tribe can appropriately challenge the Department's evaluation of title and somehow compel the Department to accept title about which the United States has ongoing concerns. Either way, Plaintiffs have no standing to press the interests of the United States before this Court.

c. *Department regulations and title examination policy permit the use of letters of credit*

The Department's title examination regulation instructs that the Secretary "shall require elimination [of] liens, encumbrances, or infirmities [that] make title to the land unmarketable." 25 C.F.R. § 151.13. Plaintiffs argue that "eliminate" can only have one meaning, to pay outstanding assessed taxes, while the Department's view, supported by agency precedent and

entitled to deference, is that liens may be eliminated either by paying them off or by making adequate provision for their payment – in this case through letters of credit. ROD at 53 ("The Department has considered the letters of credit and the Nation's commitments, and determined that they will be adequate to satisfy tax liens for purposes of acquiring the Subject Lands in trust."); see also Tohono O'Odham Nation v. Acting Phoenix Area Dir., BIA, 22 IBIA 220, 235 (Aug. 14, 1992) (tribe must either "eliminate the liens or make provision for satisfying them prior to trust acquisition"). The Department's interpretation of "eliminate" is derived from the Department of Justice "Standards for the Preparation of Title Evidence In Land Acquisitions by the United States," incorporated by reference in 25 C.F.R. § 151.13, which requires liens to be either paid or that "adequate provision should be made therefore." Section 6(a), 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) (emphasis added) (U.S. Exh. 4; Dkt. No. 240-7). An agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); see also Auer v. Robbins, 519 U.S. 452, 461 (1997). As Tohono O'Odham reveals, the Department's interpretation and application of its title examination regulations in this fashion is consistent with past practice and policy.[20]

Plaintiffs also argue that 25 C.F.R. § 151.13 does not provide the Department discretion to revisit title issues at a later point in time. Opp'n 38. While the title examination regulations require that the Department eliminate liens making title unmarketable – which the Department

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[20] Plaintiffs rely on In re Sunflower Racing, Inc., 219 B.R. 587 (Bankr. D. Kan. 1998), for the notion that letters of credit cannot eliminate liens pursuant to 25 C.F.R. § 151.13. However, the problem there was that there was no provision for issuance of a letter of credit prior to release of a lien: "And although the letter of credit should issue before the lien release, the plan is silent about this significant detail." Id. at 602.

did by requiring the Nation to post letters of credit to pay outstanding taxes should they be found due and owing[21] – nothing in the Department regulations preclude it from taking different measures to address title infirmities prior to formally taking title to trust lands. See Big Lagoon Park Co. v. Acting Sacramento Area Dir., BIA, 32 IBIA 309, 318 (Aug. 31, 1998) (placing land in trust is a two step process with the "first step" being "the decision to take land into trust," while the "second step, which the land acquisition regulations term 'Formalization of acceptance,' is taken following examination of title evidence and correction of title defects'). The time between the title examination and point where the Department is ready to formally accept title to lands to be placed in trust can be lengthy – as in the present case. The circumstances surrounding the lands proposed for trust acquisition may change and it makes no sense to prohibit the Department from addressing new title issues that may arise in order to better protect the interests of the United States. The regulations at any rate do not preclude the Department from taking further measures to ensure that the United States receives good title. In this case, the Department explained that it "will not formalize acceptance of lands into trust without an assurance that all appropriate real property taxes and related charges that are lawfully owed to the local governments, if any, have been or will be paid." ROD at 54.

Plaintiffs oppose the Department's interpretation of its own regulations on the ground that it might prevent them from seeking judicial review of the Department's title examination

[21] With regard to taxes levied on the parcel containing the Nation's gaming operation, the ROD specified that the Nation need only post letters of credit to cover taxes based on the value of that parcel without gaming improvements. ROD at 54. As to the remaining taxes on the casino lot improvements, the Department explained that, should litigation regarding the validity of those taxes still be pending at the time of formal acceptance of the land in trust, the Nation will have to post letters of credit for the disputed amount as a precondition to placing land in trust. Id. Thus, adequate provision has been made for all outstanding liens, regardless of how doubtful their validity.

process. Opp'n. 39. But, as noted above, Plaintiffs are not entitled to judicial review of the Department's title examination process because they fall outside the zone of interests of the title examination regulation and thus lack prudential standing. Plaintiffs contend that without judicial review, they will be potentially deprived of any recourse for their liens once the land is placed in trust. That is not so. If the liens are not satisfied by the measures the Department takes to ensure elimination of liens making title unmarketable – should taxes on Oneida land ultimately be found due and owing – and the land is placed in trust without the Counties receiving payment via the letters of credit, the Counties arguably would have a takings claim against the United States for their lost taxes. See Armstrong v. United States, 364 U.S. 40 (1960); see also Tohono O'Odham Nation v. Acting Phoenix Area Dir., BIA, 22 IBIA at 235 (recognizing need to make adequate provision for existing liens on property to be placed in trust because "loss of enforcement remedies for an existing lien" in turn "constitutes a compensable taking under the Fifth Amendment") (quoting Area Director's Brief). The Fifth Amendment provides Plaintiffs with any recourse to which they might be entitled, not the Department's title examination procedures. The title examination procedures are designed to protect the United States, not to provide a vehicle for local governments to advance their disputes with their tribal neighbors.

C. Count Five: Plaintiffs' bias claim should be dismissed

1. *Plaintiffs lack standing to bring a constitutional due process claim*

Plaintiffs argue the Second Circuit has "plainly suggested" cities and municipalities have standing to bring a Fifth Amendment claim. The case they rely upon, Aguayo v. Richardson, acknowledged that the issue was undecided in the Second Circuit and then, contrary to Plaintiffs' argument, cautioned that "it may be difficult to see how a city can be a 'person' if its progenitor [the State] is not." Aguayo v. Richardson, 473 F.2d 1090, 1101 (2d Cir. 1973). That cautionary

point has proved dispositive for most federal courts called upon to decide this question. See Santa Cruz County v. Leavitt, No. C07-02888 MJJ, 2008 WL 686831, at *8 (N.D. Cal. Mar. 11, 2008) ("Federal courts considering the issue have also found – based on reasoning that this Court finds persuasive – that a political subdivision of a State also cannot constitute a 'person' entitled to assert a due process violation under the Fifth Amendment."); U.S. Br. 34-35 (citing cases rejecting standing for state-created municipalities under the Fifth Amendment). Plaintiffs' sole case holding to the contrary is a Third Circuit case, In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760, 765 n.5 (3d Cir. 1989), which noted many similarities between a board of education and a private corporation but which wholly failed to address the Second Circuit's query concerning "how [can an entity created by the State] be a 'person' if its progenitor [the State] is not?" Aguayo, 473 F.2d at 1101.

Plaintiffs also cite to district court cases in the Eighth Circuit where states and municipal governments brought due process claims which were not challenged on standing grounds. Opp'n 46-47. However, the Eighth Circuit has recently rejected standing for states to bring Fifth Amendment due process claims and simultaneously expressed doubt about whether political subdivisions created by the state could bring suit either. South Dakota v. U.S. Dep't of Interior, 665 F.3d 986, 990 & 991 n.4 (8th Cir. 2012) (dismissing State due process claim for lack of standing and noting that the State failed to argue standing for its political subdivisions but nevertheless "we have some doubt political subdivisions of the state are afforded constitutional rights apart from those which derive from the state itself").

Plaintiffs identify numerous differences between a State and its subdivisions, but they, like the Third Circuit, fail to address the key question of how the State can create a governmental entity endowed with Constitutional rights that a State itself lacks. Accordingly, Plaintiffs offer

no basis for holding that the Counties constitute persons within the meaning of the Fifth Amendment when New York does not.[22]

2. *Plaintiffs fail to show the decision was biased or based on improper factors*

Plaintiffs oppose summary judgment on their bias claim, although they have not sought summary judgment on the same claim in their moving papers. Apparently they believe material issues of fact warrant a trial on this claim even though they abandoned pursuit of additional extra-record discovery on this claim after the Magistrate Judge permitted the deposition of former Department Associate Deputy Secretary James Cason. Even with the opportunity to depose Cason, Plaintiffs remain unable to demonstrate any concrete motive or conflict of interest that would motivate Department officials (and specifically, James Cason) to rig the outcome of the land into trust process. Plaintiffs, for example, have no theory (let alone evidence) that political considerations improperly drove the decision. Compare Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt, 961 F. Supp. 1276, 1282 (W.D. Wis. 1997) (evidence showing "an important White House official" was concerned about political ramifications of agency decision). Neither do Plaintiffs identify any other improper interests that could have interfered in the final outcome of the Department's decision. Compare Tummino v. Torti, 603 F. Supp. 2d 519, 543-44 (E.D.N.Y. 2009) (bias allegedly resulting from evidence that "FDA officials were motivated by improper concerns about the morality of adolescent sexual activity").

[22] Plaintiffs assert that the Federal Defendants have conceded that they can convert their Constitutional due process claim to one brought under the APA. Opp'n 48. That is wrong. We identified relevant precedent out of candor to the Court, but it remains Plaintiffs' burden to demonstrate that such conversion is proper here. While a court may convert a constitutional due process claim to a statutory APA claim, a court may also simply dismiss the constitutional claim for lack of standing. See South Dakota, 665 F.3d at 991.

Plaintiffs' bias theory comes down to their disagreement with the Department's final decision. They ask the Court to conclude that the Department's failure to embrace their view of how it should exercise its discretion must be due to the Nation's influence on the decision process which, in turn, must somehow have been improper. More is needed: Plaintiffs must demonstrate that the influence was improper (and not just simply persuasive) and that it "cause[d] the agency's action to be influenced by factors not relevant under the controlling statute." Tummino, 603 F. Supp. 2d at 544; Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132, 134 (2d Cir. 2009) (bias claim must demonstrate that "pressure was intended to and did cause the agency[] action to be influenced by factors not relevant under the controlling statute"). Plaintiffs rely on speculation and innuendo to support their claim, with nothing to suggest either improper influence or improper motivations directing the decision process. That is insufficient to dispel the presumption of regularity that attaches to agency decisions. See Estate of Landers v. Leavitt, 545 F.3d 98, 113 (2d Cir. 2008) (stating that a "presumption of regularity attaches to the actions of Government agencies," and the court is "unwilling to ascribe . . . nefarious motives to agency action as a general matter") (citations omitted); United States v. Arboleda, 633 F.2d 985, 990 (2d Cir. 1980) ("[T]here is a presumption of regularity of official action which the movant must do something to unseat."). Accordingly the bias claim should be dismissed at summary judgment.

Plaintiffs collect a litany of grievances which they urge the Court to consider in total, rather than allegation by allegation, because each allegation, taken on its own terms, adds up to nothing. Opp'n at 50. However, a large assemblage of nothing still amounts to nothing. Plaintiffs offer their grievances in bullet point form. Opp'n 50-57. The numbered paragraphs

below track Plaintiffs' unnumbered bullet points and offer a summary of each of Plaintiffs' grievances.

(1) The Nation asked the Department to expedite agency proceedings and Department correspondence indicates that the Associate Deputy Secretary directly overseeing the decision process wanted it to proceed "smoothly as possible." Opp'n 50. Plaintiffs do not explain how agency efficiency is improper.

(2) The Nation requested a special team be created to ensure the process continued to move forward, while the Department decided that the final decision on the trust application would be made by the Office of the Secretary. Opp'n 51. The special team was never created, although the Department chose to exercise discretion directly rather than delegating the decision to the regional BIA office. Still, there is nothing improper about the Secretary withdrawing delegated authority from the regional office. Plaintiffs do not suggest, for example, that the Office of the Secretary wished to override the professional judgment of regional employees for improper reasons.[23]

(3) The Department waited five months before sending notice, pursuant to 25 C.F.R.§151.10. Plaintiffs fail to explain that their receipt of that notice triggers a thirty day deadline for them to provide comments on the trust application. "The notice will inform the state or local government that each will be given 30 days in which to provide comments as to the

[23] The decision to make the trust decision in the Office of the Secretary rather than at the regional BIA office was "[d]ue to the heightened public interest." AR007198. That heightened public scrutiny derived, in part, from the mobilization of the New York congressional delegation against the Nation's application. See AR007241-46 (November 23, 2005 DOI correspondence with Congressman Sherwood Boehlert); AR007249-54 (November 23, 2005 DOI correspondence with Congressman John McHugh); AR049067 (September 26, 2006 DOI correspondence with Senator Charles Schumer); AR005689-90, AR005578-79 (Senator Schumer's correspondence with BIA urging rejection of Oneida trust application).

acquisition's potential impacts on regulatory jurisdiction . . . ." 25 C.F.R. §151.10. Had that notice been sent April 6, 2005, as they apparently wish, their ability to comment on the application would have ended May 6, 2005. In the end the Department provided Plaintiffs extensions and allowed them until March, 2006 to finish providing comments, well over the thirty days provided by 25 C.F.R.§151.10. AR005930-31. Plaintiffs also fail to mention that they knew about the Nation's application as early as April 11, 2005, at which point they began participating in the agency process through dialogue with the Department, so they cannot complain that their views on the Nation's application were a mystery prior to receipt of the §151.10 notice. AR049434-37. Plaintiffs also knew that the delay in requesting their comments on the trust application derived from the Department's request that the Nation break down and prioritize the land it proposed for trust acquisition. The Department in turn requested Plaintiffs' comments on each of the three land groupings arrived at by the Nation. ROD at 6 (explaining that the "Nation's fee-to-trust request categorized the 17,370 acres into three groups" and describing the groupings). This point is further discussed in response to Plaintiffs' next allegation.

(4) Plaintiffs allege that the Department decided to take 10,000 acres in trust early in the decision process. As discussed in prior briefing, this allegation is based upon Plaintiffs' fanciful reading of a couple Department emails which clearly explain that the 10,000 acres was described as a limit – as the most the Nation could expect to achieve from their application. The email makes clear this was done in order to force the Nation to adjust to the reality that the Department would not simply decide between the two alternatives of all Nation land or no Nation land in trust. U.S. Opp'n 62-63. Without such a prod, the Nation may have been reluctant to begin categorizing and prioritizing its land.

Plaintiffs complain that this 10,000 acre figure was arrived at prior to providing them notice of the trust application pursuant to 25 C.F.R. § 151.10, but that notice triggers a thirty day deadline for them to provide the Department comments on the potential trust acquisition's "impacts on regulatory jurisdiction, real property taxes and special assessments." Id. The Department accepted comments on each land grouping and gave Plaintiffs over six months to prepare and submit comments. ROD at 40 ("As a matter of discretion, the Department divided the comment period among the three land groups and provided substantial extensions."). If the Department had not insisted that the Nation break down its request for 17,000 acres prior to providing formal notice to Plaintiffs, Plaintiffs would have had only one earlier opportunity to comment and their comments would have been rendered less relevant because they would have addressed the impacts of taking all the Nation's land in trust, while the Department was in the process of also considering only taking part of the Nation's land in trust.[24] In short, Plaintiffs' complaint of bad faith or bias here is wide of the mark since Plaintiffs benefitted from the decision to categorize the land in the Nation's trust application.[25]

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[24] The Department formally requested the Nation prioritize the land in a letter of June 10, 2005, which was also sent to representatives of the State and Counties. AR049397-98. In that letter Associate Deputy Secretary Cason stated that he would "urge the Nation to prioritize the parcels the Tribe desires the United States to take into trust in order of the parcel's significance to the Nation. . . . We are especially interested in the Nation's views as to why particular parcels need to be held in trust. In addition, as part of our evaluation process, we plan to consult with affected state and local jurisdictions to obtain their views on this subject as well." AR049398.

[25] Finally, it is worth noting that Plaintiffs were permitted the opportunity to depose former Associate Deputy Secretary Cason, the man who purportedly decided early on to take a 'minimum' of 10,000 acres in trust. In spite of the chance to depose the decision-maker and ask questions as to whether he made such a decision, when he made it, why he made it, Plaintiffs' evidence on this score remains limited to a few emails authored by the same BIA regional employee.

(5) Plaintiffs allege the Department, out of bias, failed to abide by now defunct Termination era Indian policies. U.S. Opp'n 42-43.

(6) Plaintiffs allege that the Department willfully obstructed their numerous, sweeping and burdensome Freedom of Information Act ("FOIA") requests seeking over 60,000 pages of documents. Plaintiffs decline to offer any evidence to support this serious charge, other than to note that Department employees who worked on the Nation's trust application were also tasked with addressing Plaintiffs' FOIA requests pertaining to the same. Opp'n at 61. But that shows no more than that the same agency employees charged with carrying out the Department's daily responsibilities are also tasked to shoulder the burden of FOIA requests on top of their other responsibilities. In any event, Plaintiffs have failed to suggest that they were in any manner prejudiced by the late production of FOIA materials.

(7) Plaintiffs allege the Department allowed the Nation to select the contractor, something belied by the Record. U.S. Br. 36-42. Moreover, in responding to comments about the Nation's access to the contractor during the EIS process, the Department explained that

> the contractor must work with the applicant in order to gather necessary data from the applicant as well as understand specific issues relevant to the applicant's expressed purpose and need for the action. The third-party contractor for this EIS has therefore visited Nation lands, toured their facilities, interviewed responsible department heads, and attended meetings with Nation representatives. In addition, the contractor has collaborated with the Nation and its staff in the gathering of data, the scoping of issues of concern to the Nation, and the review of information used in preparing the NEPA documents.

AR025850-82 at AR025878-79.

(8) Plaintiffs' dispute the Department's treatment of the Nation's application as "on-reservation," contending that disagreement with them on this point derives from bad faith.

(9) Plaintiffs mischaracterize an agency email in order to allege that the Department instructed the contractor to disregard Plaintiffs' comments on taxes. See U.S. Resp. to Stmt. of Mat. Facts (Dkt. No. 261-1) at ¶ 122 (showing that Department employee actually stated that commenter concerns about property taxes rising because of land placed in trust were "not necessarily valid," not that all comments on tax impacts were invalid). Plaintiffs also object that the contractor was instructed to "support" the Nation's application, far-fetchedly insinuating that by preparing the necessary NEPA documentation to support the Department's consideration of the Nation application, the contractor was actually "supporting" a specific outcome to that process. Moreover, this allegation, is contradicted by the fact that the Department, not the Contractor, eventually came up with the NEPA alternative eventually chosen for implementation in the agency decision. That alternative appeared late in the NEPA process, at the time of the preparation of the FEIS. FEIS 2-1-2-2, AR020211-12 ("The BIA, in conjunction with the Associate Deputy Secretary of the U.S. Department of the Interior have also identified and added a Preferred Alternative – Alternative I – to the Final EIS."). Until that point, there was no outcome to "support."

(10) Plaintiffs contend that the Department obstructed the Counties' ability to participate in the scoping process by prolonging the process by which they could became "cooperating agencies."[26] The CEQ regulations permit a state or local government to request designation as a cooperating agency. 40 C.F.R. § 1508.5. However, "nothing in the regulations mandates or requires that [a federal agency] grant such a request," and, moreover, the matter is entirely at the discretion of the Department and "is not judicially reviewable under the APA" because there is

[26] Cooperating agencies share their special expertise with the federal agency undertaking NEPA work by participating in the NEPA process. 40 C.F.R. § 1501.6.

no guideline for when an agency should confer such status on a non-federal applicant. Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1242 (10th Cir. 2011).

But, as Plaintiffs note, the Counties were in fact afforded cooperating agency status although not as promptly as they wished because the Counties declined to sign a January 11, 2006 draft memorandum provided by the Department and instead chose to wait nearly a month, until February 7, 2006, to provide "comments" on the memorandum. Opp'n 54. The Counties complain that the Department then took "nearly two months" to address their comments, while the NEPA process moved forward. Id. The Counties cannot reasonably complain that the Department did not allow them to hold the NEPA process hostage while they continued to haggle over the terms of a cooperating agency agreement that the Department was not obliged to negotiate in the first place. If they wanted to participate in the NEPA process as soon as possible, they simply could have executed the January 11, 2006 Memorandum.[27] Finally, although Plaintiffs complain that delays in establishing the Counties as cooperating agencies "effectively exclud[ed]" them from the scoping process, that is not so. The Department held public scoping meetings in both Oneida and Madison County and accepted scoping comments until January 23, 2006. ROD at 9.

(11-13) Plaintiffs' believe only bias or bad faith could account for the Department's failure to adopt (a) Plaintiffs' view that the Nation should have known, in the years prior to the Supreme Court's Sherrill decision, that it cannot exercise sovereign powers over its reacquired

[27] As Wyoming makes clear, the Department was free to dictate, rather than negotiate, the terms on which the Counties could become cooperating agencies, and the Department was equally free to answer the Counties' "counteroffer" of February 7, 2006, by simply never responding. Nevertheless, the Department continued to work with the Counties to allow them to become Cooperating Agencies.

Reservation land; (b) Plaintiffs' legal position that the Nation must pay all taxes on lands proposed for trust; and (c) Plaintiffs' position that letters of credit are impermissible.

The only motivation Plaintiffs' offer for all this purportedly biased behavior is an undue concern with what they deride as "justice": a felt need to restore the Nation some of its Reservation lands to form a land base over which it can exercise sovereignty given its past unlawful treatment at the hands of the State. Opp'n 55-56. However, considering the Nation's need for a land base over which to exercise self-government and self-determination in the wake of Sherrill is in accord with the purposes of Congress in enacting the IRA, so Plaintiffs can hardly tag this as an example of "agency[] action . . . influenced by factors not relevant under the controlling statute." Schaghticoke, 587 F.3d at 134[28]; see Morton v. Mancari, 417 U.S. 535, 542 (1974) (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").

D. Count 6: The Department properly treated Nation Reservation lands as "On-Reservation"

Plaintiffs' argument that the Department was required to apply its "off-reservation" regulations, 25 C.F.R. § 151.11, to Oneida Reservation lands turns on whether the Nation "is recognized by the United States as having governmental jurisdiction" over its Reservation, 25

[28] Plaintiffs' evidence that the Department was inclined to denigrate Plaintiffs' concerns due to a concern with justice comes down to one repeatedly cited informal memorandum dated March 30, 2006 authored by a BIA regional employee. Opp'n 56. It is telling in a record of over 80,000 pages that Plaintiffs' have a total of one document demonstrating a view they attribute to the entire Department throughout the agency proceeding. See ARS005037-42 (memorandum of Kurt Chandler). Moreover, Plaintiffs repeatedly pull quotations out of context from this memorandum, as explained in the United States' Opposition at 73 n.47 and 75 n.50, and in U.S. Resp. to Stmt. of Mat. Facts (Dkt. No. 261-1) at ¶ 122.

C.F.R. § 151.2(f). The FEIS answers that question: "The U.S. Secretary of the Interior recognizes the Oneida Indian Nation of New York as the successor-in-interest to the historic Oneida that remained on the New York Oneida Reservation." FEIS at ES-4, AR020154. Plaintiffs read Sherrill as precluding the United States from recognizing the Nation's governmental jurisdiction over its Reservation. However, the actual holding of the Court was not that Nation lacks sovereign authority or governmental jurisdiction over its Reservation. Rather, the Court held that equitable reasons preclude the Nation from acquiring the judicial remedy it sought based on its claim of sovereign authority over its Reservation land: "This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court . . . preclude the OIN from gaining the disruptive remedy it now seeks." Sherrill, 544 U.S. at 216-17. The Court made this clear from the outset, stressing the difference between asserting a right in a claim and vindicating that right with a judicial remedy: "'The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.'" Id. at 213 (quoting D. Dobbs, Law of Remedies § 1.2 (1973)). For the same reason (as the Second Circuit has held) that the Nation's Reservation is not disestablished in the wake of Sherrill, the Nation still retains governmental jurisdiction over its Reservation lands. For purposes of the Department's land-to-trust regulations, that authority is recognized by the United States and it makes application of the "on-reservation" regulations proper.

Plaintiffs' allegation that this is a *post hoc* rationalization is belied by the ROD. The Department considered both Sherrill and the decisions of the Courts of this Circuit subsequent to Sherrill which held the Oneida Reservation was not disestablished as part of its analysis in

determining to apply the on-reservation regulations. Recognizing the continued existence of the Nation Reservation in the wake of Sherrill, the Department determined its on-reservation regulations apply. ROD at 32 (citing cases recognizing Oneida Reservation continues to exist and concluding its on-reservation criteria applies).

Plaintiffs also object that the outcome of the decision process had to be different if the Department applied the off-reservation regulations because then Plaintiffs' concerns would be given "greater weight." 25 C.F.R. § 151.11(b). That might be true in other circumstances where less substantive analysis supports a trust decision. But here, as the Department explained, "thoughtful consideration" of "the concerns raised by New York State and local governments" resulted in the "extraordinary comprehensiveness of the Final EIS and this ROD." ROD at 33 n.5. In other words, the Department's painstaking analysis in the ROD has already afforded Plaintiffs' concerns all the "weight" they are entitled to under either the on-reservation or off-reservation regulations.

E. Count 7: the Department properly considered the Nation's need for land

Plaintiffs argue the Nation has no need for land in trust based on its finances, even though economic development is but one of several reasons land may be placed in trust for a tribe. See 25 C.F.R. § 151.3(a)(3).[29] However, the Nation is a sovereign, not a private corporation, and the question of need does not turn on the whether the Nation's businesses are

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[29] In fact, Plaintiffs' second extra-record report, the "Supplemental Jarrell Report" is devoted entirely and redundantly to arguing that the Nation can afford to pay taxes. That report was not considered by the Department accordingly should not be considered here, but even if it is, it is merely cumulative.

economically viable under State and County regulatory and tax jurisdictions.[30] In order to be fully capable of self-government as a federally recognized tribal entity, the Nation needs land to "permanently reestablish a sovereign homeland for its members and their families," in order to "exercise governmental authority over the lands and its uses, and to protect it for future generations." ROD at 36. None of these objectives can be achieved with land held in fee completely subject to State and local regulatory jurisdiction.[31]

F. Count 8: The Department properly considered potential tax impacts

Plaintiffs challenge the Department's analysis of potential tax impacts under 25 C.F.R. § 151.10(e) along three lines. First they argue that the Department's assumption that the Nation will continue to make payments to local governments to offset the costs of services received is unreasonable. Opp'n 78-79. That assumption is based upon the Nation's payment of 38.5 million dollars to local governments between 1995 and 2005. ROD at 47. The Nation's history of making such payments is lengthy and the amounts paid are significant, so the Department's assumption that this practice will continue is reasonable.[32]

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[30] Thus, Plaintiffs' complaint that the Department should have considered how the Nation might fare under State jurisdiction is beside the point. Opp'n 76 n.52.

[31] Plaintiffs again raise their arguments about a supposed decision to take a minimum of 10,000 acres in trust here. Opp'n 74-75. That argument is addressed in the discussion of their bias claim above.

[32] Plaintiffs complain that 10.1 million of the 38.5 million in payments to local government should not be counted. They do not deny that the Nation paid this amount to the local government to offset costs of services received but rather object that "payments for capital improvements specifically to service OIN properties [are] not the economic equivalent of taxes." AR013067-244 (Jarrell Report) at AR013120. Nevertheless, the ten million dollars, like the rest of the 38.5 million paid to local governments, represents a history of Nation payments to offset costs for services it receives and provides a sound basis for the Department to conclude this practice will continue into the future.

Second, Plaintiffs take issue with the Department's position that taxes assessed on Turning Stone are unlawful. Id. at 51. Sherrill has created the anomalous situation where a gaming enterprise operating pursuant to IGRA may not be shielded from taxation because Sherrill has barred the Nation from invoking tax immunity against local tax collectors. Prior to Sherrill, the Town of Verona apparently believed the gaming lot was tax immune, having failed to tax it until after Sherrill issued. Id. at 50. Although the Department views taxes on the gaming operation and gaming-related improvements as barred by IGRA, it also recognized that for purposes of assessing tax impacts, the possibility that an IGRA-protected casino could be taxed is not completely foreclosed. Therefore, the Department analyzed one scenario in which it assumed Verona's taxes on the gaming lot are due and owing, and, for purposes of that analysis, took Verona's assessment at face value.[33] Id. at 49. Thus, Plaintiffs have no basis to complain that the Department should have accepted Verona's taxes on Turning Stone at face value in its consideration of potential tax impacts because the Department did just that.

Nevertheless, Plaintiffs do complain, arguing that the analysis should have come out differently. Pl. Br. 97. While they have no basis to second guess the Department, whose analysis should be upheld regardless of its outcome so long as it demonstrates reasonable consideration of potential impacts, City of Lincoln City v. United States Department of Interior,

[33] There are significant problems with Verona's assessment. ROD at 51-52 (Verona's appraisal of casino lot tax value based on a report "which states that it should not be considered an appraisal and was based on a limited physical inspection"). And there are significant problems with the assessed value of the gaming related improvements because "improvements such as the luxury hotel are incapable of generating sufficient revenues to operate profitably as stand-alone ventures without the casino," id. at 52, so that Verona's high valuation of these gaming-related facilities is an indirect tax on IGRA-protected gaming revenues. Nevertheless, the Department analyzed a scenario where it assumed Verona's tax appraisal was proper in spite of these misgivings.

229 F. Supp. 2d 1109, 1125 (D. Or. 2002), it is nevertheless instructive to understand what Plaintiffs seek. As the Department noted, adding the questionable casino lot taxes at face value to the analysis distorts it in that "taxes assessed on the 225-acre casino tax lot comprise approximately 80% of the taxes assessed on all Nation lands." ROD at 52. Given that the majority of the tax impacts derive from the casino lot, Plaintiffs are in effect seeking a remand for the Department to reconsider whether the casino tax lot should be included among the lands taken into trust because the potential tax yield for local governments on the gaming lot is too high to permit it. The Department has already made clear that the questionable and exorbitant taxes assessed by Verona on the Nation's gaming enterprise "demonstrate the need for Federal protection of tribal gaming enterprises that is provided by IGRA." Id. at 52.

Finally, Plaintiffs raise a methodological quarrel with the Department insofar as they believe the Department's analysis should confine itself to the question of whether placing land in trust yields a financial gain or loss to local governments. The Department's approach here, instead, is to place potential tax losses in the context of the overall fiscal benefits to the region deriving from the applicant tribe, and that approach still considers all tax impacts and is one typically used by the Department in analyzing tax impacts. See U.S. Opp'n 64-67.

G. Counts 9 and 11: the Department properly considered jurisdictional impacts

The Ninth Count. Plaintiffs argue the Department's analysis of jurisdictional impacts is irrational because it does not embrace Plaintiffs' operating assumption that once land goes into trust, the Nation will abruptly end its longstanding practice of entering into agreements with its

neighbors to address jurisdictional issues of mutual concern.[34] Opp'n 87. Along similar lines, Plaintiffs contend the Department should assume the Nation is a scofflaw based on the fact that prior to Sherrill, the Nation had a longstanding principled position (supported by the Second Circuit) that it could exercise sovereign rights over Reservation lands unlawfully taken by the State. Opp'n 89-90. The Department's analysis of potential jurisdictional impacts had to consider how the Nation has actually managed its lands in the past as well as its history of concluding intergovernmental agreements with neighbors to address issues of mutual concern. The Department could not disregard that documented history simply because Plaintiffs speculate the Nation will run amuck after land is placed in trust. Plaintiffs, not the Department, are the ones making arbitrary assumptions and, as a consequence, their challenge to the Department's consideration of jurisdictional impacts is meritless.[35]

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[34] This argument complements their other contention that the Department should have assumed that the Nation would also immediately turn aside from its long and well-documented history of making payments to neighbors for services provided the Nation. Plaintiffs' comments emphasize disputes between the Nation and its neighbors, but the AR also documents informal cooperation outside the confines of specific agreements. See e.g., 05/10/2007 Nation Response to Comments, AR004308-408: at AR004376 (noting that while constructing its golf courses, New York State Department of Environmental Conservation ("NYSDEC") "were granted access to building plans and documents" and that "the Nation implemented the NYSDEC's recommendation that the course include stone check dams, siltation ponds and silt fencing"); AR004377 (Nation cooperation with State to address chronic wasting disease); AR004382 (Nation dredging project carried in consultation with NYSDEC).

[35] Plaintiffs itemize instances where the Nation has not complied with State environmental regulation, and conclude that placing land in trust will only enable "future departures" from State and local regulations. Opp'n 89. That point is true of all trust acquisitions which are designed to enable the tribe holding trust land to exercise sovereignty over the land and to govern itself according to its own standards. Given, as the State notes, the Nation in the past acted on the assumption it was entitled to govern its Reservation lands, the Department had a concrete history of Nation land management to consider in assessing what potential jurisdictional problems may derive from placing Nation land in trust. Plaintiffs focus on those instances where the Nation deviated from State laws the Nation (and the Second Circuit before Sherrill) did not believe it was obliged to follow, but the Department had to place those instances in the context of the

The Eleventh Count. Plaintiffs lack standing to sue to protect the easements and property interests of third parties. See Michigan v. EPA, 581 F.3d 524, 529 (7th Cir. 2009) (state "quasi-sovereign interest" not at stake where state not threatened with territorial loss). As to the merits of Plaintiffs' claim, there are none. The ROD made clear that the act of placing land in trust does not affect valid existing easements and rights-of-way. ROD at 65-66. Plaintiffs offer the Court nothing to suggest otherwise and rest their argument on mere speculation about the Nation's future behavior towards the City of Oneida. As the ROD noted, the Nation shares a mutual interest with the City in its utility infrastructure since Nation lands are also serviced by that infrastructure, so the Nation has an incentive "to work collaboratively with the local governments and service providers to improve the existing infrastructure system." Id. at 66. Indeed, the Nation has spent millions of dollars developing and improving the utility infrastructures that Plaintiffs speculate will suffer harm as the Nation disallows access by easement owners to inspect and repair that infrastructure.[36] ROD at 58. Accordingly, the State's

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overall history of Nation land management. The Department reasonably concluded that "[o]verall, the Nation's uses are generally consistent with local zoning and the uses of adjacent non-Nation lands," and "where zoning non-conformance has occurred there have been no significant adverse effects evident on adjacent land uses." ROD at 59.

[36] The Department also noted that much of Plaintiffs' comments involved reviving past disputes with the Nation and asking the Department to take sides. ROD at 61. Instead, the Department concluded that the incidents, "individually and collectively, are not substantial" and "appeared to stem from disputes over which government had jurisdiction at the time." Id. Finally, the Department noted that "[t]hese concerns have been satisfactorily addressed by the Nation in its responses to comments and through information provided to the Department in support of its fee-to-trust request." Id. The Nation explained, for example, that "with respect to utility easements and access, contrary to the commenters' assertion, no utility has ever been denied access to Nation-owned lands." 05/10/2007 Nation Comment Responses at AR004356.

concern about the City of Oneida's utilities has been properly considered and addressed by the Department.

H. Count 10: The Department properly considered BIA's ability to supervise Nation trust lands

Although Plaintiffs contend otherwise, the ROD shows that the Department has considered whether the BIA will be able to properly supervise the trust lands. The Department noted, for example, that "the BIA experienced additional administrative burdens in conducting environmental site assessments on some non-contiguous properties," but also explains that those parcels will not be taken in trust. ROD at 69-70. Plaintiffs argue that the AR does not reflect the analysis contained in the ROD, but, as the IBIA has explained, 25 C.F.R. § 151.10(g) requires a "managerial judgment that falls within BIA's administrative purview," not agency fact finding that must be substantiated by a record. Kansas v. Acting S. Plains Reg'l Dir., BIA, 53 IBIA 32, 39 (Feb. 11, 2011); see also Iowa v. Great Plains Reg'l Dir., BIA, 38 IBIA 42, 54-55 (Aug. 7, 2002) ("BIA is uniquely qualified to know what additional responsibilities it will have to assume in relation to land acquired in trust."). Consistent with that view, the Board has rejected the notion that the Department must create a record to justify its managerial assessment: "we do not construe § 151.10(g) to necessarily require the BIA to include in the record specific evidence, e.g., projected future appropriations and staffing, to demonstrate that BIA will be equipped to handle additional responsibilities associated with a trust acquisition." Kansas, 53 IBIA at 39. Plaintiffs' demand for record evidence is meritless; the ROD sufficiently explains why the BIA is able to assume additional responsibilities entailed by the trust acquisition, and Plaintiffs have not shown its reasoning to be either arbitrary or capricious.

I. Counts 13-14: The Department complied with NEPA

As Plaintiffs acknowledge, the Department committed an "incredible" amount of "time, effort, and money" to fulfilling its obligations under NEPA, Opp'n 97, resulting in a comprehensive FEIS that Plaintiffs fail to challenge in any credible way.

1. *Plaintiffs challenge to the use of tax scenarios fails to state a NEPA claim*

Plaintiffs concede that the tax scenarios that are the nub of their NEPA claim "relate to economic and regulatory concerns." Opp'n 101. That ends the matter because NEPA concerns an agency's responsibility to analyze the environmental consequences of a federal action. "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983). Plaintiffs attempt to salvage their NEPA claim by asserting that the tax scenarios they challenge influence the Department's consideration of the reasonable alternatives which is in turn mandated by NEPA. Opp'n 101. Plaintiffs still fail to state a NEPA claim because the Department is free to choose among the alternatives on whatever basis, so long as it has compared their environmental consequences, and Plaintiffs do not suggest that the tax scenarios influenced the environmental analysis. "NEPA requires a comparative analysis of the *environmental* consequences of the alternatives before the agency." Ctr. for Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633, 645 (9th Cir. 2010) (emphasis added); see also Friends of Ompompanoosuc v. FERC, 968 F.2d 1549, 1558 (2d Cir. 1992) ("[T]he range of alternatives that must be discussed is a matter within an agency's discretion.").[37] Plaintiffs want to use their

[37] Plaintiffs' cases do not suggest otherwise. Center for Biological Diversity faulted the Department's NEPA analysis of alternatives because it unreasonably failed to consider how its choice of a reasonable alternative would have differing environmental consequences through its impact on mining operations: "NEPA requires a meaningful analysis of the different

NEPA claim to argue once again that the Nation can afford to pay taxes, but this economic argument is irrelevant to NEPA unless Plaintiffs can demonstrate that it somehow distorted the Department's analysis of the environmental effects of the proposed action and the reasonable alternatives. Plaintiffs have not done this.

2. *The EIS adequately considered the direct effects and indirect effects*

Plaintiffs allege the FEIS fails to consider direct and indirect environmental effects resulting from placing land in trust. Instead of offering a critique of the FEIS's analysis or specifying some environmental issue the FEIS failed to consider, Plaintiffs' argument amounts to an effort to paint the Nation's self-government of its Reservation lands (in accord with the Second Circuit's Sherrill decision) in the years prior to Sherrill as lawless. Having swallowed Plaintiffs' premise, the FEIS (according to Plaintiffs) should have speculated that the Nation's history of 'lawless' behavior will lead to future environmental impacts, which the FEIS should analyze, even though the nature of the impacts cannot yet be identified. Opp'n 103-04. Plaintiffs continue to advance this argument even though the Second Circuit has made clear that while "speculation in an EIS is not precluded, 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) (internal quotations and alterations omitted) (quoting County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1379 (2d Cir. 1977)).

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environmental consequences that would result from public ownership [under one alternative] and private ownership [under a second alternative]." 623 F.3d at 646. Hughes River Watershed Conservancy v. Glickman indicates that courts can review economic assumptions underlying NEPA work, but that review is only relevant to an inquiry that ties back to the question of whether the EIS properly considered environmental impacts: "we will engage in a 'narrowly focused' review of the economic assumptions underlying a project to determine whether the economic assumptions 'were so *distorted as to impair fair consideration of the projects adverse environmental effects*.'" 81 F.3d 437, 446 (4th Cir. 1996) (emphasis added; citations omitted).

3. *The EIS adequately considered cumulative impacts*

Plaintiffs' cumulative impacts claim proceeds much like their direct and indirect impacts claim. Plaintiffs contend the Department failed to consider cumulative impacts but cannot identify any cumulative impacts that the FEIS should have addressed. Instead they propose there are "issue[s] of fact" about whether the Department adequately considered their comments and about whether the Department adequately considered the unspecified incremental impacts of the land transfer. Opp'n 105, 106. If there are impacts the FEIS failed to consider, Plaintiffs should be able to identify them. See Habitat Educ. Ctr. v. U.S. Forest Serv., 609 F.3d 897, 902 (7th Cir. 2010) (collecting cases, noting "an agency does not fail to give a project a 'hard look' simply because it omits from discussion a future project so speculative that it can say nothing meaningful about its cumulative effects"). Plaintiffs' cases suggest no less.[38]

Plaintiffs also contend that where federal land is transferred or sold, the foreseeable environmental consequences resulting from the likely uses of the land must be considered. Opp'n 106-07. The Department did consider the proposed uses the Nation has for the land, as Plaintiffs admit. But Plaintiffs go further and argue that the Department should not have trusted the Nation. Opp'n 106 ("the DOI improperly accepted at face value OIN's representations"); Opp'n 107 (the Department failed to "fully ascertain the OIN's intentions"). Absent some indication that Nation did not mean what it said, the Department has no obligation to adopt

[38] See Senville v. Peters, 327 F. Supp. 2d 335, 348 (D. Vt. 2004) (no cumulative impacts discussion for proposed highway project of "several [other non-speculative] planned highway improvements in the region"); Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002) (EA cumulative impact analysis of proposed project airport's increase of noise pollution on park area deficient because it failed to consider proposed airport's impacts in combination with other [existing, non-speculative] noise impacts on park, "such as the 250 daily aircraft flights" deriving from other airports).

Plaintiffs' jaded view of the Oneidas. See Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir. 1991) ("This court's task is to make sure the Forest Service considered the information available at the time it made its decision . . . .").

J. Count 16: The Department complied with 40 C.F.R. § 1506.6

Plaintiffs assert, Opp'n 107-09, that they are not attempting to convert FOIA violations into NEPA violations, but their reading of 40 C.F.R. § 1506.6(f) does precisely that by construing "underlying documents" to refer to any document in the agency record, and even documents not in the agency record, specifically contractor documents containing things like raw factual data that were never provided to the Department but which were subject to, and produced in response to, Plaintiffs' FOIA requests as contractor documents. See TOMAC v. Norton, 193 F. Supp. 2d 182, 195 (D.D.C. 2002) (distinguishing "the administrative record—the record the agency relied upon in its final action" from "FOIA's emphasis on every scrap of paper that could or might have been created"). Moreover, a number of those documents were not subject to production even under FOIA because they contained confidential business information protected under FOIA exemption 4, 5 U.S.C. § 552(b)(4), and were only produced after the Nation, the United States, and Plaintiffs entered into a Court-approved stipulation to protect the confidentiality of the documents. See Stipulated Protective Order Regarding Certain Confidential Business Information (Dkt. No. 210).

As discussed in the United States opening brief, § 1506.6(f) requires that the Department make "environmental impact statements, the comments received, and any underlying documents" available through FOIA without regard to the FOIA "exclusion for interagency memoranda where such memoranda transmit[s] comments of the Federal agencies on the environmental impact of the proposed action." 40 C.F.R. § 1506.6(f). Its purpose is to ensure

that agency comments are not withheld pursuant to FOIA's Exemption 5. Info. Network for Responsible Minn. (Inform) v. BLM, 611 F. Supp. 2d 1178, 1186 (D. Colo. 2009). Section 1506.6, in other words, does not require that agencies make NEPA documents available pursuant to FOIA – FOIA already does that. Section 1506.6(f) prevents agencies from withholding certain NEPA documents pursuant to a FOIA exemption. See City of West Chicago v. U.S. Nuclear Regulatory Comm'n, 547 F. Supp. 740, 746 (N.D. Ill. 1982) (Section 1506.6(f) "is intended to insure that the comments of federal agencies on EIS's that have been submitted to them for comment, as provided by 42 U.S.C. § 4332(2)(C) (1977), not be shielded from disclosure by misplaced reliance on Exemption 5 [of FOIA]").[39]

Plaintiffs here seek a remand in order to enable public participation in the agency process with respect to documents that may, or may not, be part of the AR, which they acquired through a belated response to their FOIA requests. Plaintiffs allege they were denied "factual data underlying the DEIS and FEIS, including spreadsheets prepared by . . . the contractor retained to do an economic analysis of OIN's business operations," documents which "provided the necessary factual foundation for . . . conclusions concerning the revenue and expenses of OIN's business enterprises." Opp'n 109. In other words, Plaintiffs allege a NEPA violation with regard to information not pertaining to the environmental consequences of placing land into trust

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[39] Plaintiffs rely on Environmental Protection Information Center v. Blackwell, a case that did not directly address an alleged violation of Section 1506.6(f) but rather held that "public participation during the NEPA process" was inadequate due to the agency's failure to disclose its reliance upon a United States Fish and Wildlife Biological Opinion in its Environmental Assessment ("EA"), which thereby precluded an opportunity for adequate public review. 389 F. Supp. 2d 1174, 1204-05 (N.D. Cal. 2004). The document's unavailability alone did not warrant finding a NEPA violation, however. The court considered its importance to the public debate NEPA is supposed to foster, noting that the agency admitted reliance on the document and relied upon it in its briefing before the court in defense of the agency action. Id. at 1204-05 & n.15.

– information that is irrelevant to NEPA. Moreover, Plaintiffs' participation with regard to the Nation's finances and business operations was not hindered.[40] As Plaintiffs note, they submitted an expert report to the Department authored by an economist assessing Nation enterprises and finances and making the case that the Nation can operate businesses and still pay taxes if its land is not placed in trust. Pl. Br. 71 & 65 n.46. Moreover, Plaintiffs have prepared for this Court a supplemental expert report by a Professor Jarrell that, although not technically before the Court, makes clear that Plaintiffs have not suffered harm from the belated FOIA response. That report, Pl. Exh. II ("Supplemental Jarrell Report") (Dkt. No. 241-1), addresses "significant additional information that was produced by the United States," Pl. Exh. II at 2, and the upshot is that Professor Jarrell's original opinions, already made known to the agency, are confirmed and strengthened by the newly acquired FOIA documents: "The opinions in my original report regarding the economic value of the Oneida Nation's businesses would have been substantially greater had Plaintiffs been informed of this additional financial information regarding the tribe's businesses during the DEIS comment period." Id.

Accordingly, Plaintiffs' sixteenth cause of action should be dismissed because, as Plaintiffs' demonstrate, the Department's belated FOIA responses did not impair Plaintiffs' participation in the NEPA process, even assuming Plaintiffs could somehow demonstrate the FOIA-produced documents were "underlying" as that term is used in 40 C.F.R. § 1506.6(f). Friends of Ompompanoosuc, 968 F.2d at 1557-58 (agency failure to provide notice as required under NEPA is harmless where plaintiff had "ample time to comment" and "cannot demonstrate

[40] Blackwell points out that the unavailability of NEPA documents is only relevant to the extent it affects the ability of the public to participate in the NEPA process in some material way. 389 F. Supp. 2d at 1204 n.14 ("Moreover, the Court notes that, in its briefing, EPIC did not point to any harm resulting from the alleged lack of public review with respect to the reports on fuels and fire risk").

prejudice from [the agency's] oversight"). Nor did it hinder their participation in any other aspect of the proceedings. See South Dakota v. U.S. Dep't of Interior, 787 F. Supp. 2d 981, 997 (D.S.D. 2011) ("agency's violation of a procedural rule" harmless unless it "precludes an interested party from presenting certain colorable arguments to the ultimate decision maker"). As Plaintiffs note, their expert opinion is only strengthened, but not altered, by the FOIA documents. Those opinions have been heard and addressed by the Department. The Department has never disputed Plaintiffs' assessment of the Nation's finances, but instead has taken exception to the notion that the Nation's sound finances preclude it having land placed in trust. ROD at 35 ("As a threshold matter, the Department finds that the Nation's financial wherewithal and competence to manage its affairs do not render it ineligible for placement of land into trust."). As the current briefing makes clear, there is no argument about the state of the Nation's finances or its economic ventures such that an even stronger presentation by Plaintiffs of the Nation's financial health would have altered the present decision.

IV. 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.

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Respectfully submitted,

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