UNITED STATES DISTRICT COURT
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 -

KENNETH L. SALAZAR, Secretary, United States Department of the Interior; JAMES E. CASON, Associate Deputy Secretary of the Interior; P. LYNN SCARLETT, 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, United States General Services Administration; UNITED STATES GENERAL SERVICES ADMINISTRATION,

Defendants,

and

ONEIDA NATION OF NEW YORK,

Defendant-Intervenor.

Index No. 6:08-CV-00644 (LEK) (DEP)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs brought this action under the Administrative Procedure Act ("APA") to challenge an extraordinary decision by the Department of Interior ("DOI" or "Department") to take 13,003.89 acres of land (the "Subject Lands") scattered over a two-county area in Central New York into trust (the "Determination") for the Oneida Indian Nation of New York ("OIN"). The Determination is set forth in a Record of Decision (the "ROD") issued on behalf of the Secretary of the Interior (the "Secretary") on May 20, 2008.

The amount of land the DOI has agreed to take into trust is unprecedented in a populated area, particularly so where the land to be given trust status is owned by an economically vibrant tribe that operates a number of successful business enterprises – including the Turning Stone Casino and Resort ("Turning Stone") – with revenues well over $300 million annually, and that has no need for the significant economic advantages that trust status will confer. The Determination will remove at least $14.39 million annually from tax rolls and frustrate the application of New York environmental, health, land use, and other regulations to surrounding parcels. Despite the unique size of the Determination in a populated area and its impact on surrounding non-Indian communities, the DOI chose to summarily dismiss comments from the State, Counties and local municipalities, rather than evaluate its action in light of them. Notwithstanding the OIN's history of ignoring State and local law and its use of voluntary payments as a means of political pressure, the DOI concluded that taking over 13,000 acres of land into trust without any mitigation measures would be a benefit to the State, Counties, and local cities, towns, and school districts.

In reaching the Determination, the DOI committed a number of errors including: 1) failing to determine the threshold issue of whether the Secretary had statutory authority to take

land into trust for the OIN; and 2) disregarding the plain terms of its own regulations, applying the wrong set of regulatory criteria, and, after applying the incorrect criteria, repeatedly drawing conclusions that are unsupported by the administrative record (the "Administrative Record"), arbitrary, and in some instances, directly contrary to the views of senior DOI personnel responsible for making the decision on the OIN application.

As a result, the Determination and the ROD are fatally deficient and cannot be sustained.

The Lack of Statutory Authority

From the beginning of the decision-making process, the DOI ignored the preliminary issue of whether the Secretary had statutory authority to take land into trust for the OIN: to wit, whether the OIN was a recognized tribe under federal jurisdiction in 1934. Although Plaintiffs alerted the DOI to this requirement in their initial comments on the OIN application and the Supreme Court later confirmed this requirement, the ROD is silent on the issue and there is no evidence in the Administrative Record reflecting consideration of the OIN's tribal status or whether the OIN was under federal jurisdiction in 1934. Absent a record-based determination that the OIN met the statutory standard, the DOI had no authority to take land into trust.

The reason the DOI did not consider the issue is clear: it lacks authority to take land into trust for the OIN because the OIN was not a federally recognized tribe on June 18, 1934, and was not under the supervision of the Office of Indian Affairs as of that date. Contemporaneous records of the DOI demonstrate that the Oneidas in New York had no tribal organization and no reservation of their own. Nor did the DOI exercise supervision and control over the Oneidas in New York; rather it specifically disclaimed any duty to intervene on behalf of the Oneida Indians living in New York at the time. In addition, the modern tribal applicant OIN is not the successor in interest to any of the Oneida Indians that once resided on the plot of land discussed in the

Second Circuit's decision in United States v. Boylan, 265 F. 165 (2d Cir. 1920). So even if those Indians were eligible to have lands taken into trust under the IRA (which they are not), the modern tribal applicant nevertheless would remain ineligible.

The ROD Is Fundamentally Flawed

In addition to failing to establish the Secretary's statutory authority to act, the Determination is fundamentally flawed in its reasoning and conclusions. The DOI ignored the plain meaning of the definition of "reservation" in its land-into-trust regulations and arbitrarily decided to evaluate the OIN application under its on-reservation standards, which are considerably less deferential to the concerns of State and local municipalities than its off-reservation standards. The DOI failed to lend any deference to the affected governments' concerns and instructed the contractor responsible for the environmental impact statement ("EIS") that those concerns were not valid.[1] The DOI similarly disregarded its own standard practices and established procedures. For example, the ROD issued in violation of the longstanding DOI policies requiring preliminary title opinions and elimination of encumbrances before issuing a decision to take land into trust.

In applying the mandatory criteria under the incorrect, on-reservation, standard, the ROD employed a series of assumptions that are counterintuitive, unsupported by fact, and apparently not even found credible by DOI decision-makers. Those assumptions infect the entire ROD; and in finding that the mandatory criteria of the on-reservation regulation supported taking over 13,000 acres of land into trust for the OIN, the DOI drew conclusion after conclusion that was either completely unsupported or contradicted by the Administrative Record, including that:

[1] That contractor, Malcolm Pirnie, Inc. ("Malcolm Pirnie") relied on information submitted by the OIN that Plaintiffs were precluded from accessing. The DOI advised Plaintiffs to file Freedom of Information Act ("FOIA") requests in order to access the OIN documents, but then failed to produce most responsive documents until months after the ROD was issued and did not complete production until June 2011, well after Plaintiffs had been deprived of a meaningful opportunity to comment on them. See Dkt. No. 49, 210.

- The OIN would suffer a loss of lands rather than pay property taxes if it was unsuccessful in tax enforcement litigation against the Counties and other municipalities;
- Lucrative OIN enterprises would shut down if land was not taken into trust, resulting in a significant loss of property, income and sales taxes attributable to OIN employees;
- Property taxes paid by OIN employees will compensate municipalities for services rendered to both the OIN employee-owned property and the OIN land being taken into trust;
- The OIN will continue to make voluntary payments to municipalities and school districts after its land is taken into trust;
- There will be no jurisdictional conflicts regarding State law because State law will not be applicable to land held in trust; and
- The OIN will not change its existing uses of the Subject Lands.

The Federal Defendants will no doubt argue that a seventy-three-page ROD and lengthy Final Environmental Impact Statement ("FEIS") demonstrate that the Determination necessarily was based on a thorough, careful investigation that is fully supported by the Administrative Record. But the reality is otherwise. In numerous respects, the Determination rests not on logical conclusions derived from a fair reading of the Administrative Record, but instead on conclusions reached despite it or common sense. As a result the ROD is arbitrary and capricious, not rationally connected to the evidence before the DOI, and must be set aside.

By this motion, Plaintiffs move for summary judgment under Federal Rule of Civil Procedure 56 on their Third, Fourth, and Sixth through Fourteenth Causes of Action.[2] By acting

[2] Plaintiffs made a motion for summary judgment on part of its Third Cause of Action, namely that 25 U.S.C. § 465 does not apply to the OIN (Dkt. No. 57), but reserved the right to move for summary judgment on the grounds that section 465 does not apply to the OIN because the OIN was not a recognized tribe under federal jurisdiction in 1934 and here so move. The Court noted that Plaintiffs properly preserved this issue. (Dkt. No. 132 at 23-24, n.13). At this time, Plaintiffs do not move for summary judgment on their Fifth, Fifteenth or

without statutory authorization, ignoring its regulations and policies, relying on fundamentally flawed presumptions, ignoring the requirements of the National Environmental Policy Act ("NEPA"), and failing to make mandatory considerations, the DOI has acted arbitrarily in taking over 13,000 acres of land into trust for the OIN and its Determination must be vacated.

STATEMENT OF FACTS

A. Events Preceding The OIN's Application To Take 17,370 Acres Into Trust (the "Application")

The Subject Lands are lands that were ceded by the historic Oneida Indian Nation[3] "to the people of the State of New York forever" in 1788 and were located within an approximately 250,000-acre area that was transferred to the State by the ancient Oneida tribe in a series of transactions beginning in 1795. (Compl. ¶ 31; Ans. ¶31).[4] Since the 1800s, the area has been populated predominately by non-Indians. (Compl. ¶ 34; Ans. ¶ 34). Beginning in 1987, the OIN purchased on the free market land that the Oneida tribe had sold to the State in the late 18th or early 19th centuries. Baldwin Decl.[5] at Exh. A (FEIS at ES-4). By 2005, the OIN had purchased a total of 17,370 acres scattered throughout Madison and Oneida County (the "Counties"). Id. (FEIS at ES-4).

For the approximately two centuries between the Oneidas' sale of the land and the OIN's repurchase of the land, "governance of the area in which the properties are located has been provided by the State and its county and municipal units." City of Sherrill v. Oneida Indian

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Sixteenth Causes of Action as there may be disputed material facts that are not appropriate for Rule 56 motion practice.

3 As the Second Circuit has recently noted, the OIN is not the historic Indian tribe that treated with the State in 1788 or that may have been in existence in 1794 at the time of the Treaty of Canandaigua between the United States and the Six Iroquois Nations. Oneida Indian Nation of New York v. Madison County, 2011 U.S. App. LEXIS 21210, *9 n.2 (2d Cir. Oct. 20, 2011).

4 Plaintiffs' Second Amended and Supplemental Complaint (Dkt. No. 94) is referred to herein as "Compl." and the Federal Defendants' corresponding answer (Dkt. No. 137) is referred to herein as "Ans."

5 References to "Baldwin Decl." refers to the Declaration of Aaron M. Baldwin in Support of Plaintiffs' Motion for Summary Judgment dated November 15, 2011.

Nation of New York, 544 U.S. 197, 202 (2005). Notwithstanding the predominately non-Indian character of the land and the State's and subdivisions' exercise of jurisdiction over the land, the OIN resisted the payment of property taxes on the land and refused to abide by State, County and local municipality laws and regulations, including specifically local zoning and state environmental regulations applicable to Turning Stone. Sherrill, 544 U.S. at 202.

The OIN's refusal to pay property taxes on land it purchased on the free market led to the Sherrill litigation in which the OIN claimed that it had sovereignty over the land and was, therefore, exempt from taxation. Sherrill, 544 U.S. at 211-12. The Supreme Court rejected that contention and held that "[t]he Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." Id. at 203. In holding that OIN land was not exempt from taxation, the Supreme Court noted that "justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight." Id. at 215-16. A significant concern of the Sherrill Court was that the "checkerboard" of alternating jurisdictions would "'seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." Id. at 219-20 (internal citations omitted). Discussing the possibility of a land into trust application under 25 U.S.C. § 465, the Court emphasized that the regulations under that section recognized the "interests of others with stakes in the area's governance and well-being." Id. at 220. As set forth below, although the ROD gives lip service to those concerns, it ignores them, and is fundamentally at odds with the Court's description of the regulatory scheme.

B. The OIN Applies To The DOI To Have 17,370 Acres Taken Into Trust And The DOI's Special Handling Of The Application

Days after the Sherrill decision on March 29, 2005, the OIN approached the DOI seeking special treatment from the DOI by asking the DOI to waive the provisions in the DOI's land-into-trust regulations contained in 25 C.F.R. Part 151, and to assist the tribe in "avoiding" the implications of Sherrill. Baldwin Decl. at Exh. B (PWNR000060) (Internal DOI correspondence). Shortly thereafter, on April 4, 2005, the OIN filed the Application to transfer 17,370 acres to the United States to hold in trust. Id. at Exh. C (AR003473-77). The Application claimed that taking land into trust would "clarify uncertainties existing in the wake of the Sherrill decision, is needed to preserve the Nation's sovereignty and its lands . . . and is necessary to facilitate the Nation's self-determination, its economic development and its ability to provide housing, jobs, education and health care for its members." Id. at Exh. C (AR003474). Within days of filing the Application, the OIN again asked about what the DOI could do "to forestall any efforts by the locals to enforce jurisdiction on their properties" while their application was pending. Id. at Exh. D (Produced without Bates numbering) (Internal DOI correspondence). The DOI planned a meeting with the OIN to discuss a "solution" to the Sherrill decision – one that might benefit similarly situated tribes in New York. Id.

When the DOI would not waive the land into trust procedures entirely for the OIN, the OIN asked for the next best thing: special treatment in the handling of the application. The OIN retained a former DOI and DOJ official, Thomas Sansonetti, who was also a friend of DOI Associate Deputy Secretary James Cason (the principal decision-maker on the OIN application). Mr. Sansonetti wrote to request that Mr. Cason "accelerate the timeline for taking Oneida fee lands into trust by creating a special team within your organization to review and hopefully approve the lands described in the Tribe's application." Baldwin Decl. at Exh. E (AR083810-

12). One month after Mr. Sansonetti's request, DOI correspondence reflected that "Jim Cason is very interested in making the Oneida trust acquisitions go as smoothly as possible." Id. at Exh. F (AR007818) (emphasis added). And by September, internal DOI correspondence reflected that the Determination would be made at the Secretary/Assistant Secretary level, as opposed to the regional office level, as would normally be the case. Id. at Exh. G (ARS001065-66).[6]

From the outset, the DOI proceeded under the assumption that it would be taking a significant amount of land into trust for the OIN. Notwithstanding that the land-into-trust regulations call for notification to state and local governments "[u]pon receipt" of an application (25 C.F.R. § 151.10), the DOI did not send official written notice of the Application to the State until September 20, 2005, more than five months after its receipt. Id. at Exh. J (AR006454-57). Written comments from the State and Counties in response to that notification were first submitted in January 2006. But by September 2005, the ongoing conversations between the OIN and the DOI were focused on whether the DOI was prepared to take more than 10,000 acres of land into trust. Id. at Exh. K (Produced without Bates numbering) (Internal DOI correspondence). Specifically, DOI told the OIN that Mr. Cason "only felt comfortable bringing in 10,000 of the 17,000 plus acres at this time." Id. ("Jim Casson [sic] told the Oneida to prioritize their properties for the fee-to-trust process . . . so the Oneida have about 10,000 in their Groups 1 & 2 properties.").[7]

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[6] The official announcement of that decision was made some months later, after a trip by Mr. Cason to OIN lands in January 2006 with, among others, Mr. Sansonetti. At that point, Mr. Cason officially removed authority for the Eastern Regional Office of the BIA to make a decision on the OIN application, and decided that the decision on the Application would be made by the central office in Washington D.C., where Mr. Cason would play a central role in the decision-making process. Baldwin Decl. at Exh. H (AR007198) (Internal DOI memorandum); Exh. I (AR004768) (Internal draft DOI memorandum).

[7] Consequently, the OIN broke down their properties into three groups: Group 1 encompassing its gaming and gaming-related properties, Group 2 containing government and cultural facilities, non-gaming enterprises, hunting lands, and tribal housing, and Group 3, undeveloped parcels, and adjusted the acreage under each classification so that the Group 1 and Group 2 properties were slightly under 10,000 acres total. Baldwin Decl. at Exh. L (ROD at 6); Exh. G (ARS001065) (Internal DOI correspondence). The DOI did not request

There is no evidence in the Administrative Record that taking anything less than 10,000 acres – or denying the Application in its entirety – was ever given serious consideration by DOI. Instead, such alternatives were summarily dismissed, before the release of any environmental impact statements and under the guise of not satisfying the OIN's tribal need. Baldwin Decl. at Exh. M (ARS001043) (Internal DOI correspondence). At least from the summer of 2005, long before written comments were received from Plaintiffs, the issue that the DOI was actually considering was not whether any land should be taken into trust but whether it would take 10,000 acres (roughly 60% of the OIN land) or more. And indeed, the OIN, with the assistance of their lobbyist, ultimately prevailed on the DOI to increase that amount materially, to 13,000 acres, an increase intended to make the "Oneida somewhat happier." Id. at Exh. N (Produced without Bates numbering) (Internal DOI correspondence).

C. The DOI's Failure To Properly Analyze Whether It Had Statutory Authority To Take Land Into Trust For The OIN

In the State's initial comments to the DOI on the Application on January 30, 2006, it alerted the DOI that section 465 of the Indian Reorganization Act ("IRA") does not apply to the OIN because, inter alia, there were serious questions regarding whether the OIN was a recognized tribe under federal jurisdiction in 1934. Id. at Exh. O (AR000286 n.2); see also Exh. P (AR001113 n.2). The State's interpretation of the Secretary's authority to take land into trust under the IRA was confirmed by the Supreme Court in Carcieri v. Salazar, 555 U.S. 379 (2009). The DOI ignored this comment and concluded that it had authority to take land into trust for the OIN, citing to the definition of "tribe" in its own regulations that is not the statutory definition used in the IRA (as construed under Carcieri), and its 2007 list of Indian entities

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comments on the Group 3 parcels until November 15, 2005. Id. at Exh. PPPP (AR005930-31) (DOI letter to New York Governor).

eligible to receive BIA services. Baldwin Decl. at Exh. L (ROD at 32-33).[8]

The ROD does not recite or apply the controlling legal standards. The ROD stands mute on the statutory eligibility requirements, saying nothing about the Oneidas' tribal organization or federally-recognized tribal status as of June 18, 1934, or whether the Oneidas in New York, on that date, were under the supervision and control of the federal Office of Indian Affairs. The Secretary's failure to apply the controlling legal standards for determining the DOI's authority to act on behalf of the OIN's Application requires the ROD to be set aside.

As explained, infra at 25-39, the contemporaneous historical records show the DOI's official view from at least 1915 to 1941 was that the Oneidas in New York had no tribal organization and no reservation of their own and in any event, the DOI exercised no jurisdiction over the Oneidas and their lands in New York.[9] The DOI communicated this official view of the Oneidas to Congress in 1915, and consistently articulated that view through at least 1942, as documented in the DOI's Handbook on Federal Indian Law.

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8 The ROD also cites United States v. Boylan, 265 F. 165 (2d Cir. 1920), and City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 220-21 (2005) as authorizing the Secretary to take land into trust for the OIN, but without addressing whether the OIN was a recognized tribe under federal jurisdiction as of June 18, 1934. Baldwin Decl. at Exh. L (ROD at 34).

9 In reviewing the DOI's determination, the Court may take judicial notice of the government records demonstrating that the Oneidas were not a federally recognized tribe and "under federal jurisdiction" in 1934. See, e.g., Big E. Entm't, Inc. v. Zomba Enters., 453 F. Supp. 2d 788, 797 (S.D.N.Y. 2006). Indeed, here and elsewhere it is necessary and appropriate for the Court to consider extra-record material in order to "determine the adequacy of the government agency's decision." United States v. Azko Coatings of Am., Inc., 949 F.2d 1409, (6th Cir. 1991) (finding that extra-record evidence is permissible as either background information to aid the court's understanding or to determine if the agency considered "all relevant factors or adequately explained its decision"). The absence of formal administrative findings by the DOI on the recognition and federal jurisdiction issue makes an extra record investigation by the Court necessary for proper judicial review. See National Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) ("Despite the general 'record rule,' an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision makers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice."); Concerned Citizens of Chappaqua v. Dep't of Transp., 579 F. Supp. 2d 427, 436 n.9 (S.D.N.Y. 2008) (court considered affidavit outside administrative record because it described effects of proposed action which had not considered by agency on the record).

D. The DOI's Decision To Use The Wrong Administrative Criteria

Even though Plaintiffs objected, citing the DOI's own regulation, the DOI decided to evaluate the OIN application under its land-into-trust criteria for "on-reservation" acquisitions as opposed to the "off-reservation" criteria, which mandates "greater scrutiny to the tribe's justification of anticipated benefits" and "greater weight to the concerns raised" by local governments. 25 C.F.R. § 151.11(b). The DOI's regulations define "reservation" as (1) land over which the tribe has governmental jurisdiction or (2) land within a tribe's former reservation that has been subject to a final judicial determination of disestablishment or diminishment. 25 C.F.R. § 151.2(f). Notwithstanding the Supreme Court's Sherrill decision declaring that the OIN does not have governmental jurisdiction and the DOI's conclusion that the OIN's purported reservation has not been disestablished or diminished pursuant to a final judicial determination, the DOI concluded that the Subject Land was "on-reservation" (Baldwin Decl. at Exh. L (ROD at 32)), and dismissed Plaintiffs' concerns.

E. The DOI Delegates Responsibility For The Selection Of Malcolm Pirnie And Preparation Of The Environmental Impact Statements

On December 23, 2005, the DOI issued a Notice of Intent to prepare an EIS, but not before the OIN had hand-picked a contractor, Malcolm Pirnie, to prepare it, and the DOI had rubber-stamped the OIN's selection. The DOI entrusted the responsibility for interviewing and recommending a contractor to the OIN, with the DOI only retaining sign-off authority. Id. at Exh. Q (AR081034-35) (Zuckerman Spaeder Letter to DOI). The DOI also delegated to the OIN the task of drafting a Memorandum of Agreement that would govern the relationship between Malcolm Pirnie, the OIN, and the DOI. Id. at Exh. R (AR081033) (DOI Letter to Zuckerman Spaeder). Among other things, the OIN-drafted agreement contained provisions requiring the BIA to consult with the OIN before designating any entity to act as a cooperating agency in the

EIS process, and before any changes could be made to the scope of work. Id. at Exh. S (AR080993, AR080995) (Zuckerman Spaeder Letter to DOI).[10] The coordinating of the environmental analysis and drafting of the EIS was driven by the OIN.[11]

Although the DOI belatedly responded to the NYSDEC's and the Counties' requests to be cooperating agencies, the DOI effectively excluded them from any meaningful role in the process. For example, the Counties requested cooperating agency status under NEPA on November 1, 2005, and November 7, 2005. See id. at Exh. U (AR080973-74); Exh. V (AR080975-76). The Counties did not receive a response to that request from the DOI until January 4, 2006, (id. at Exh. W (AR080964); Exh. X (AR080965)), and on January 11, 2006 were provided with a draft memorandum of understanding and instructed to sign it as soon as possible, as the EIS review process was moving forward. Id. at Exh. Y (AR063311). When the Counties provided comments on the draft memorandum of understanding on February 7, 2006, the BIA took nearly two months to reply, effectively excluding the Counties from the scoping process. Notably, the DOI provided OIN lawyers with an opportunity to comment on the memorandum of understanding on March 8, 2006, before responding to the Counties. Id. at Exh. Z (ARS00191-200).

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[10] "Cooperating agency" means "any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal . . . [for] major Federal action significantly affecting the quality of the human environment," and includes a "State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe." 40 C.F.R. 1508.5. It is questionable whether under this definition the OIN should have been permitted to act as a cooperating agency, as the OIN do not have a "reservation" as defined by the DOI.

[11] The OIN set the schedule for the EIS and was consulted about delays and changes. See Baldwin Decl. at Exh. T (AR008264) (Internal DOI correspondence) ("The Oneida lawyers basically forced the schedule on Malcolm Pirnie not really considering how long it takes to get things through DC . . . . Tom and Dave will present that schedule to the Oneida Nation, hopefully this week and after their approval Tom can finally get the counties to sign the cooperative agency MOU."). Any delays in the schedule were viewed as a "cost" for the OIN because of accruing property taxes (thus presuming land would be coming into trust), even as early as March 2006, before an EIS was completed.

In contrast, throughout the development of the EIS, the OIN had open access to Malcolm Pirnie personnel, and it is clear from the Administrative Record that the OIN's views were accorded great weight. See id. at Exh. AA (AR076401-405) (Zuckerman Spaeder letter to Malcolm Pirnie proposing principles that would become tax scenarios in the EIS and ROD); Exh. BB (AR081329-33) (providing legal analysis for jurisdiction considerations that would be the foundation for analyses in the EIS and ROD); Exh. CC (FOIA-019807 [Dkt. No. 141-6]) (providing historical information and analysis of OIN non-compliance with State law and regulation that would ultimately be referenced in the FEIS).

F. The EIS Process

Although the DOI played no meaningful role in selecting Malcolm Pirnie, DOI personnel did act to shape certain key aspects of Malcolm Pirnie's analysis. Before Malcolm Pirnie drafted a pre-publication draft EIS in August 2006, the DOI provided the contractor with conclusions it wished the EIS to "express", noting that jurisdictional impacts were not "an insurmountable issue" or "substantial" and that comments from the State and local governments were nothing more than a "control issue." Id. at Exh. DD (ARS005037-38). The DOI also counseled Malcolm Pirnie that "the tax issue is not necessarily a valid issue but fear was widely spread." Id. at ARS005040. The OIN's current uses of the land that do not conform to State and local law were summarily dismissed in the FEIS. Id. at Exh. A (FEIS at 4-290 to 4-291).

The DOI, OIN, and Malcolm Pirnie worked hand-in-hand to formulate a range of alternative agency actions and to substantiate the conclusions that the DOI had already made. See id. at Exh EE (ARS002414) (Internal DOI correspondence); Exh. FF (PWNR000774) (BIA Director's Weekly Report). Indeed, the OIN was the entity making decisions about what information would be included in the EIS. Id. at Exh. M (ARS001043) (Internal DOI

correspondence) ("The Oneida lawyers want to leave these alternatives in the DEIS so that the analysis demonstrates the negative impact on the Tribe by not meeting the Tribal need. Normal NEPA procedure is to eliminate an alternative as soon as it is determined to not meet the Tribal need. . . . Since what they want is a deviation from standard NEPA procedure, they are opening us up for scrutiny over why standard procedures were not followed.").

The public Draft Environmental Impact Statement (the "DEIS") was issued on November 24, 2006, and was followed by a comment period ending February 22, 2007. The FEIS was released on February 22, 2008, adding the Preferred Alternative and what would become the Determination, after the public comment period ended. Id. at Exh. A (FEIS at 2-2).

G. The United States Violates FOIA And Precludes Plaintiffs From Access To Substantive Information Purportedly Supporting The Determination

Throughout the EIS process the OIN had direct and open access to Malcolm Pirnie, and received, and had the opportunity to comment on and respond to, comments made by the State and Counties. In order to be in a position to address the OIN application, the State and Counties sought access to such information, but were afforded no comparable opportunity to review the materials provided by the OIN.

When elected officials voiced concerns about State and County access to information provided by the OIN in support of the Application, they were told by Mr. Cason that the State and Counties could obtain access through FOIA. Id. Exh. GG (AR007242) ("The State and local governments may obtain materials submitted by the OIN in support of its application in accordance with the Freedom of Information Act ("FOIA") 5 U.S.C. § 552."); Exh. HH (AR049171) (same). Following Mr. Cason's advice, Plaintiffs submitted a number of FOIA

requests to the Federal Defendants from October 2006 through September 2007.[12] Notwithstanding that Plaintiffs made follow up inquiries and promptly paid all amounts charged for copies, the Federal Defendants simply refused to produce responsive documents in a manner that would have allowed for meaningful consideration. (Dkt. No. 140-6.)

The Federal Defendants did not substantially produce responsive documents until December 31, 2008 – two years after the Counties' initial FOIA request and six months after this action was started – and even then the production was deficient on a number of grounds. In any event, the production was made years after the documents were requested and over seven months after the ROD was issued, effectively precluding Plaintiffs from commenting on the DOI's conclusions. Three months later, the Federal Defendants produced the Administrative Record upon which the ROD is purportedly based. (Dkt. No. 99). The Federal Defendants would go on to supplement the Administrative Record four times. (Dkt Nos. 170, 171, 193, 200).

H. The DOI Departs From Standard Practice And Procedure Without Explanation

In evaluating the Application and arriving at the Determination, the DOI departed from its longstanding practices and procedures without any explanation in the ROD.

1. The DOI Abandons Its Efforts to Obtain Preliminary Title Opinions ("PTOs")

Under the DOI's land-into-trust regulations, the Secretary must obtain title evidence meeting the Standards For the Preparation of Title Evidence In Land Acquisitions by the United States, which includes evidence as a basis for the preparation of preliminary title opinions. Baldwin Decl. at Exh. JJ. The BIA took the initial steps to procure PTOs by requesting the DOI Solicitor's Office to issue a PTO for each parcel included in the Application, id. at Exh. KK

[12] Specifically, the Counties made FOIA requests on October 30, 2006, November 20, 2006, July 13, 2007 and September 20, 2007. The State made a request on January 10, 2007. (Dkt. No. 140-6.)

(AR007022), and apparently continued that process into August 2006. See id. at Exh. LL (AR004980). The Administrative Record contains no responses to the request or any completed PTOs, and the ROD makes no mention of them.

2. The DOI Accepts Letters Of Credit In Lieu Of Elimination Of The Tax Liens On The OIN Lands

Mr. Cason informed the OIN and elected federal officials, on a number of occasions, that DOI policy was to not accept into trust lands that are encumbered by tax liens. See id. at Exh. MM (AR05715-17) (Letter to Ray Halbritter); Exh. HH (AR049174) (Letter to Congressman John McHugh); Exh. NN (AR049067) (Letter to Sen. Charles Schumer). According to Mr. Cason, the DOI requires that "taxes be paid or an agreement [be] reached between the tax assessor and the applicant before [the DOI] publishes a notice of intent to acquire land in trust." Id. at Exh. HH (AR049174).

Since the OIN first purchased property within the Counties, it has steadfastly refused to pay applicable property taxes. After the ruling in Sherrill, the OIN reached a settlement with the City of Sherrill, but did not reach an agreement with the Counties, both of which had brought tax-enforcement proceedings against the OIN. Oneida Indian Nation of New York v. Madison County, 2011 U.S. App. LEXIS 21210, at *19 (2d Cir. Oct. 20, 2011). In 2005, the OIN filed for injunctive relief to prevent the Counties from foreclosing upon delinquent OIN property. Id. at *23. Recently, the Second Circuit vacated a district court judgment finding the OIN exempt from property tax under state law, and vacated the OIN's previously issued injunctions. Id. at *96-98.

On March 6, 2008, after the FEIS was released, counsel for the OIN forwarded to the DOI a letter describing the OIN's plans to obtain letters of credit to "secure payment" of real property taxes, penalties and interest billed by the Counties. Baldwin Decl. at Exh. PP

(AR060866). The letter stated that the OIN expected to receive the letters of credit "within two weeks." Id. Another letter from OIN's counsel to the DOI stated that, in order for the Counties to receive payment under the letters of credit, a number of criteria must be met: there must be an "unreviewable judgment" that has "determined that the properties . . . are not subject to a tax exemption"; there must be an "assessment determined in the state litigation . . . appl[icable] to all years in issue"; and the amount must be "confirmed in an opinion letter issued by an independent counsel selected by the Issuing Bank." Baldwin Decl. at Exh. QQ (AR048514, AR048522). Similar criteria are applicable to interest and penalties. Id. (AR048514-15, AR048522-23).

The DOI accepted the letters of credit and the OIN's commitment to obtain replacement or supplemental letters of credit in lieu of requiring the OIN to eliminate the tax liens on the property the DOI sought to take into trust. Id. at Exh. L (ROD at 53). In the less than three months between the OIN's letter to the DOI and the issuance of the ROD, there is no critical analysis of the letters of credit produced in the Administrative Record, before the letters were incorporated into draft RODs as a satisfaction of the tax liens, see id. at Exh. MMM (ARS001575-1600) (the Draft ROD); id. at Exh. TTTT (ARS002894-96); id. at Exh. UUUU (DOI privilege log excerpt), except for the Counties' objections to them, id. at Exh KKK (AR010120-23). The Counties and tax assessors have not accepted the letters of credit. Notwithstanding that the letters of credit do not "eliminate" the liens and no agreement has been negotiated with the Counties, the DOI published a "Notice of Final Agency Determination to Take Land Into Trust" on May 23, 2008. Id. at Exh. OOO (73 Fed Reg. 30144).

I. The DOI Relies Upon Irrational Presumptions And Hypothetical Scenarios From The OIN

On June 14, 2006, five months before the DEIS was released, counsel for the OIN sent a letter to Malcolm Pirnie proposing that "if the Counties prevail with respect to the foreclosures,

[the OIN] will not pay taxes and will instead suffer the loss of lands." Baldwin Decl. at Exh. AA (AR076402). This premise was then expressly incorporated into a scenario for analysis in the DEIS, carried forward into the FEIS, and adopted in the ROD. The FEIS and ROD also included similarly unreasonable and fundamentally flawed scenarios, including a scenario that assumes that all of the OIN's business enterprises would cease operations if the Application was denied and Turning Stone Casino declared unlawful, and a scenario that assumed that the OIN would continue to dispute lawfully-owed taxes and State jurisdiction, notwithstanding the Supreme Court's decision in Sherrill. See id. at Exh. L (ROD at 13-14).

The FEIS and ROD also relied on the principle behind these scenarios that OIN enterprises will shut down if they are not taken into trust. See id. at Exh. A (FEIS 4-217 to 4-218). Mr. Cason, however, believed otherwise and noted that "the future opportunity to continue Sav-On operations do not depend on our trust decisions." Id. at Exh. SS (ARS004558). Similarly, the ROD contradicts this logic expressly (id. at Exh. L (ROD at 12; 17) (concluding that Turning Stone is now operating lawfully under IGRA and that the DOI disputes the "Casino Closes and All Enterprises Close" taxation jurisdiction scenario), and implicitly, as it concludes that new OIN business ventures "are not dependent upon the final determination because they may be completed whether or not the land is acquired in trust," and that Turning Stone Casino is operating lawfully without trust status. Id. at Exh. L (ROD at 12, 39).[13]

[13] Notably, when the Counties' petition for certiorari had been granted in the Madison County tax foreclosure litigation, the OIN thereafter "affirmatively disclaimed any reliance on the doctrine of tribal sovereign immunity from suit" and "its declaratory claims premised upon the Nonintercourse Act," further discrediting the assumptions made by the DOI. Oneida Indian Nation of New York v. Madison County, 2011 U.S. App. LEXIS 21210, at *6-7.

J. The DOI Decides To Take An Unprecedented 13,003.89 Acres Into Trust For The OIN

The Determination concluded to take 13,003.89 acres into trust for the OIN (an amount that is more than twice the amount of land the Secretary took into trust in all of 2005 for a total of 87 tribes (id. at Exh. TT) (GAO Report at 3) under 25 U.S.C. § 465, a statute enacted to allow "landless" Indians and tribes "to make a living." Id. at Exh. UU (78 Cong. Rec. 11123 (1934)). Moreover, the Determination does not limit the OIN's ability to submit additional applications to take the remainder of the 17,370 acres it owns "or other lands" into trust in the future. Id. at Exh. L (ROD at 38-39). To the contrary, the Administrative Record demonstrates that the DOI repeatedly made clear to the OIN that not only was it free to seek to have land acquired in the future taken into trust, but it also could apply again to have properties not accepted by the ROD taken into trust. Id. (ROD at 39); Id. at Exh. G (ARS001065) ("However the EIS will be written to leave it open to bring those other properties into trust at a later date after the land claims are resolved"); Id. at VV (ARS000904-05) ("Mr. Cason did leave open the door for fee-to-trust applications in the future by saying the 13,000 would be it for this application, but they could request more in a new application. . . . The Oneida Indian Nation are unlikely to sue, but will file a new application.").

Plaintiffs filed suit on June 19, 2008, challenging the Determination under the APA and asserting violations of the United States Constitution, the IRA, FOIA and NEPA.

ARGUMENT

I. THE OIN WAS NOT A RECOGNIZED TRIBE UNDER FEDERAL JURISDICTION IN 1934

A. The Controlling Legal Standard

The IRA establishes eligibility criteria for tribal applicants seeking to have land taken into trust. The tribe must have been recognized and "under federal jurisdiction" as of June 18,

1934, when the IRA was enacted. Carcieri v. Salazar, 555 U.S. 379, 382 (2009) ("We agree with petitioners and hold that, for purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction as the time of the statute's enactment."). See United States v. John, 437 U.S. 634, 650 (1978) (holding 1934 temporal limitation in IRA applies to requirement that tribe be "recognized").[14] "As a result, § 479 limits the Secretary's authority to taking lands into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." Carcieri, 555 U.S. at 382.

The "under federal jurisdiction" requirement has a meaning specific to the IRA, as documented by its legislative history. The "principal author of the IRA," Indian Commissioner John Collier, introduced the phrase during a hearing before the Senate Indian Affairs Committee in 1934. Id. at 390 n.5. The Commissioner's "now under Federal jurisdiction" language was designed to address concerns of several members of the Senate Indian Affairs Committee, including its chairman, that the IRA would reach too far and provide benefits to Indians who are largely assimilated and did not need to be brought "under the supervision of the Government of the United States." See Hearings on S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic

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[14] The Supreme Court in John held the IRA applied to the Mississippi Choctaws because they met the definition of "Indians" in Section 479:

> The 1934 Act defined "Indians" not only as "all persons of Indian descent who are members of any recognized *[in 1934]* tribe now under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood." 48 Stat. 988, 25 U. S. C. § 479 (1976 ed.). There is no doubt that persons of this description lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior, *at the time the Act was passed*.

437 U.S. at 650 (emphasis added).

Enterprise, before the Senate Committee on Indian Affairs, 73d Cong.2d Sess. Pt. 2, p. 266, attached as Exhibit A to the Declaration of David H. Tennant, dated November 15, 2011 ("Tennant Decl.") at ¶ 8. The exchange leading up to Collier's proposal to amend the bill to add "now under Federal jurisdiction" provides the specific context for this temporal limitation:

> The CHAIRMAN [Senator Howard Wheeler]: . . . I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here for instance, in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.
>
> Senator O'MAHONEY: If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.
>
> Commissioner COLLIER: Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.
>
> Id., ¶ 9, Exh. A at 266.

In adding this restrictive language to the IRA, Congress sought to impose a practical restriction on the number of people who could appropriately "be put upon the Government rolls" under the IRA – to avoid adding to "the Indian problem." Id., ¶ 10, Exh. A at 263-64. In this well-defined context, a tribe "now under Federal jurisdiction" must be understood to refer to those federally recognized tribes that were, as of June 18, 1934, "under the supervision of the Government of the United States," i.e., had their lands supervised by the DOI, Office of Indian Affairs, and otherwise were under the "supervision and control" of that office. Id., at 264-266.[15]

[15] The temporal restriction recognized in Carcieri is consistent with the remedial policy of the IRA, to reverse the effects of the federal allotment policy. Those effects were felt by existing tribes. Tribes formed after the enactment of the IRA, which ended allotments, would not experience those effects.

This natural reading of Carcieri and the legislative history translates into a straight-forward inquiry into the tribe's relationship with the federal government in 1934, as the DOI recognized in Village of Hobart, Wisconsin v. Acting Midwest Regional Director, Bureaus of Indian Affairs, Interior Board of Indian Appeals, Docket Nos. 10-107, 10-091, 10-092. See Tennant Decl., ¶ 11, Exh. B (DOI's appellee's brief, dated September 27, 2010) The DOI in Village of Hobart looked at the following specific factors: (1) Did the tribe retain trust lands which required federal supervision? (2) Did the federal government report the tribe's reservation and population in the 1933-1934 Annual Report of the Commissioner of Indians Affairs? (3) Did the tribe vote to adopt the IRA in 1934? See id., Exh. B at 17-18. The DOI cited contemporaneous DOI records to answer these questions and demonstrate that the tribal applicant in that case – the Oneida Tribe of Indians of Wisconsin (not the Oneida Nation of New York) – was "under federal jurisdiction" as of June 18, 1934, within the meaning of the IRA:

- The 1947 Haas Report "conclusively resolves the IRA status of the Tribe" (Tribe adopted IRA by vote of 1844 to 688) (Id. at 12.)
- The April 23, 1936 letter from John Collier, Commissioner of Indian Affairs, "documents the vote of the Oneida Tribe to accept the IRA on December 15, 1934." (Id. at 18.)
- The November 13, 1931 letter form C.J Rhoads, Commissioner of Indian Affairs, and other contemporaneous correspondence from the Office of Indian Affairs, showed the "United States still considered the Oneida members under their care and supervision" (id. at 16) and "the Tribe and some of its members at all times retained trust lands which required federal supervision." (Id. at 17.)
- The 1933-34 Annual Report of the Commissioner of Indian Affairs "contains a report of the Indian population under the Keshena Agency in Wisconsin [and] notes that the Oneida Reservation has a total population of 3,128 Indian persons, and then breaks that down by subcategories." (Id. at 18.)

The DOI marshaled these historical facts, contemporaneous to June 1934, to argue that the Tribe met the "under federal jurisdiction" requirement of the IRA:

> The Haas Report, correspondence from Collier, Commissioner of Indian Affairs, the April 1934 Report of the Indian populations under the Keshena in Wisconsin, and correspondence from the Superintendent at the Keshena Agency all provide

> clear and indisputable evidence that the Oneida Tribe was under federal jurisdiction on June 18, 1934.
>
> Id. at 18.

As set out below, the DOI undertook no comparable review of the historical evidence concerning the OIN when it determined the Secretary had authority to take land into trust under the IRA for the benefit of the OIN.

B. The ROD Fails To Apply The Controlling Legal Standard

The ROD is silent on the Oneidas' tribal status in 1934 and does not address the statutory requirement that tribal applicants demonstrate they were a federally recognized tribe and "under federal jurisdiction" as of June 18, 1934 when the IRA was enacted. Instead, the ROD cites an inapplicable definition of "tribe" (under 25 C.F.R. § 151.2(b))[16] (Baldwin Decl. at Exh. L (ROD at 32)) and states a bare legal conclusion that "the Secretary clearly has discretionary authority to acquire the Nation's lands in trust," citing the Supreme Court's decision in Sherrill in 2005 and making reference to the Boylan litigation in the early part of the 20th century. Id. at 34. As explained below, Boylan is no substitute for a consideration of the statutory criteria of federal recognition as a tribe in 1934, or the exercise of federal jurisdiction over the tribe in 1934.[17] The Secretary's failure to consider (much less apply) that essential requirement in acting on the Application requires the Court to set aside the ROD. See Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 101 (2d Cir. 1970) (court may "set aside agency action found to exceed the agency's statutory authority") (citing 5 U.S.C. § 706(2)(C)); see also Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993) ("Agency actions that do not fall within the

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16 Section 151.2(b) defines "tribe" as any tribe or nation "which is recognized by the Secretary as eligible for the special programs and services from the [BIA]." Under Carcieri, this definition of "tribe" is not determinative of jurisdiction under the IRA. 555 U.S. 392-93.

17 Indeed, Boylan involved a handful of families that the DOI did not consider a tribe, treat as a tribe, or have any relations with whatsoever – and involved events on a parcel of land three decades before the passage of the IRA. See, infra, at 27-30, 40-43.

scope of a statutory delegation of authority are ultra vires and must be invalidated by reviewing courts."). The DOI and BIA, like all other federal agencies, can act only when expressly permitted by statute; any action taken in excess of such authority will be voided. See Thomas v. United States, 141 F. Supp. 2d 1185, 1196-99 (W.D. Wis. 2001) (holding that the Secretary of the Interior and Deputy Commissioner of the BIA exceeded their statutory authority under the IRA and APA when the Deputy Commissioner revoked the approval of amendments to a tribal constitution beyond the 45-day limit provided by statute for review).[18]

C. This Court Should Determine Whether The Secretary Had Authority To Take Land Into Trust For The Benefit Of The OIN

All parties, together with intervenor-defendant OIN, believe the Secretary's authority under the IRA can be determined as a matter of law by examining the historical record. As a result, the parties have cross-moved for summary judgment on that basis. Plaintiffs believe this Court can and should decide this question rather than remand the IRA eligibility issue to the Secretary. The issue is principally one of law, with the defining consideration being the meaning of "under federal jurisdiction" in the IRA. That issue can be answered best by the Court. Not only is this question a legal one suited for the court, the Secretary has strongly resisted imposing the legal requirements stated in the IRA and articulated by the Supreme Court in Carcieri. The Secretary refused to address in the ROD the "under federal jurisdiction" requirement even though specifically petitioned to do so by New York State and even though the Supreme Court

[18] The Secretary's failure to apply the correct legal standard is not excused by the timing of the Carcieri decision. Although the Supreme Court decided the case some eight months after the ROD was issued, the Secretary was on notice since at least January 30, 2006 (two years) that the State of New York, like the State of Rhode Island in Carcieri, was pressing for a plain reading of the "now under Federal jurisdiction" phrase in Section 479 of the IRA, and the Secretary knew that the Supreme Court, over the Secretary's objection, had granted the State of Rhode Island's certiorari petition in Carcieri three months before the Secretary issued the ROD. Under these circumstances, the Secretary was obligated to either delay issuance of the ROD or address the OIN's eligibility under the straight-forward reading of the IRA advocated by the State of New York. Instead, the Secretary issued the ROD before the Supreme Court's ruling in Carcieri.

had granted the State of Rhode Island's petition for a writ of certiorari in Carcieri months before the ROD issued (see supra note 18). After Carcieri was handed down, the Secretary has worked to overturn that decision by supporting legislative efforts in Congress

while defying Congressional inquires seeking to identify those tribes affected by Carcieri.[19] Within its own sphere of operations, the DOI largely eviscerated the requirements of Carcieri in a land-into-trust decision involving the Cowlitz Indian Tribe that left non-tribal interests (states, counties, towns, and elected officials alike) appropriately criticizing the Secretary for in effect overruling Carcieri.[20] As such, the DOI cannot be trusted to render a fair determination concerning the OIN's eligibility to have land taken into trust, and would doubtlessly engage in a result-oriented analysis to find the OIN "under federal jurisdiction," in further defiance of the Supreme Court's holding in Carcieri. Thus, a remand to this agency would be both futile and

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19 In connection with two bills to amend the land-into-trust provisions under the IRA, House Natural Resources Committee Ranking Member Doc Hastings (Washington) issued a letter to the Secretary of the Interior dated October 30, 2009, seeking information about the impact of the Carcieri decision on federally recognized tribes. (A copy of the letter is available on line at Hobart, Wisconsin's webpage at: http://www.hobart-wi.org/vertical/Sites/%7B354A483F-042E-454E-A570-720BFEDE46D9%7D/uploads/%7B73043DCB-D310-462B-BB89-B50B84498984%7D.PDF) Two years later, the Secretary had failed to meaningfully respond as reported on-line:

> 'Unfortunately, since this has been pending, the department honestly has not been very forthcoming as to what their process has been in all of this time since Carcieri was put in place,' Rep. Doc Hastings (R-Washington) said. 'So for us to make whatever decision we make, whatever resolution or whatever way we approach this, we have to have all of the information, and frankly, the department has not been forthcoming in that regard.'

Obama Supports "Carcieri Fix", Global Gaming and Business (Mar. 31, 2011), http://ggbmagazine.com/issue/vol-10-no-4-april-2011/article/obama-supports-carcieri-fix1

20 See Letter from Rep. Jaime Herrera Beutler to Assistant Secretary Larry Echo Hawk, dated February 1, 2011, calling the Secretary's construction of Carcieri in Cowlitz "very aggressive, and possibly unlawful." A copy of Representative Beutler's letter is available as a PDF download from the Columbian Newspaper's website, http://www.columbian.com/news/2011/feb/07/herrera-beutler-says-casino-ok-is-troubling. DOI's action is presently the subject of litigation. See Clark Co. Wa v. DOI, No. 1:11-cv-00278 (D.D.C. filed Jan. 31, 2011), and Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar, No. 1:11-cv-00284 (D.D.C. filed Feb. 1, 2011). Because the Secretary has yet to speak on the application of IRA requirements to the OIN, and has articulated markedly different approaches two months apart in Hobart and Cowlitz, Plaintiffs must wait to see what position the Secretary takes here. Plaintiffs note that there is no basis in the Carcieri decision to analyze the applicant's status as a "recognized tribe" separate from its status as "under federal jurisdiction." Both are to be measured as of the date of IRA's enactment under a natural reading of that statute.

inappropriate. See generally Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 756 n.7 (1986) (observing that courts are not required "to remand in futility"); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (remand is not required where it "would be an idle and useless formality").

D. The Undisputed Historical Record Shows The Oneida Indians In New York Were Not Recognized As A Tribe Or Under Federal Jurisdiction In June 1934.

1. The Oneida Indians In New York In 1934 Were Not Organized As A Tribe, Or Recognized By The DOI As A Tribe

a. Reeves Report

The official view of the DOI, from at least 1915 to 1941, was that the Oneida Indians in New York were not organized as a tribe. The Department reported this view to Congress in the form of a report prepared by John R.T. Reeves, Chief Counsel in the Office of Indian Affairs. Reeves traveled to New York at the direction of the Commissioner of Indian Affairs to survey the condition of the New York Indians. His report, dated December 26, 1914, was made part of the Congressional record for certain proposed legislation respecting the New York Indians. See Tennant Decl., ¶ 15, Exh. C (House Document 1590 (1915), 63rd Cong., 3d Sess, report of John R.T. Reeves). The Secretary submitted the report from Reeves to Congress by letter dated January 22, 1915. See Tennant Decl., ¶ 16, Exh, D. The report, widely cited and referred to as simply the "Reeves Report," documented, among other things, the absence of tribal Oneida Indians in New York:

> The Oneidas also, by various treaties, sold all of their land, except about 350 acres to the State, and removed to the reservation in Wisconsin procured from the Menominee by treaty with the Federal Government. The 350 acres in New York belonging to the Oneidas have long since been divided into severalty under State law, and as a tribe these Indians are known no more in that State.

Id., Exh. C at 11 (emphasis added).

b. Late 18th And Early 19th Century Census Reports

Reeves did not prepare his report on a blank slate. Rather, there was a wealth of historical and largely contemporaneous information, much of it collected by the DOI through the Government's census, that supported the Reeves Report's conclusion that the few Oneidas who remained in New York following the removal of the Oneidas to Wisconsin in the mid-19th century were not organized as tribe, but rather were scattered in small numbers in central New York without a reservation of their own. See Tennant Decl., ¶ 18, Exh. E (U.S. v. Elm, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877)) ("[The Oneida] tribal government has ceased as to those who remained in [New York] state. . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity. . . . They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population."). See also:

- 1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (Tennant Decl., ¶ 20, Exh. F):

  "The Oneidas have no tribal relations, and are without chiefs or other officers."

- 1892 Extra Census Bulletin, Indians, The Six Nations of New York (Id., ¶ 21, Exh. G at 25):

  "No maps of reservations for [the Oneidas] will be found, as they no longer retain their ancestral homes in New York."

- 1892 census map of New York (Id., ¶ 22, Exh. H):

  Does not depict Oneida reservation.

- 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (Id., ¶ 23, Exh. I):

"The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens."

- 1900 Annual Report of the Department of the Interior (Id., ¶ 24, Exh. J):

  "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties, in the vicinity of the Oneida Reservation, which was sold and broken up in 1846, when most of the tribe removed to Wisconsin. What lands they have they own in fee simple and the Oneida here are voters at the white elections."

- 1901 Annual Report of Department of the Interior (Id., ¶ 25 Exh. K at 288-89):

  "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846… They are citizens of New York and entitled to vote at white elections… At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces."

- 1906 Annual Reports of the DOI (Id., ¶ 26, Exh. L):

  "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 160 of them have 'squatted' on the Onondaga Reserve; so many of these have intermarried with the Onondaga . . ."

c. The DOI's Continued Reliance On The Reeves Report

The Reeves Report served as the Department's official view of the Oneidas for the next thirty years, including being quoted in letters from the Assistant Commissioner of Indian Affairs in 1924 and 1925 and was set forth in full in the Department's Handbook on Federal Indian Law, edited by Assistant Solicitor Felix Cohen, in 1941. See Tennant Decl. ¶¶ 28-29, 42, Exhs. M, N, W, and X. In this way the Reeves Report remained the official position of the DOI during and

after the Boylan litigation.[21] The exchanges between the DOI and the Department of Justice concerning the Boylan case reveal the degree to which the DOI believed the Reeves Report accurately reflected federal Indian law and policy, and disagreed with the Department of Justice's decision to intervene on behalf of the individual Oneidas. An examination of Boylan puts the exchange between the Department of the Interior and the Department of Justice into context.

(i) Background To Boylan

Pursuant to the 1838 Treaty of Buffalo Creek and subsequent state treaties, the remaining Oneida lands in New York were sold or divided into severalty in the mid-19th century. See Tennant Decl., Exhs. C and E. The 32-acre parcel in Boylan was the subject of the Oneidas' 1842 treaty with the State of New York (specifically two lots, 17 and 19). Boylan, 256 F. at 470. Under a state law passed in 1843, those parcels could be divided in severalty, providing individual fee ownership, and giving the owner the right to transfer or encumber the property. See Baldwin Decl. Exh. WW (Declaration of Stephen Dow Beckham, dated November 14, 2011, and his expert report annexed thereto (Beckham Report) at 5). The Indians who took title and possession of those parcels routinely exercised their individual property rights, with eleven recorded sales and mortgages between 1844 and 1885. Baldwin Decl. Exh. WW (id. at 18). One Oneida Indian who held individual title to a divided interest in the 32-acre parcel, acted in conformity with his individual property rights and mortgaged his interest to secure a loan. Id.

[21] United States v Boylan addressed the validity of 1885 conveyances of interests in a certain 32-acre plot in Oneida New York (Madison County) which had been continuously occupied by certain Oneida families since 1842. The late 19th century conveyances resulted in a state court judgment of foreclosure in 1906 and eviction of the few Indians residing on the property in 1909. Six years later, the Department of Justice commenced a lawsuit on behalf of the evicted Indians and obtained an order returning the property to them. That proceeding ended in 1920. The Boylan case is reported at 256 F. 468 (N.D.N.Y. 1919) and 265 F. 165 (2d Cir. 1920) and is discussed immediately below.

Those events occurred in the late 19th Century. Id. After the Indian-borrower defaulted on his loan, the lender foreclosed on the property in 1905, and successfully brought an eviction action in 1906 to remove the few Indians who lived on the property. 256 F. at 473. The Indians were evicted in 1909. Id. at 470.

That eviction of the Indians from the parcel sparked a series of political and legal efforts to return them to the property. Six years after the eviction, the Department of Justice commenced a federal lawsuit to try to return the property to the Indians. That lawsuit was filed in the Northern District of New York in September 1915. Tennant Decl.,¶ 35, Exh. Q. A trial was held in the district court in July 1916 (see Tennant. Decl., ¶ 38, Exh. T), resulting in a judgment in favor of the United States and the evicted Indians. 256 F. at 494-95. The district court rendered its written decision nearly three years later. Id. at 468 (March 3, 1919). The Second Circuit affirmed the decision in 1920, eleven years after the eviction in question occurred. 265 F. 165.

In the course of vindicating the rights of the evicted Indians, the district court made certain "findings" as to the Oneida Indians and their relation to the historic Oneida Tribe, concluding they were a "remnant of the Oneida tribe." 256 F. at 495. The district court also believed this tribal remnant maintained "tribal relations," including regularly holding council meetings. Id. at 486, 494. The district court also considered the 32-acre parcel to be a remnant of the Oneidas' "reservation." Id. at 486. The district court's findings that the evicted Indians were a "tribe" or band" was affirmed by the Second Circuit in a 2-1 decision. 265 F. at 171. The infirmities in the district court's factual findings (affirmed by the majority opinion in the Second Circuit) are discussed, infra, at 43-45.

(ii) The DOI's Reaction To Boylan

From the outset, the DOI distanced itself from the Department of Justice's intervention on behalf of the Indians in Boylan. When the prosecutor asked the DOI to confirm that Department of Justice intervention was authorized by the DOI, the DOI flatly stated that no such authorization existed in the file. Tennant. Decl, ¶¶ 36-37, Exhs. R and S. This eliminated an essential element of the prosecutor's case as alleged in the complaint, and rendered untrue the prosecutor's representation to the court that he had such authority from the agency-client, DOI. See id., ¶¶ 38-39, Exhs. Q (Boylan Complaint) and T (Boylan Transcript at 32). Moreover, when the prosecutor invited the DOI to comment on the core legal premise of the intervention, namely that a tiny fragment of the Oneidas' former reservation remained in the form of a 32-acre parcel in Madison County, the DOI unequivocally reiterated its official position, and communicated to Congress, that the Oneidas had no reservation in New York and "as a tribe these Indians are known no more in that State." Id. ¶¶ 32-33, Exh. D.

Even after receiving a copy of the Boylan decision, the DOI rejected the view that the Oneida Indians in New York were wards of the Federal Government. The DOI stressed that the Office of Indian Affairs "never . . . assumed any direct supervision over the internal affairs of the Oneida Reservation in New York." Tennant Decl. ¶ 40, Exh. U (Assistant Commissioner E.B. Merritt letter dated July 29, 1920). The DOI further observed in a memorandum dated December 26, 1926 that:

> Under State statutes these lands were parceled out in severalty by and among Indians of the tribe. The individuals of the tribe acquired no title but only a possessory interest in the land. Some litigation has resulted in recent years involving these lands – United States v. Boylan, 256 Fed. 468 and 265 F. 165. There are no Federal Statutes specifically subjecting the Oneida Indians of New York or any of their lands in that State to the jurisdiction of the Secretary of the Interior and the only jurisdiction exercised by the Department is that granted by Section 463 of the United States Revised Statutes. In the absence of specific

> legislation granting jurisdiction over the New York Indians this Department has not attempted to assume jurisdiction over their affairs.

Tennant Decl. ¶ 41, Exh. V at 1-2 (emphasis added). Moreover, as set out below in Section D(2), the unilateral action by the Department of Justice on behalf of the Boylan Indians did not bring those Indians "under federal jurisdiction" for purpose of the IRA; for that to happen, the Department of the Interior must exercise jurisdiction and control over trust lands or provide other services to the tribe. (See, supra, "The Controlling Legal Standard," at 19-23.) And as set out below in Section F (at 44), the decision in Boylan – even if could establish eligibility on the part of those evicted Indians to receive benefits under the IRA (it did not) the OIN is not in a position to benefit from any such determination because the members of the OIN are not related by family history or social or political relationship to the Boylan Indians, as explained in the Beckham Report (Baldwin Decl. Exh. WW).

Accordingly, the decision in Boylan is anomalous, inconsistent with decades of federal Indian law and policy administered by the Department of the Interior, largely unsupported by facts or law, and in the final analysis is little more than a curious historical footnote in the present discussion of IRA eligibility.

d. The IRA Vote In 1936 Did Not Change The DOI's Official Position That Oneidas In New York In 1934 Were Neither Organized Nor Recognized As Tribe, And Were Not Under Federal Jurisdiction.

Following the enactment the IRA and the process of determining which Indians should be allowed to hold a referendum under the IRA, the DOI officially concluded that the Oneida Indians in New York were not eligible to hold such a referendum because they did not have a reservation of their own in New York. Tennant Decl., ¶ 45, Exh. Z (Letter from John Collier to William Harrison dated June 5, 1935). Supporting the DOI's conclusion was a May 20, 1935 report from the Smithsonian Institution prepared at the request of Commissioner Collier. The

Smithsonian report concluded that "the [Oneidas and Cayugas] no longer had tribal lands or tribal organizations within the State of New York." Id., ¶ 46, Exh. AA at 19 (May 20, 1935 Letter from J.N.B. Hewitt to John Collier).

After issuing his decision, Commissioner Collier was advised by an Oneida Indian that the Oneidas possessed a 350-acre reservation in New York. See Tennant Decl. ¶ 49, Exh. DD. That report prompted Collier to take a second look at the circumstances of the Oneidas in New York. The second look included directing the part-time federal Indian Agent in New York to investigate the claimed reservation, because its existence was unknown to the Office of Indian Affairs. Id., ¶ 50, Exh. EE (letter from William Harrison to Collier). Collier also tasked the Director of Lands to study the issue. Id., ¶ 52, Exh. HH (May 12, 1936 J.M. Stewart Memorandum). The Indian Agent in New York could not definitively say whether some small remnant of state reservation land still existed. Id., ¶ 52, Exh. EE at 2 (January 16, 1936 letter) ("From my examination of this matter I am unable to say the Oneidas have a reservation."). The Director of Land reviewed the decision in Boylan and concluded that it appeared to recognize a small amount of remaining reservation land in New York, but that all such remaining reservation land was under the exclusive jurisdiction of New York State. Id., ¶ 53, Exh. HH at 3 ("such reservation is not a Federal reservation, but is under the jurisdiction of the State. . . .").

Based on this mixed record, and without making any findings that the Oneidas in New York had a tribal organization, Commissioner Collier permitted the Oneidas in New York, wherever located, to hold a referendum under the IRA. Tennant Decl. ¶ 54, Exh. II (letter from Acting Commissioner Daiker to Harrison). The sole basis for doing so was the apparent existence of a small remnant of the Oneidas' historic reservation, which "if true, might be construed to be a reservation within the meaning of the Indian Reorganization Act and thus

entitle the Oneida Indians to hold a referendum." Tennant Decl., ¶ 49, Exh. DD (September 9, 1935 letter from Collier to Harrison). On the very last day possible sixty-nine Oneida Indians in New York held the referendum and overwhelmingly rejected the IRA by a vote of 57 to 12. Id., ¶¶ 56-57, Exhs. LL (recorded Oneida vote) and MM (letter from Commissioner Morris recounting the IRA votes). In doing so, the Oneidas rejected any possibility of coming under federal jurisdiction and remained under the jurisdiction of New York State. See Baldwin Decl. at Exh. WW (Beckham Report at 40); see infra, at 39-40.

e. The 1939 Berry Report

In 1939, the Superintendent of the New York Agency, C.H. Berry, prepared a report on the "New York Indian Situation" coming "after six months of intensive study." Tennant. Decl., ¶ 58, Exh. NN. The report details Berry's visits to the New York reservations (Cattaraugus, St. Regis, Alleghany, Onondaga, Tonawanda, Tuscarora) and conversations with "leading Indians of the various tribes." Id. at 1. Nowhere in the report does Berry identify an Oneida tribe in New York, or an Oneida reservation in New York.

Superintendent Berry advised Commissioner Collier, by letter dated September 1, 1939, that the Oneida reservation does not exist:

> It will be noted that Mr. Harrison [former federal Indian Agent in New York] indicates that the Oneida Reservation as such really no longer exists. This has been my understanding based upon inquiries I have made of reading [sic] Oneidas themselves, and other persons familiar with the situation. . . . [a]ll land within the boundaries of the former Oneida reservation is now occupied by Indians or white person, who, apparently, have legal possession of the land.
>
> Tennant Decl, ¶ 59, Exh. OO (emphasis added).

The view that no Oneida reservation existed in New York was also communicated in an October 17, 1939 letter from Assistant Indian Commissioner William Zimmerman, Jr.: "It appears that the Oneida Reservation, as such, no longer exists. All of the lands within the

boundaries of the former reservation are now occupied by Indians or by white persons, who apparently have legal possession of the respective tracts." Tennant Decl. ¶ 60, Exh. PP.

f. The United States' Pleading That The Oneidas' Tribal Status In New York Ended In 1805

The United States took the position in litigation before the Indian Claims Commission that the Oneida Tribe ceased to exist in New York in 1805, due to internal divisions. Specifically, in Oneida Nation of New York v. United States, Docket No. 301, the United States filed an answer denying liability for the Oneidas' sale of lands to New York, stating that:

> Defendant further alleges the Oneida Nation ceased to exist on March 21, 1805, if not earlier; that the First Christian Party and the Second Christian Party of Oneida Indians ceased to exist on June 19, 1840, if not earlier; and that the Orchard Party ceased to exist on March 13, 1841.
>
> Tennant Decl. ¶ 63, Exh. SS (Answer at 36).

In alleging that the Oneida tribe ceased to exist in New York in the early 19th century, the United States made reference to the March 21, 1805 indenture that divided the Oneida reservation into two parts (at the request of two warring Oneida factions, the Christian party and Pagan party). The United States also referenced several later state treaties (including June 19, 1840 and March 13, 1840) that "authorized the Oneida Indians owning lands in the Counties of Oneida and Madison to hold their lands in severalty . . . [and] to sell and convey their real estate the same as if they were born citizens of the state." Id., ¶ 64, Exh. SS (Answer at p. 35-36). The United States deemed those provisions to have necessarily ended tribal existence for the Oneida Indians who remained in New York after the 1838 Treaty of Buffalo Creek. See also Baldwin Decl. at Exh. WW (Beckham Report at 18) (changing property holding to fee ownership in severalty ended reservation status and state oversight of lands).

g. OIN's Affidavit That It Had No Tribal Organization In New York In 1934

The Oneidas likewise have stated in litigation that the tribe lacked any formal governmental structure in New York in 1934. Specifically, the Oneida Indian Nation submitted an affidavit from a Nation elder named Delia Waterman in Oneida Indian Nation of New York v. Andrus, 79-cv-652 (N.D.N.Y. 1979). Tennant Decl., ¶ 65, Exh. TT. In her affidavit, dated October 25, 1979, Delia Waterman, who was 79 years old at the time, described the informal cultural and social organization that existed in New York from the early 1900s until 1948:

> In approximately 1930, I began an active pursuit of the Nation land claims. At that time and throughout my life, until 1948, the Oneida Nation was not formally organized in any government structure. The Nation did not have any elected officials or any traditionally installed chiefs. Basically, the Nation maintained an informal customary tribal relationship among its members on a social and cultural way. Political decisions were arrived at through informal discussions between Nation families.
>
> Id., Exh. TT (Aff. at ¶ 2).

The Waterman Affidavit describes the process by which a formal government structure came to pass in 1948 by way of a formal adoption of a constitution, beginning with monthly meetings and elections in "the early 1940's." Id., ¶ 66, Exh. TT (Aff. at ¶ 4). Only after the tribe had adopted its constitution and elected an Executive Committee was OIN able to establish a tribal governmental relationship with the BIA. Id., Exh. TT (Aff. ¶¶ 6-9).

h. DOI's Position In 1982 That Oneidas Were Not A Tribe Under Federal Jurisdiction In 1934

A DOI analyst, Michael T. Smith, prepared a lengthy memorandum in 1982 detailing the history of Oneida Indians in New York. The memorandum concludes that the individual Oneidas who were evicted from the 32-acre parcel in 1906, consisted of a small "group" of Oneida Indians, numbering less than 36, who either were the allottees of two parcels (i.e. Lots 17 and 19) under the 1842 Treaty, or were the descendents of those allottees. Tennant Decl. ¶ 67,

Exh. UU (DOI 1982 memorandum at 5 (6-7 in transcribed version). This "group" was not an organized tribe or band of Indians; rather, it was an "ad hoc organization" that revolved around the allotted lands. Id. Accordingly, even as late as 1982, the DOI did not believe the handful of Oneida Indians associated with the 32-acre parcel constituted any type of recognized tribe or band either at the time of the Boylan litigation or later.[22]

2. The Historical Record Conclusively Demonstrates That The Oneidas In New York Were Not "Under Federal Jurisdiction" Within The Meaning Of The IRA In 1934

The Indian Affairs Office took a "hands off" approach to New York Indians as a whole, and did not exercise any form of supervision over the few Oneidas living in New York, or the lands they owned in New York. Indeed, the DOI plainly and repeatedly disclaimed any right or duty to supervise the New York Oneidas or their lands in New York, even when petitioned directly by Oneidas invoking the federal government's trust relationship with Indians. See e.g., Tennant Decl., ¶¶ 69-70, Exh. VV (July 18, 1931 letter from Commissioner Rhoads) ("We have not attempted to assume control over any tribal or individual property of the Oneidas of New York"); Exh. U (July 29, 1920 letter from Assistant Commissioner Merritt) ("This office never having assumed any direct supervision over the internal affairs of the Oneida Reservation in New York"); Exh. WW (December 9, 1926 letter from Secretary of the Interior) ("[T]his department has no jurisdiction over the matter about which you write"); Exh. YY (October 19, 1911 letter from Assistant Commissioner Hauke) ("You are under the jurisdiction and control of the tribal authorities and the State of New York."); Exh. ZZ (July 19, 1911 letter from Assistant Commissioner Hauke) ("Should you or any member of the Six Nations claim lands in the

[22] The DOI 1982 memorandum also concluded that this small group cannot be viewed as "the legitimate successors of the Oneida Nation" because they represented a small portion (36 out of a total population in 1841 of 146) of the 'Home Party of the First and Second Christian Parties'" – just one of a number of Oneida factions. Tennant Decl. ¶ 68., Exh. UU at 5 (6-7 in transcribed version).

vicinity of Oneida Lake or any other part of the State of New York, . . you should submit the matter to the proper officers of the Indian council and authorities of the State of New York."); Exh. AAA (January 30, 1913 letter from Assistant Commissioner Hauke) ("In the absence of any specific legislation by Congress authorizing this Department to assume jurisdiction over the internal affairs and the lands in [sic] the New York Indians, the Office would not be justified in interfering in any way [referring to certain litigation]"); Exh. BBB (March 29, 1924 letter from Commissioner Burke) ("[I]n the absence of legislation this Department has not and could not well assume active jurisdiction or control over the affairs of the New York Indians, though technically a superior sovereignty and jurisdiction might rest in the Federal Government."); Exh. FFF (April 26, 1939 letter from Assistant Commissioner Zimmerman) ("In the absence of specific legislation by Congress directing this service to do so, we are not in a position to assume active supervision or control over the situation with respect to the Indians in the State of New York.")(April 26, 1939).

Commissioner Collier observed that New York State had in fact been performing "the sovereign functions usually exercised by the Federal Government in behalf of the Indians . . ." Tennant Decl, ¶ 80, Exh. EEE (February 19, 1938). The reason for this state of affairs was the "peculiar" history in New York, recounted in a 1942 study by the U.S. Indian Service:

> [I]t should be said that for a century and a half the State of New York has, by virtue of default on the part of the federal government, considerably monopolized the administration of tribes in that State. The assumed jurisdiction, largely based in New York's doctrine of "State's Rights", has never been widely challenged by the Federal Government and has considerable sanction in the scores of treaties between New York and State and Indian tribes. Also, New York, as one of the thirteen original state colonies, took title to Indian lands, and it was generally regarded that jurisdiction over the Indians was included. New York State has carried on numerous activities of social welfare while the Federal Government has remained aloof.

Tennant Decl. ¶ 84, Exh III at 1 (A study of the St. Regis Indians, A. Phinney, Field Agent, US Indian Services, July 31, 1942). The same view of the state-federal relationship in New York was expressed twenty years earlier by Indian Affairs Commissioner Burke to Congressman Andrew Hickey:

> As to the policy of the Federal Government in dealing with the New York Indians, it may be said that ever since the early days the State of New York has exercised considerable jurisdiction over the Indians within her borders, has constructed and maintained highways through the Indian reservations there, has provided separate schools for education of Indian children, and to a limited extent at least, has enforced sanitation and other health methods for the betterment of these people. Minor police supervision has also been exercised; and administrative officers of the Federal Government have never seriously questioned the right of the State to do so. . . . In the absence of legislation this Department has not and could not well assume active jurisdiction or control over the affairs of the New York Indians, although technically a superior sovereignty and jurisdiction might rest in the Federal Government.

Tennant Decl. ¶ 77, Exh. BBB (Letter of Commissioner Burke, Indian Affairs Office to Congressman Andrew Hickey, March 29, 1924).

One year before the IRA was enacted, the Commissioner of Indian Affairs responded to an academic's inquiry questioning whether the "Indians of New York are under complete Federal Jurisdiction?" Commissioner Rhoades provided a detailed response that stressed New York State's active control over Indians within its borders and corresponding lack of active control by the Federal Government:

> The Indians in the State of New York were originally under the New York Colony. Upon the successful termination of the revolution then, the State of New York assumed all the jurisdiction theretofore had by the Crown of Great Britain through its Colony. While the United States made treaties with the New York Indians and guaranteed them peaceful possession of their land, the state assumed the burden of government, including the establishment of schools and highways. The state has exercised the usual prerogative of sovereignty and jurisdiction over these Indians while the Federal Government to a large extent, has not. This is probably due is some measure to the fact that Congress has never expressly directed this or any other Department of the Federal Government to assume active control and supervision over the New York Indians such is found in Act of July

> 27, 1868 (15 Stat. 222) with respect to the Cherokee Indians of North Carolina. Having no such legislation and having no appropriation for the purpose of carrying on extensive activities with respect to the New York Indians, this Department has not felt empowered to assume active control over the Indians within that State, such as is now exercised over most of the other Indians of the United States.

Tennant Decl., ¶ 78, Exh. CCC at 1 (Commissioner Rhoads letter dated April 10, 1933).

This unusual state of affairs – where the sovereign roles of the state and Federal Governments are reversed – continued through the late 1930s and early 1940s, as documented in Superintendent Berry's 1939 "Report on New York Indian Situation" (Tennant Decl.,¶ 58, Exh. NN) and the Report of the Joint Legislative Committee on Indian Affairs dated February 25, 1944 (id., ¶ 86, Exh. KKK). The Berry report recounts:

> New York has from the beginning of its relations with the Indians of the state, carried practically the sole responsibility of the educational and health work of the New York Indians . . . and . . . has contributed large sums of money for direct relief . . . In these particular fields of service, it would appear that the state has done quite as well by its Indians as the Federal Government has done for the Indians who are under its direct supervision outside of this state.

Id. at Exh. NN at 2.

Commissioner Collier lauded New York State's interest in its Indians and its expenditure of $500,000 per year for Indian services, and observed that, "State authorities also contend that the Federal Government has no jurisdiction over New York Indians, except insofar as the ten major crimes are concerned." Tennant Decl., ¶ 83, Exh. HHH, at 2 (May 31, 1939). Collier acknowledged that "the guardianship of the Federal Government over these Indians is a shadowy, uncertain one and has never been clearly defined either by legislation or by litigation." Id. In contrast to the State's substantial outlay of resources for its Indians, Collier noted that, "[e]xcept for the annual distribution of a few belts of cotton cloth and supervising the expenditures out of emergency funds, the Federal Government contributes directly very little." Id.

Indian advocate Anne R. Coleman, in her 1939 report "The New York Indians," commented that, "[w]hile . . . these Indians, like all other Indians in the United States, are theoretically wards of the federal government, they are actually under the care of New York State. This status continues to be jealously guarded both by the state officials immediately concerned, and also by many of the Indians themselves." Tennant Decl., ¶ 82, Exh. GGG at 2 (May 1939).

Collier noted that "[a] change in the status of these Indians can be brought about in two ways only: (a) voluntary action on the part of the Indians, such as agreeing to adopt the Indian Reorganization Act of June 18, 1934, or (b) legislation by Congress under its plenary authority over the Indians." Tennant Decl., ¶ 80, Exh. EEE at 3.

Because the Oneidas did not adopt the IRA, and Congress did not enact legislation authorizing and funding federal Indian Service in New York, the DOI "remained aloof" from the Indians in New York, and was not exercising supervision and control over the Oneida Indians in New York as of June 1934.

E. The Grounds Cited By OIN Do Not Establish Federal Recognition Or Jurisdiction In 1934

In its opposition to Plaintiffs' motion seeking discovery relating to the Secretary's statutory authority under Carcieri (Dkt No. 167), the OIN set forth their contentions as to why the "under federal jurisdiction" requirement is satisfied as a matter of law: (1) the federal government's decision allowing the Oneidas to vote under the IRA means they were recognized as tribe and under federal jurisdiction in 1934; (2) the receipt of treaty cloth (annual annuities)

under the 1794 Treaty of Canandaigua demonstrated federal jurisdiction; and (3) the decision in Boylan.[23]

As explained above, the IRA referendum permitted on the last day possible (June 17, 1936) says nothing about whether the Oneidas in New York were organized as a tribe or recognized as a tribe on June 18, 1934, and only further documents the absence of federal jurisdiction over these Indians. Below we address OIN's claims with respect to the treaty cloth distributions and Boylan.

1. The Receipt Of Treaty Cloth By Individual Oneida Indians Does Not Confer Federal Recognition Of Tribal Status Or Federal Jurisdiction Under The IRA

The OIN claims that the federal government's recognition of certain treaty rights under the 1794 Treaty of Canandaigua – and continued payment of annuities in the form of treaty cloth – means the tribe was recognized and "under federal jurisdiction" within the meaning of the IRA in 1934. That assertion is without merit. As an initial matter, "under federal jurisdiction" in the IRA means the tribe's lands and affairs were "under the supervision and control" of the Office of Indian Affairs. See, supra, at I.A. Nothing of that sort happened with respect to the few Oneidas or their 32 acres in New York. Moreover, payment of the treaty cloth does not confer federal jurisdiction on the recipient for the reasons stated by the DOI in 1982 when examining the status of the Oneidas in New York:

> It should be emphasized that neither the individual representative nor those to whom he distributes the cloth acquire any 'federal recognition' as a 'tribe' by this act. . . The individual's right to share is derived from his or her connection to the historic entity and not dependent on his or her current status.

[23] The OIN places great weight on Boylan to support its claim that the OIN, a modern tribal entity, meets the eligibility requirements under the IRA, contending the Oneidas referenced in the Boylan case were "recognized and under federal protection" in 1934. (Dkt No. 167, Defendant-Intervenor Mem. at 24). The ROD also cites to the Boylan litigation in claiming the Secretary has authority to take land into trust for the benefit of the OIN (Baldwin Decl. at Exh. L (ROD at 34, 36)), although the Secretary does not articulate or apply the "now under federal jurisdiction" standard in the IRA.

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> The cloth payment does not convey political recognition. It recognizes a cultural organization 'the Oneida Nation.' This group is made up of persons on a roll (not approved by the government) kept by someone who may have no other official position and the government is seemingly unconcerned to whom the cloth is eventually distributed.
>
> Tennant. Decl., ¶ 67 Exh. UU (DOI 1982 memorandum at 4, 10) (6, 13 in transcribed version).

The DOI 1982 memorandum further noted that "there have been no other consistent federal contacts with these people," reinforcing the conclusion the Oneidas in New York were not "under federal jurisdiction" as of June 18, 1934, as required by the IRA. Id., Exh. UU at 10 (13 in transcribed version).

2. The "Finding" Of Tribal Oneidas In Boylan, Carried Forward By The Second Circuit In Sherrill, Does Not Create A Genuine Issue Of Fact Regarding The OIN's Eligibility Under The IRA

The district court in Boylan determined in 1919 that the handful of Oneidas living on the 32-acre parcel ten years earlier (in 1909) maintained "tribal relations" and otherwise were a remnant of the Oneida Tribe. Boylan, 256 F. at 486-87. That finding was affirmed by the Second Circuit in Boylan 265 F. 165 in a 2-1 decision, and was cited by the majority opinion in the Second Circuit's 2003 decision in City of Sherrill v. Oneida Indian Nation, 337 F.3d 139, 153 (2d. Cir. 2003), another 2-1 decision. The district court's discussion in Boylan of the Indians living on the 32-acre parcel addressed a legal issue (existence of a ward-guardian relationship) that was different from the legal issue discussed by the Second Circuit in Sherrill (tribal standing to challenge illegal conveyances under the Indian Trade and Intercourse Act ("ITIA")), both of which are distinct from the legal question at hand, namely, whether the handful of Oneidas occupying the 32-acre parcel in New York as of June 18, 1934 were recognized "as a tribe" by

the DOI and was then under the supervision and control of the Department of the Interior and its Office of Indian Affairs.

a. Boylan Litigation

Boylan made the findings while analyzing the Department of Justice's authority to intervene on behalf of the evicted Indians, concluding they were still wards of the federal government. Boylan, 256 F. at 496. The finding that the Oneidas had tribal relations is dictum inasmuch as the district court later concluded that the federal government was under a duty to protect the "remnants of this tribe whether few or many" – even "a single Indian" (i.e., without regard to whether the Indian Affairs Office recognized the remnant as an organized band or tribe). 256 F. at 488. [24] The district court's findings also looked backwards in time, since the critical event in question – the eviction of Oneida Indians from the 32-acre parcel – occurred in 1909.[25] Moreover, the court's finding of tribal relations in 1909 lacks specifics and is thinly documented. Indeed, the only testimony regarding tribal council meetings concerned two or three Oneidas attending a handful of meetings of the Six Nations on the Onondaga Reservation

[24] The broad conception of the federal government having a duty to protect individual Indians – that the guardian-ward relationship extends to each and every Indian – was exactly what the IRA drafters and adopters wanted to avoid as the test for receiving benefits under the IRA. Instead, by injecting "now under federal jurisdiction" into the IRA definition of Indian tribe (and adopting a 50% blood quantum requirement for non-tribal Indians) Congress excluded all Indians who were either not then under the supervision and control of Indian Office or who were not at least 50% Indian blood, even if a court could consider those Indians as "wards" of the United States. See "Controlling Legal Standards," supra, at 19-23.

[25] OIN previously characterized Boylan as being decided "just prior to enactment of the IRA" (Dkt. No. 167 at 24). That simply is inaccurate. The events at issue in that case occurred 25 years before the IRA was passed. Boylan thus does not provide a contemporaneous view on the status of the 32-acre parcel or the Oneida Indians in New York in 1934. Indeed, in 1936 when the part-time federal Indian agent in New York was dispatched to the Oneida, New York to investigate the possibility of a small remnant of reservation land remaining, he found William Rockwell, the parcel's owner, living there with his third wife and son, farming three acres -- with nothing remotely "tribal" going on. See Baldwin Decl. at Exh. WW (Beckham Report at 43-44). The changes since the time of Boylan included the fact that ownership and occupancy of the parcel had changed. Rockwell purchased the land and held outright fee title, making the land his own personal real property. As a single-family owned and occupied plot of land in 1936, the 32-acres was no longer communal reservation land. Id. at 45-46, 66-67.

to discuss land claims – the last time eight years earlier. Tennant Decl., ¶ 38, Exh. T (Boylan Tr. at 34, 36).

And the district court in Boylan did not cite, much less apply, the controlling legal standards for determining tribal status articulated by the Supreme Court in Montoya v. United States, 180 U.S. 261 (1901).[26] Instead, the court applied a standard-less legal test that allowed the court to conclude that what was at most a disorganized "ad hoc organization" that revolved around the allotted lands (see Tennant Decl., ¶ 67, Exh. UU (DOI 1982 memorandum at 5 (6 in transcribed version)), was a "tribe."[27]

As explained above (supra at 27-30), the DOI at the time of the Boylan case rejected both the Department of Justice's legal premise for commencing the litigation, as well as the resulting conclusion of the federal court that the federal government was obligated to protect these Indians "as wards of the Nation." The official view of the DOI was that these Indians had no tribal organization or reservation in New York, and in any event were "never under the jurisdiction" of the DOI and its Office of Indian Affairs.

b. Second Circuit in Sherrill

The Second Circuit's majority opinion in City of Sherrill, 337 F.3d at 153, cited Boylan in the course of rejecting the City of Sherrill's argument that the Oneidas' loss of tribal status in New York deprived them of standing under the ITIA to contest the ancient land conveyances at issue in that case. The majority cited Boylan for the proposition the Oneida tribe existed at the time Boylan was decided, countering evidence presented by the City (and credited by the

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[26] Montoya established the common law tests for a tribe: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." 180 U.S at 266.

[27] The Second Circuit's affirmance of the district court's finding of tribal status suffers from the same infirmities and temporal limitations.

dissenting member of the Second Circuit) that the Oneidas were known no more as a tribe in New York. Id. The majority's discussion of Boylan is dictum because the majority rejected the City's legal argument that the Oneidas could have lost standing to contest conveyances under the ITIA by temporarily losing their tribal status. Id. at 165-66. In any event, as noted above, the uncontroverted, historic and official records of the DOI document the Department's official view (communicated to Congress) that the few Oneidas remaining in New York after the main body of the tribe removed to Wisconsin and Canada in the mid-1800s had no tribal organization or reservation.

c. IRA Inquiry

Neither Boylan nor Sherrill reviewed the historical evidence about the Oneidas in New York in the 1930s, and neither, of course, addressed the "under federal jurisdiction" eligibility requirement in the IRA. Thus, neither case can speak to the temporal restriction embodied in the IRA. The historical record is clear that, as of the date of the enactment of the IRA (June 18, 1934), the DOI did not recognize the Oneidas in New York as a tribe, and did not exercise supervision or control over the Oneidas' affairs or property in New York.

3. Even If The Department Of Justice's Intervention In Boylan Could Establish Federal Jurisdiction Within The Meaning Of The IRA, That Case-Specific Jurisdiction Ended When The Case Ended In 1920

The unilateral decision of the Department of Justice to intervene on behalf of the Oneida families evicted from the 32-acre parcel is fundamentally at odds with the IRA's concept of "now under federal jurisdiction"(see supra, at 19-23). But even if the type of legal intervention in Boylan were relevant to determining "under federal jurisdiction," which Plaintiffs submit it is not, the Department of Justice's intervention was time-limited. When the land was restored to the ejected Indians, the Department of Justice's intervention ended. As noted above, the DOI did

not then step in to supervise the affairs of the Oneidas restored to the 32-acre parcel, and did not even bring that land under the jurisdiction of the DOI until sometime in the 1940s. Rather, at all times relevant to the IRA analysis, the DOI continued to respect New York State's exclusive jurisdiction over that remnant of the historic Oneida state-created reservation and the remnant of that historic tribe that lived scattered across central and western New York.

F. The OIN Is A Modern Tribal Entity That Is Not the Successor In Interest To The Group Of Indians Who Resided On The 32-Acre Parcel In Boylan

Even if the Oneidas in Boylan could be viewed as being under federal jurisdiction in 1934 and eligible for benefits under the IRA, the OIN is not related to that group by family history or relationship, or even political or social structure, and thus cannot stand in the shoes of the Boylan Indians for purposes of determining IRA eligibility. In order for the OIN to even have the benefit of the dated and anomalous findings in Boylan, this modern tribal applicant would have to demonstrate a meaningful relationship to that historic group. See United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 548 n.2 (10th Cir. 2001). But as the expert report of Prof. Stephen Dow Beckham makes clear, the families with historic ties to the 32 acres (by virtue of the 1842 treaty) had been reduced by death and land conveyances to the point, where in 1935, the lands were owned in fee by one person, William Honyost Rockwell. See Baldwin Decl. at Exh. WW (Beckham Report at 10-22, 43-44, 66-67 (Conclusion #13)). After Rockwell died, in 1960, other Oneidas – with no relationship to Rockwell or the other historic families that are listed under the 1842 Treaty – moved from the Onondaga Reservation onto the 32 acres, beginning their occupancy. Id. at 59-64, 69 (Conclusion #27). Those newcomers to the 32 acres are the predecessors to the modern tribal applicant. Id. at 59-64. Most importantly, they are complete strangers to the four families that received the 32-acre lot under the 1842 Treaty. Id. Moreover, the modern tribal applicant, OIN, was formed long after 1934. See id.

Exh. UU (DOI 1982 memorandum at 7-9 (9-12 in transcribed version)); Baldwin Decl. at Exh. W (Beckham Report at 68).

Accordingly, the OIN would not be able to benefit from any determination that the Boylan Indians were "under federal jurisdiction" in 1934 for purposes of the IRA, even if that determination were supported by Boylan (which it is not).

II. THE DOI APPLIED THE WRONG REGULATORY STANDARD AND THE DETERMINATION WAS MADE WITHOUT REGARD TO THE RELEVANT FACTORS UNDER 25 CFR 151

Agencies are required to consider the factors relevant to their analysis, and if they apply the wrong factors, their analysis cannot pass muster on judicial review. See Fla. Power and Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (matter must be remanded to agency "if the agency has not considered all relevant factors"); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (agency must apply correct factors). "It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." See Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998).

Part 151 of the DOI regulations contains, inter alia, two sets of standards to evaluate land-into-trust applications: 25 C.F.R. § 151.10 (On-reservation acquisitions) and 25 C.F.R. § 151.11 (Off-reservation acquisitions). Although there is no basis for finding that the OIN-owned fee land comes within the definition of "reservation" that is contained in the regulations governing land into trust applications, 25 C.F.R. § 151.2(f), the ROD all but omits discussion of that definition and evaluates the Application under the section 151.10 standards, not under the relevant standards set forth in section 151.11 for off-reservation acquisitions. The principal difference between the two sections is the emphasis in section 151.11 off-reservation standards on the concerns of state and local governments. And indeed, shortly after the DOI issued its

decision on the Application, its representatives gave testimony to Congress emphasizing the importance of the interests of non-Indian communities in considering off-reservation land into trust applications. Because the DOI arbitrarily applied the wrong criteria, its Determination must be vacated.

A. The OIN Application Should Have Been Evaluated As An Off-Reservation Application Under 25 CFR 151.11 Because The Land At Issue Does Not Qualify As A Reservation

The ROD plainly states, and the Administrative Record demonstrates several times, that the DOI considered the Application to be an "on-reservation" application, and evaluated it under section 151.10. Baldwin Decl. at Exh. L (ROD at 32); Exh. A (FEIS at ES-3). As justification for application of section 151.10, the DOI baldly concluded that the subject land is "located within the exterior boundaries of its 'Indian reservation,' as defined in 25 C.F.R. § 151.2(f), or adjacent thereto." Id. at Exh. L (ROD at 32). The DOI's conclusion cannot be squared with the unambiguous language of that definition.

Section 151.2(f) of the DOI's regulations for land acquisitions defines reservation as:

> that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. 151.2(f).[28]

In other words, to be a reservation for purposes of the land into trust regulations the land has to meet one of two criteria: (1) it must be land over which the Indian tribe in question is

[28] This definition is consistent with cases that have recognized that the core characteristic of an Indian reservation is the right of the tribe to exercise sovereignty over the land. See United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); see also United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 348 (1942), reh'g denied 314 U.S. 716 (1942) ("Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive.").

currently recognized to have tribal governmental jurisdiction; or (2) the land must be contained within a former reservation that has been disestablished or diminished pursuant to a final judicial determination.

It is undisputed that the Supreme Court held in Sherrill that the OIN "long ago relinquished the reins of government and cannot regain them." Sherrill, 544 U.S. at 203; Baldwin Decl. at Exh A (FEIS at 1-8) ("Following the U.S. Supreme Court's decision, the Nation lacks sovereignty over the lands as a matter of law."). It was on the basis of that determination that the Court held the OIN lands are not exempt from local real estate taxes and other state and local regulatory law. Sherrill, 544 U.S. at 220 ("If OIN may unilaterally reassert sovereign control . . . little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls."). Accordingly, the United States does not "recognize" the OIN as having governmental jurisdiction over the lands it seeks to have taken into trust. The DOI has acknowledged this. See Baldwin Decl. at Exh. L (ROD at 36) (determining the necessity of taking land into trust for the OIN because "[t]he Nation's ability to exercise governmental authority over the lands and its uses, and to protect it for future generations, will promote the health, welfare, and social needs of its members and their families"). And indeed, it is precisely because, under Sherrill, the OIN does not have such governmental jurisdiction that it applied to have the land taken into trust; that is the only possible way that the OIN can acquire any governmental jurisdiction over the land. See Baldwin Decl. at Exh. L (ROD at 34). Nor does the land satisfy the second, alternative criterion for land into trust reservation treatment. The DOI has concluded that there has been no final judicial determination that the "Oneida reservation" has been disestablished or diminished. Id. at Exh. L (ROD at 32); Exh. A (FEIS at ES-5).

Since under Sherrill the OIN has no governmental jurisdiction over the subject land, and since there has been no final judicial determination that the OIN's "reservation" has been disestablished or diminished, the subject land cannot be part of the OIN's "reservation" as that term is defined under section 151.[29] The DOI simply failed to address the plain meaning of its own definition of "reservation" in deciding to apply section 151.10. Ironically, much of the brief discussion in the ROD of which regulatory framework the DOI chose to apply discusses the fact that the DOI believes the land is part of an OIN reservation that "was not disestablished." Baldwin Decl. at Exh. L (ROD at 32). But, as noted, this alone would not bring the land within the definition of a "reservation" under section 151.2(f). Without tribal governmental jurisdiction over the land, which is absent here, or a final judicial determination of disestablishment, the land falls outside of the definition of reservation in section 151.2(f), and the Application must be reviewed under section 151.11.

B. The Suggestion In The ROD That The Result Would Be The Same Even Under 25 C.F.R. § 151.11 Is Not A Substitute For Bona Fide Consideration Under The Correct Regulatory Standard

An entire page of the ROD is devoted to a misguided explanation as to why the application was evaluated under section 151.10. Evidently recognizing that, under the DOI's own definition of reservation, the section 151.10 criteria did not apply, the DOI included a footnote at page 33 of the ROD asserting that even if it had decided to apply the correct regulatory standards, it would "still acquire the Subject Lands in trust." Baldwin Decl. at Exh. L

[29] Nor are all of the Subject Lands "adjacent" to any OIN Indian reservation, as arbitrarily concluded by the DOI in the ROD. Even assuming arguendo that the DOI is correct in its view that under United States v. Boylan, 265 F. 165 (2d Cir. 1920), the OIN has sovereignty over 32 acres of land in the City of Oneida, Madison County, none of the land the OIN sought to have taken into trust comes within the scope of section 151.10. The criteria in that section apply to land within and "contiguous" to a reservation. Almost none of the 13,000 acres the DOI has decided to take into trust is "contiguous" to the 32-acre parcel. The IBIA has held that "contiguous" means adjoining or abutting. Baldwin Decl. at Exh. XX (Jefferson County v. Northwest Regional Dir., 47 IBIA 187, at 205-206 (IBIA Sept. 2, 2008)).

(ROD at 33, n.5). It is axiomatic that an agency must meaningfully consider all factors required by that agency's regulations before making a determination. See Sabin v. Butz, 515 F.2d 1061, 1069-70 (10th Cir. 1975) (vacating summary judgment for agency because the record did not demonstrate that the agency considered "all relevant factors"). Indeed, an agency must also coherently explain its reasoning and basis for making a decision. See, e.g., State Farm, 463 U.S. at 48-49 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . ."). The DOI's casual and unsupported suggestion that the decision would pass muster under the correct regulatory standard is no substitute for an informed and objective evaluation of each factor under section 151.11 and a cogent explanation of the DOI's evaluation of those factors.

As noted above, a key difference between the section 151.10 and section 151.11 factors is that under the latter, "as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" and "shall give greater weight to the concerns raised pursuant to paragraph (d) of this section [written comments from state and local government regarding potential impacts on regulatory jurisdiction, real property taxes and special assessments]." 25 C.F.R. § 151.11(b).[30]

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[30] The DOI has routinely noted the material distinction between sections 151.10 and 151.11. In a hearing before the House Committee on Natural Resources on a bill to authorize the Secretary to take property of the Samish Nation into trust, then-Deputy Assistant Secretary George Skibine opposed part of the bill that would treat an acquisition application by the Samish as an on-reservation application:

> We do not see any justification to exempt these off-reservation parcels from the requirements of 25 CFR § 151.11 (which applies to off-reservation lands). The major difference between the regulatory provision applying to on-reservation acquisitions (25 CFR § 151.10) and the provision applying to off-reservation acquisitions (25 CFR § 151.11) is the weight given to the concerns of off-reservation local communities. In our view, the concerns of non-Indian communities that may be affected by off-reservation trust acquisitions are an important criterion [sic] in the Secretary's discretionary decision of whether to acquire off-reservation land into trust, and it should be preserved.

The only support for the DOI's claim that the same exact result would be reached under the section 151.11 standards as under the section 151.10 standards actually applied is that single footnote in the 73-page ROD that concludes the DOI gave "thoughtful consideration" to the State's and local governments' comments and the OIN's justification for placing lands in trust "[a]s shown by [the] extraordinary comprehensiveness of the Final EIS and this ROD."[31] Baldwin Decl. at Exh. L (ROD at 33 n.5). Tellingly, section 151.11 is mentioned nowhere in the analytical sections of the FEIS.[32]

And, in any event, the ROD's conclusion is belied by the Administrative Record. The record is replete with assertions by DOI personnel that the section 151.11 framework was irrelevant, and that the section 151.10 criteria applied. For example, draft responses to comments concerning the applicable regulatory framework ignored comments concerning section 151.11: "The commenter's assertions based on 151.11 do not apply in the Nation's case. None of the offered proofs by the commenter are relevant or applicable to the Oneida Indian Nation's trust decision before the BIA and Secretary of the Interior. As stated in response to a previous comment, the Secretary must consider the criteria at 25 U.S.C. § [sic] C.F.R. part 151.10." Baldwin Decl. at Exh. ZZ (AR011366) (Draft responses to individual confidential commenter); see also id. at Exh. AAA (AR027068) (Letter from Division of Indian Affairs to

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Baldwin Decl. at Exh. YY (H.R. 2040, To Authorize a Process By Which the Secretary of the Interior Shall Process Acquisitions of Certain Real Property of the Samish Nation into Trust, and for Other Purposes, Before H. Comm. On Nat. Resources, 111th Cong. (2009) (Statement of George Skibine, Dept'y Assistant Secretary for Policy and Economic Development for Indian Affairs, U.S. Dep't of Interior)). See also id. at Exh. XX (Jefferson County, 47 IBIA at 207 ("We will not construe section 151.11(b) to be meaningless in some undefined set of cases where parcels are non-contiguous but close [to an existing reservation].")).

31 Comprehensive evaluation under NEPA is not a substitute for deference to state and local government concerns, especially where the DOI is already mandated to consider the impact on local governments under the less deferential section 151.10 factors.

32 In response to the comments from the State and Counties that the Application should be considered under section 151.11, (Baldwin Decl. at Exh.O (AR00291-94) (State's Comments); id. at Exh. RRRR (AR004270-71) (Counties' Comments)) the DOI merely referred back to the conclusory footnote in the ROD rather than to any analysis demonstrating compliance with section 151.11(b). Baldwin Decl. at Exh. L (ROD at 71, ¶ 3).

Malcolm Pirnie) ("[T]he Secretary will consider that the Nation is applying for on-reservation trust status as opposed to off-reservation trust status. Compare 25 C.F.R. § 151.10 (on-reservation standard) with § 151.11 (off-reservation standard)."); Baldwin Decl. at Exh. AAA (AR027074) ("The Nation's application is for an on-reservation acquisition and it is sufficient, as a threshold matter, that the land to be acquired is owned by the Nation in fee and located within the Oneida reservation.").

It is clear that the DOI did not give greater weight to the State's, Counties' and local municipalities' concerns about taking land into trust, and did not scrutinize the OIN's justification of anticipated benefits as required under section 151.11. Correspondence from the DOI to Malcolm Pirnie regarding the so-called "comprehensive" EIS reflect that not only did the DOI fail to give greater weight to the affected governments' concerns, it instructed Malcolm Pirnie to discount State and local municipality comments before the EIS was drafted: "[t]he concerns expressed over local jurisdiction and utilities or other services are not considered substantial reasons to deny the transfer." Baldwin Decl. at Exh. DD (ARS005037); "State jurisdictional issues should not be considered substantial reasons to deny the fee-to-trust standard." id. at ARS005038; "The objections received from local and state authorities over the loss of jurisdiction are considered to be a control issue . . . . The comment letters received from local authorities currently having jurisdiction over the lands indicate that their land management policies include a high degree of political influence not conducive to managing tribal lands fairly for the benefit of Indian tribes." id.; "So the tax issue is not necessarily a valid issue but fear was widely spread. This may indicate an organized effort to disseminate the misinformation." id. at ARS005040-41. Indeed, internal DOI correspondence before comments on the OIN application were solicited demonstrates that the State and local government comments would not seriously

be considered: "[The OIN] expect a bunch of negative comments, but the fee-to-trust action is justified as a Supreme Court directed the procedure." Baldwin Decl. at Exh. K (Produced without Bates numbering).[33]

In other words, at best, the DOI evaluated the OIN application through the prism of section 151.10. It cannot cure that problem with a stray footnote in the ROD asserting that if they were to do it all over again correctly – i.e., by applying the section 151.11 criteria – it would all come out the same. An agency determination must be evaluated on the grounds proffered by the agency. See Butte Cnty v. Hogen, 613 F.3d 190, 196-97 (D.C. Cir. 2010). The DOI expressly evaluated the OIN application under section 151.10 which is plainly the wrong section to apply. Accordingly, the Determination must be vacated.

III. THE DETERMINATION IS ARBITRARY AND CAPRICIOUS BECAUSE THE DOI DEPARTED FROM ITS EXISTING POLICIES AND PRACTICES

The APA requires a court to set aside agency actions if such actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." State Farm, 463 U.S. at 43 (citations omitted).

In analyzing whether agency actions are permissible under the A.P.A., courts will hold agencies to their existing precedents and established policies. Some explanation of a departure from precedent is required; an agency cannot disregard its standing practice without giving a rational explanation as to not only the substance of the particular action it is taking, but also why it has changed course. See generally N.Y. Pub. Interest Research Group, Inc. v. Johnson, 427

[33] The Sherrill Court did not direct the DOI to take land into trust but rather stated that a land into trust application would be the only way for the OIN to gain sovereignty over the land. 544 U.S. at 220-21.

F.3d 172, 182 (2d Cir. 2005) ("Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."); AT&T Corp. v. F.C.C., 236 F.3d 729, 736-37 (D.C. Cir. 2001) (holding that agency cannot silently depart from previous policies or ignore precedent). Courts closely scrutinize agency actions which do not comport with the agency's own rules or its prior actions under similar circumstances. See e.g., Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 80-83 (2d Cir. 2006) (change in Medicare reimbursement policy required explanation on the record, not post hoc rationalization); United Church of Christ v. F.C.C., 560 F.2d 529, 532 (2d Cir. 1977) (noting that "changes in policy must be rationally and explicitly justified"); see also Nat'l Fed'n of Fed. Emps., FD-1, IAMAW v. FLRA, 412 F.3d 119, 121, 123 (D.C. Cir. 2005) ("Of course, agencies may depart from precedent, but 'an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

A. The Determination Is Contrary To The DOI's Policy To Not Take Land Into Trust For Tribes Who Can Successfully Manage Their Own Affairs

The land into trust provisions of the IRA were designed to provide for acquisition of "small tracts of land" to allow "landless" Indians or tribes to become economically self-sufficient. See Baldwin Decl. at Exh. UU (78 Cong. Rec. 11123 (1934)) (purpose of the IRA is to "provide for the acquisition, through purchase of land for Indians now landless who are anxious and fitted to make a living on such land . . . [I]f we could put them on small tracts of land . . . they could make their own living"); id. at Exh. BBB (78 Cong. Rec. 11730 (1934)) ("Section 5 sets up a land acquisition program to provide land for Indians who have no land or

insufficient land."). Indeed, this Court recognized that "[a] principle purpose of both the IRA and ILCA [Indian Land Consolidation Act] was to restore Indian economic life through expanding tribal land bases." (Dkt. No. 132 at 26.)[34] Section 465 was never intended to serve as a vehicle to enable a tribe to accumulate vast wealth at the expense of the surrounding non-Indian population.

Consistent with that recognized legislative goal, the longstanding policy of the DOI has been to take land into trust only for those Indians who cannot manage their own affairs:

> [W]e will not take additional land in trust for Indians who now have the ability to manage their own affairs. I see no reason why an Indian quite able to successfully manage his own affairs should be permitted to acquire additional land in trust and receive a variety of free real estate services and tax exemption for his newly acquired land.

Baldwin Decl. at Exh. CCC (Memorandum, dated April 21, 1959, from Commissioner of DOI, BIA to All Area Directors and Superintendents, at 1). That policy was revised one year later, and the Commissioner of Indian Affairs reiterated that when "trust status [would] place [the applicant] in a position where the trust status is being used as a 'tax dodge' by a 'big operator,' or where the trust status is being abused in various ways" trust status should be denied. See id. at Exh. DDD (Memorandum dated August 3, 1960 from Commissioner of DOI, BIA to All Area Directors.)[35]

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[34] Plaintiffs recognize that the Court has disagreed with their position that Section 465 lacks an intelligible standard, and do not attempt to relitigate the issue here. Instead, Plaintiffs contend that the purpose of the IRA recognized by the Court is consistent with the policies previously articulated by the DOI and is fundamentally at odds with taking a large amount of land into trust for an economically vibrant tribe.

[35] Indeed, this policy is consistent with recent DOI statements on the purpose of taking land into trust under the IRA: "Most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes and helps generate revenues for public purposes." Baldwin Decl. at Exh. EEE (H.R. 3742 and H.R. 3697: Bills to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land Into Trust for Indian Tribes, Before H. Comm. On Nat. Resources, 111 Cong. 15-23 (2009) (Statement of Donald Laverdure, Dept'y Secretary – Indian Affairs, U.S. Dep't of Interior at 2). The OIN does not need trust land for these purposes.

The DOI expressly disregarded this long-time policy and the Congressional intent in enacting the IRA by deciding to take over 13,000 acres of land into trust for the OIN, a tribe that has achieved substantial economic success and self-determination without the benefit of trust status. Instead of providing a reasoned explanation for its departure from this established policy, the DOI merely stated that the IRA is not limited to impoverished or incompetent tribes, and paid no credence to the BIA policy in effect for over forty years. The DOI attempted to pay lip service to this departmental policy by stating that "[p]lacement of non-gaming lands into trust will support [non-gaming] efforts and provide lands for other member needs, thereby protecting tribal self-determination and bringing stability to the Nation." Id. at Exh. L (ROD at 36-37). The DOI, however, notes no instability of the OIN, does not fully describe the tribe's "need" for land, and fails to consider the fact that in the 12-month period ending June 30, 2006, the OIN generated income of over $330 million per year except to say, essentially, that such economic success does not matter. See id. at Exh. FFF (AR013094) (Jarrell Report at ¶ 49). Simply put, the OIN is not only capable of managing its own affairs, but is quite adept at it, and this would be true regardless of whether the land is taken into trust.[36]

Notably, the DOI itself determined that the OIN can lawfully continue to operate all of its existing businesses even if the land is not taken into trust. Id. at Exh. L (ROD at 39) (listing new OIN business activities that "are not dependent upon the final determination because they may be completed whether or not the land is acquired in trust"). This is even true as to the OIN's Turning Stone Casino, so none of the land has to be taken into trust to allow OIN economic

[36] In fact, the DOI noted that "[f]or several years, the Nation was so successful in achieving its goals of enhancing self-determination and financial independence that it determined that it could return Federal Tribal Priority Allocation (TPA) funds to the BIA." Baldwin Decl. at Exh. A (FEIS at 3-246) (emphasis added).

activities to continue. Id. at Exh. L (ROD at 12) ("Turning Stone is now operating lawfully under IGRA.")[37]

Nor, from an economic point of view, does the OIN need the significant competitive benefits of land in trust status to operate its businesses competitively. The lead decision-maker on the OIN application at the DOI, Mr. Cason, recognized this reality, noting that "[t]he future opportunity to continue Sav-On operations do not depend on our trust decisions. If the [sic] are competitive operations, they can operate in fee." Id. at Exh. SS (ARS004558) (Handwritten Note by James Cason). This comports with the State's expert report on the viability of the OIN enterprises even if the OIN must pay property taxes: "the OIN can meet the property tax burden for all OIN lands of $16.2 million without significantly financially impairing the OIN Enterprises or frustrating the OIN goals of economic self-sufficiency." Id. at Exh. FFF (AR013112) (Jarrell Report at ¶ 98); see also id. at Exh. II (Supplemental Jarrell Report at ¶ 72).

But that reality, recognized by the DOI itself, did not inhibit the DOI from taking into trust the vast majority of properties held by the OIN, including some of the very types of properties that Mr. Cason expressly recognized as being able to operate competitively whether held in trust or not.

B. The DOI Disregarded Its Practice Of Obtaining Preliminary Title Opinions Without Any Reasoned Analysis

Another significant departure from DOI standards and policies without reasoned explanation is the DOI's failure to obtain preliminary title opinions ("PTOs") before deciding to bring land into trust for the OIN. The obtaining of PTOs is a substantial step in the land-into-trust process that was disregarded by the DOI without any explanation in the ROD or the FEIS. Under 25 C.F.R. § 151.13, "[i]f the Secretary determines that he will approve a request for the

[37] Plaintiffs did not share that view, but the Court has previously rejected Plaintiffs' arguments on that issue.

acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States." Those standards state that "preliminary title evidence will be accepted as a basis for the preparation of preliminary title opinions which contemplate further submission of the matter for final approval of title." Baldwin Decl., Exh. JJ at 3.

The DOI's standard procedure of obtaining PTOs before issuing a final decision in the land-into-trust process is well documented. See, e.g., Baldwin Decl. at Exh. GGG (AR007315) (BIA Standard Fee To Trust Checklist) (listing steps for request and receipt of PTOs from the Solicitor's Office before issuance of Final Title Opinions); id. at Exh. HHH (FOIA-045877) (OIN Outline at ¶ 16) ("The Office of the Solicitor will prepare a Preliminary Title Opinion regarding the property based on the evidence submitted."); id. at Exh. III (FOIA-045886-88) (Oneida Fee-to-Trust Briefing Paper at 6, Appendix A) ("Another critical time consuming issue involves the drafting of the Preliminary and Final title Opinions by the Department of the Interior's Office of the Solicitor.") The appendix to the Oneida Briefing Paper scheduled the conclusion of drafting PTOs by April 1, 2006. Id. at Exh. III (FOIA-045887, App. A); see also id. at Exh. TT (GAO Report at 16) (listing step of obtaining preliminary title opinions before issuing a decision letter to the applicant and publishing a notice of decision in the Federal Register). Accordingly, notwithstanding any argument regarding a lack of regulatory timing requirements under section 151.13,[38] the DOI's standard procedure is to obtain PTOs before the issuance of a decision to take land into trust.

[38] In opposition to Plaintiffs' Motion to Compel Production of the Administrative Record, the United States argued that section 151.13 does not require title opinions to be obtained before the Secretary determines land should be taken into trust. (Dkt. No. 169 at 17.) Such a reading in effect merges the PTO with a final title opinion. In any event, whether or not this contradictory reading is accepted, there is no dispute that the DOI

Notably, the BIA took initial steps to comply with this standard procedure. On April 29, 2005, the BIA Eastern Regional Office requested that the DOI Solicitor's Office issue a PTO for each parcel included in the Application. Baldwin Decl. at Exh. KK (AR007022). The DOI continued the task of obtaining PTOs, as evidenced by an August 2, 2006 internal e-mail: "When we spoke on 6/14/06 it was with Group 1 – Turning Stone Casino, the attorney was reviewing the comments. The Preliminary Title Opinion was waiting for information." Id. at Exh. LL (AR004981). The Administrative Record does not contain any completed PTOs. The ROD, FEIS, and Administrative Record contain no explanation as to why the DOI abandoned this process. The only mention of the issue in the ROD is the disingenuous comment that, under section 151.13, title examination "must be completed, and liens that make title to the land unmarketable and other liens in the Secretary's discretion must be addressed, prior to formal acceptance of lands into trust." Id. at Exh. L (ROD at 53).

The inescapable inference is that the process was abandoned, and the DOI embarked on a non-regular approach, because the PTOs would have confirmed that the OIN did not have marketable title, and would have hampered the goal of the OIN and the DOI to push the process forward aggressively. See, e.g., Baldwin Decl. at Exh. JJJ (Produced without Bates numbering) (Internal DOI e-mail chain) (emphasis added)] ("This is [sic] really gotten out of hand from an orderly review standpoint. Other concerns; I don't know how John will pass on the title with the tax liens filed against them; how long it will take Boyd to complete a legal description review for all the tracts (300+), I really think they need to rethink that requirement or narrow the scope of his review (tract closes; no omitted calls, ties to known points, etc.).").

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departed from its standard practice of obtaining PTOs before a final decision to take land into trust, without explanation.

Regardless of the reason, however, it is beyond dispute that the DOI ignored its standard practice of obtaining PTOs before issuing a decision on the Application, and failed to explain its departure from that practice.

C. The DOI Did Not Require the OIN To Satisfy Outstanding Tax Liens as Required by 25 C.F.R. 151.13

The DOI stated numerous times, and the United States does not dispute, that "it is Departmental policy not to accept into trust lands that are encumbered by tax liens." Baldwin Decl. at Exh. MM (AR005716) (Letter from James Cason to Ray Halbritter [June 10, 2005]). Indeed, Mr. Cason advised New York Congressman John McHugh that the "Department typically requires that the taxes be paid or an agreement reached between the tax assessor and the applicant before it publishes a notice of intent to acquire land in trust." Id. at Exh. HH (AR049174); see also id. at Exh. NN (AR049067) (Letter from James Cason to Sen. Charles Schumer [Sep. 26, 2006]). Section 151.13 states:

> If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.

25 C.F.R. § 151.13 (emphasis added). There is no ambiguity in section 151.13: if the liens render the land unmarketable, the Secretary has no discretion and "shall require" the elimination of those liens prior to "approval" of a request to take land into trust.[39]

[39] Section 151.12(b) states that "[f]ollowing completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made . . . ."

The tax liens on OIN lands that the DOI seeks to take into trust render those lands unmarketable. See Midurban Realty Corp. v. F. Dee & L. Realty Corp., 247 N.Y. 307, 311 (1928). In lieu of requiring "elimination" of the liens affecting marketable title, the DOI capriciously decided to accept questionable letters of credit and commitments to procure additional letters of credit from the OIN. Letters of credit do not remove tax liens. NY Real Property Tax Law § 1110 ("Real property subject to a delinquent tax lien may be redeemed by payment to the enforcing officer . . . .") (emphasis added). Such a decision not only violates section 151.13, but is also contrary to the DOI's longstanding policy as the Counties were not consulted and did not agree to the letters of credit.

The DOI's decision to accept letters of credit was also made without any scrutiny or analysis of the letters in the Administrative Record. The only analysis of the letters of credit produced by the Federal Defendants is contained in the Counties' objections. See Baldwin Decl. at Exh. KKK (AR010120-23).[40] The ROD baldly concludes that the "[l]etters of credit are

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The plain language meaning of Part 151 is that title examination and the elimination of liens, encumbrances and infirmities that make the land unmarketable under section 151.13 must be completed before the Secretary can make a final determination to take land into trust. Such a reading is consistent with the DOI policy communicated to Congressmen Boehlert and McHugh.

40 The letters of credit were a relatively late development in the decision-making process. The first discussion of the letters of credit that Plaintiffs can locate in the Administrative Record occurred on March 6, 2008, when Michael Smith, counsel for the OIN, forwarded a letter sent to the DOJ informing the DOJ that the OIN were obtaining letters of credit that it would provide "within the next two weeks." Baldwin Decl. at Exh. PP (AR060865-67). There is no reflection in the Administrative Record of any analysis conducted regarding the letters of credit from the date of that letter until the letters of credit were incorporated into a draft version of the ROD, except notes on a draft ROD by Kurt Chandler that are redacted by the Federal Defendants on grounds of attorney-client privilege. Baldwin Decl. at Exh. TTTT (ARS002894-96); id. at Exh. UUUU (privilege log excerpt). Indeed draft versions of the ROD reflect the DOI's misguided conclusions as to and acceptance of the letters of credit: "All properties being brought into trust must have all legal post-Sherrill tax liens cleared as a condition of acceptance by the Department. To meet this requirement the Nation's Letter of Credit paid all back taxes for all properties." Id. at Exh. MMM (ARS001590) (Undated draft ROD) (emphasis added). Assuming that the letters of credit "paid" back taxes for the OIN properties ignores not only major non-payment risks faced by the Counties, but the nature of the instruments themselves. The same draft ROD also presumed that the Counties could not claim they would be injured by removal of the land from the tax rolls if they rejected the letters of credit. Id. at ARS001592 (Governments that "have rejected the Letter of Credit . . . have received no tax benefit to date as a result of Sherrill. Accordingly, their annual operating budget cannot claim to be dependent on the Nation's property taxes.").

adequate provision for tax liens on the Subject Lands," (id. at Exh. L (ROD at 55)), but contains no analysis of these letters of credit, attached as Exh. QQ (AR048511-30) and Exh. RR to the Baldwin Declaration. Moreover, many of these unsubstantiated conclusions contained in the ROD are not rationally connected to the letters of credit. For example, the ROD concludes that "[t]he letters of credit are guarantees of payment after placement of the lands in trust." Baldwin Decl. at Exh. L (ROD at 54). This is not true. There is no discussion in the ROD or analysis produced in the Administrative Record of the significant risks of nonpayment as a result of accepting the letters of credit in lieu of actual payment on the liens, including credit risk, termination risk, risk that the issuer, RBS Citizens, NA ("Citizens"), will not honor the letters because a lack of clarity of the drawing conditions and the very substantial risk of inability to satisfy unrealistic drawing conditions. No other delinquent taxpayer is allowed to obtain letters of credit in lieu of actual payment; the DOI carved out a special exception for the OIN.

As an initial matter, obtaining payment under a letter of credit is dependent on the solvency of the issuer at the time of drawing. Citizens presents a significant credit risk that was not evaluated by the DOI and that may, in fact, be coming to fruition. As of July 15, 2008, Citizens was rated AA- by Standard & Poors with a negative outlook. By March 2009, the negative outlook had been realized and Citizens was rated A- by Standard & Poors and A-2 by Moody's. (Dkt. No. 141-3, ¶ 52.) As of July 2009, Moody's rated Citizens as B-, and currently, Moody's rates Citizens as C+. Baldwin Decl. at Exh. LLL. It is very possible that Citizens will not be able to pay the Counties on the letters of credit when the pending tax litigations between the Counties and the OIN are concluded. This is precisely why the DOI erred as a matter of law in ignoring section 151.13 and accepting the unauthorized letters of credit.

There also exists a risk (not considered by the DOI) that the letters may be terminated. Each of the letters expired on September 30, 2009 and was automatically extended one year under the same terms. Citizens can unilaterally terminate each letter on that one year anniversary by giving the Counties 30 days' written notice. See Baldwin Decl. at Exh. QQ (AR048513, AR048521); id., Exh. RR at 2 (same).

So also, the drawing conditions for the letters of credit are significantly qualified and the amounts to be paid are subject to an opinion of independent counsel. Even if the Counties were successful in the ongoing litigation concerning the amount of taxes and penalties owed by the OIN and Citizens was able to pay out on the letters, there exists a substantial likelihood that the drawing conditions of the letters of credit would remain unsatisfied: There is no assurance that any final judgment in the federal or state litigation would make the determinations required by Exhibit A to the letters of credit, to wit, that the properties are not subject to a tax exemption, and a determination of the proper level of assessment.[41] It also may not be possible to obtain the opinion of an independent counsel with respect to the final judgment and the amount required to be paid, considering the amount to be paid is a mixed issue of law and numerous facts. In any event, the authority of a sovereign (through its political subdivisions) to collect lawfully-owned taxes should not be dependent on the "opinion" of an unelected or unappointed, non-governmental "independent counsel."

The ROD and Administrative Record do not demonstrate the reasoning or justification for the DOI to depart from its standard practices and mandatory regulations, especially the policy that "taxes be paid or an agreement reached between the tax assessor and the applicant before the

[41] The OIN have taken the position that determining the proper level of assessment is difficult: "Even if the principal balance of every tax bill ever sent to the Nation were known and totaled, there still remain important questions about what is 'due,' especially after appropriate equitable principles are applied." Baldwin Decl. at Exh. NNN (AR049402, n.1) (Letter from Zuckerman Spaeder to DOI).

[DOI] publishes a notice of intent to acquire land in trust." Baldwin Decl. at Exh. HH (AR049174). The tax assessors have not agreed to the letters of credit. Again, the inescapable conclusion is that the DOI departed from established practice simply because the OIN did not want to have to follow that procedure, much as the OIN have refused to abide by the Supreme Court's holding in Sherrill. See infra Section IV.A.2.

The ROD further relies, without analysis or substantiation, upon the OIN's "commit[ment] to obtain replacement or supplemental letters of credit to cover the sums billed by both Counties prior to the conclusion of the pending tax litigation." Baldwin Decl. at Exh. L (ROD at 53). Such unenforceable commitments by the OIN do not satisfy or otherwise eliminate the liens on the OIN land. See In re Sunflower Racing, Inc., 219 B.R. 587, 601-02 (Bankr. D. Kan. 1998), aff'd 226 B.R. 673 (D. Kan. 1998) (finding commitment to obtain future letters of credit not indubitably equivalent to satisfaction of creditor's mortgage liens that would render property unmarketable under section 151.13). It is contradictory for the DOI to rely upon the OIN's commitments to procure additional or renewal letters of credit when it premised many of its conclusions upon the OIN's previous statement that the OIN would suffer a loss of lands instead of paying lawful property taxes if the Counties prevailed in the tax foreclosure litigation. See Baldwin Decl. at Exh. AA (AR076402) (Letter from Zuckerman Spaeder to Malcolm Pirnie).

The DOI merely concludes in the ROD 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" (id. at Exh. L (ROD at 54)) (emphasis added), which is also not in compliance with the mandatory "elimination"

requirement under section 151.13.[42] Nor is it in compliance with the requirement under section 151.12(b) (or the policy communicated by Mr. Cason) that the liens must be eliminated before the Secretary publishes a notice of final determination to take land into trust.[43] Although an agency is normally accorded deference in the interpretation of its own regulations, the Court need not defer to the DOI where the DOI's reading is clearly erroneous and contrary to the unambiguous language of the regulation. See Lin v. Dep't of Justice, 459 F.3d 255, 262 (2d Cir. 2006) (court would "afford 'substantial deference' to the Board of Immigration Appeals' interpretation unless it is plainly erroneous or inconsistent with the regulation or inconsistent with the agency's previous interpretation"). Section 151.13 plainly calls for "elimination" of the liens. Since the DOI did not require the OIN to properly eliminate the tax liens, the Determination is arbitrary and capricious.[44] See, e.g., Cloutier v. Apfel, 70 F. Supp. 2d 271, 277 (W.D.N.Y. 1999) (finding "clear error" where agency failed to address factors contained in agency's regulations).

IV. THE DOI RELIED ON IRRATIONAL ASSUMPTIONS AT THE CORE OF ITS DECISION MAKING PROCESS, VIOLATING THE NATIONAL ENVIRONMENTAL POLICY ACT AND RENDERING THE DETERMINATION ARBITRARY AND CAPRICIOUS

In approving the FEIS and drafting the ROD, the DOI relied upon a set of unprincipled and irrational scenarios in which it assumed that the OIN would suffer a loss of its enterprises

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42 The DOI's intimation that liens need only be addressed to the satisfaction of the federal government (see Baldwin Decl. at Exh. L (ROD at 54)) is similarly contrary to this plain language of section 151.13.

43 The DOI published a "Notice of Final Agency Determination to Take Land into Trust" in the Federal Register on May 23, 2008, before tax liens on the OIN properties were eliminated and section 151.13 was satisfied. See Baldwin Decl. at Exh. OOO (Notice of Final Agency Determination to Take Land into Trust under 25 U.S.C. 465 and 25 CFR part 151, 73 Fed. Reg. 30144 (May 23, 2008)). The ROD contains no reasoned explanation for this departure from policy.

44 The DOI did not decide and has not represented to this Court or otherwise stated that it will actually require elimination of the liens should the Counties prevail in the tax litigation and the letters of credit prove insufficient to satisfy the tax liens. Instead, the United States has opined that the Counties "would likely have a takings claim if their liens were effectively destroyed." (Dkt. No. 169 at 16).

and property if its land were not taken into trust. That assumption has no basis in fact since the OIN is financially able to pay property taxes and it is irrational to assume that the OIN would voluntarily destroy its enterprises valued at over $2.6 billion. The DOI, however, used these irrational scenarios to justify its conclusions as to the environmental consequences of taking land into trust and to support its ultimate determination in the ROD. In doing so, the DOI has violated NEPA and rendered the Determination arbitrary and capricious.

A. The DOI Ignored The Environmental Consequences Of Taking Lands Into Trust By Conducting An Inadequate And Superficial Review Of Environmental Impacts And By Relying On Irrational Assumptions In Violation of NEPA

NEPA requires the Secretary of the Interior to "take a hard look" at the environmental impacts and consequences of a "major action" such as the taking of over 13,000 noncontiguous acres of land into trust. See Natural Res. Def. Council, Inc. v. Fed. Aviation Admin., 564 F.3d 549, 556 (2d Cir. 2009) (finding an agency's obligation is to take a "hard look" at the environmental consequences before taking an action). The typical means of ensuring such a "hard look" is preparation of an Environmental Impact Statement ("EIS"). See 42 U.S.C. §4332(2)(C). As stated in the Council for Environmental Quality ("CEQ") regulations implementing NEPA, the EIS provides a "means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g); see also Natural Resources Def. Council v. U.S. Army Corps of Eng'rs, 457 F. Supp. 2d 198, 222 (S.D.N.Y. 2006) ("CEQ regulations prohibit an agency from preparing an EIS simply to justify decisions already made.").

Although review of an EIS is normally "narrow," an EIS is inadequate when the agency fails to compile all relevant information, analyzes the data unreasonably, ignores pertinent data, or fails to make disclosures to the public. See NRDC v. FAA, 564 F. 3d at 556. A superficial EIS that ignores relevant information, relies on false assumptions, and obfuscates analysis in

order to justify a predetermined result is not a valid "hard look". See generally Sierra Club v. U.S. Army Corps. of Eng'rs., 614 F.Supp. 1475, 1515-16 (S.D.N.Y. 1985) ("When an agency decision is based upon conclusions in an EIS which are not arrived at in good faith or in a rational and reasoned manner, that decision is necessarily arbitrary.").

In its evaluation of an EIS, an agency must assess, among other things, alternatives to the proposed action See 40 C.F.R. §1502.14. The evaluation of alternatives is the "heart of the environmental impact statement." Id. As such, an agency must, "[r]igorously explore and objectively evaluate all reasonable alternatives," and "devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." Id. An agency must, however, base its analysis of alternatives on rational assumptions; failure to do so may result in invalidation of the EIS. See Ctr. for Biological Diversity v. DOI, 623 F.3d 633 (9th Cir. 2010) (holding that an EIS examining the transfer of federal land to a mining company was invalid because the analysis of alternatives was based on the illogical assumption that there would be no change in the mining company's activity regardless of whether it was subject to a federal mining statute); cf. Save Our Ecosystems v. Clark, 747 F.2d 1240, 1245-46 (9th Cir. 1984) (holding that, in a challenge to the spraying of herbicides on United States Forest Service and Bureau of Land Management (BLM) lands, the "worst case scenario analysis" conducted by the BLM was inadequate because it was based on the unfounded assumption that there was some level of exposure to a particular herbicide that was safe for humans).

Here, after the environmental review reflected in the February 2008 FEIS, the DOI arbitrarily concluded that the transfer of more than 13,000 acres of land into trust would have no direct environmental impacts. Although at first blush the DOI's environmental review appears

comprehensive (if one merely looks at the number of pages in the DEIS and FEIS), it relies on faulty logic and false assumptions to justify the DOI's decision regarding the OIN's trust application, rather than objectively assessing the environmental impact of the proposed action. See 40 C.F.R. § 1502.2(g).

For example, the DOI "identified nine alternatives representing the reasonable range of alternatives for analysis in the [FEIS] including a No Action Alternative." Baldwin Decl. at Exh. L (ROD at 13). In analyzing the alternatives, the DOI used four "taxation/jurisdiction scenarios," three of which are unreasonable and fundamentally flawed: (1) "Casino Closes and All Enterprises Close (CC-AEC);" (2) "Property Taxes Not Paid and Dispute Continues (PTNP-DC);" and (3) "Property Taxes Not Paid and Foreclosure (PTNP-F)." See id. at Exh. L (ROD at 13-14). By accepting the FEIS for publication, the DOI endorsed the use of these flawed scenarios, and those scenarios fundamentally tainted the DOI's analysis of reasonable alternatives.

1. Casino Closes And All Enterprises Close (CC-AEC)

The Casino Closes and All Enterprises Close (CC-AEC) scenario assumes that Turning Stone, all SaveOn gas stations and convenience stores, and all other OIN enterprises would close if the lands owned by the OIN were not taken into trust. Id. at Exh. L (ROD at 14). The DOI, however, "emphasizes that this scenario would occur only if the State prevailed on its stance regarding the lawfulness of the casino." Id.[45] The CC-AEC scenario goes on to postulate that if

[45] This scenario assumes that Turning Stone is operating unlawfully, and as a result, must close. This is based on a determination from the state courts that the compact authorizing Turning Stone is invalid and that the casino is not lawful. Nevertheless, the DOI has taken the position that the casino is operating lawfully even though the land is not in trust. Id. at Exh. L (ROD at 12); Id. at Exh. VVVV (AR074093) (Letter from Jason Cason to Ray Halbritter [June 13, 2007]). Thus, the land does not have to be taken into trust in order for the casino to continue to operate based on the DOI's position. This is a further reason why the scenario assuming the casino will close is irrational. Additionally, the state court ruling regarding the unlawfulness of the casino does not impact the legal status of OIN SaveOn gas stations, convenience stores, and other profitable enterprises, the closure of which is also contemplated by this scenario.

the casino closed, the OIN would not have revenue to pay taxes and that 17,370 acres would either be foreclosed or sold in advance of foreclosure. Id.

While the DOI asserted that the CC-AEC scenario is only one of four possible outcomes, the remainder of the ROD evaluated the "no-action alternative" (alternative G) with heavy reliance on the CC-AEC scenario. When evaluating alternatives, the no-action alternative is significant because it outlines the consequences of maintaining the status quo. See Ctr. for Biological Diversity, 623 F.3d at 642 ("A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action. The no action alternative is meant to 'provide a baseline against which the action alternative . . . is evaluated.'"). Here, the DOI's analysis of the no-action alternative predicts poor outcomes for the OIN, the closing of Turning Stone and all other enterprises resulting in the loss of jobs and tax payments by employees.

The real likelihood of Turning Stone and all other OIN enterprises closing is essentially nil.[46] Moreover, the DOI has taken the position that the casino is operating lawfully despite the fact that the land is not in trust. See Baldwin Decl. at Exh. L (ROD at 12). As of June 30, 2006, Turning Stone had an estimated worth of between $2.15 billion and $2.31 billion and generated $330 million in revenue annually. Id. at Exh. FFF (AR013094, AR013109-10) (Jarrell Report at ¶¶ 49, 92). In addition, as of December 31, 2006, the OIN's other enterprises were worth approximately $239.8 million. See id. at Exh. FFF (AR013106) (Jarrell Report at ¶ 82); see also id. at Exh. II (Supplemental Jarrell Report ¶ 30) (citing increased revised figures for value of

[46] As Professor Gregg Jarrell (University of Rochester, Simon School of Business) stated in his expert report submitted to DOI by the State, "the DEIS 'scenario' that contemplates closure of some or all of the OIN Enterprises because the Enterprises are not economically viable (cannot produce adequate profits after payment of property taxes) is invalid." Baldwin Decl. at Exh. FFF (AR013121) (Jarrell Report, at ¶ 117). This conclusion was based upon Professor Jarrell's extensive valuation of OIN enterprises. Id. at Exh. FFF (AR013094-AR013110) (Jarrell Report, at ¶¶ 48-93). See also id. at Exh. II (Supplemental Jarrell Report ¶¶ 32-33 72).

OIN enterprises). It is irrational to suggest that the OIN is more likely to abandon these multi-billion and multi-million dollar ventures than attempt to operate them within the confines of State and local laws. In fact, the DOI repeatedly acknowledges that it "disputes" the CC-AEC scenario. (ROD at 17). Nonetheless, the DOI's evaluation of the no-action alternative to justify its decision to take the land into trust for the OIN is based in large part on the CC-AEC scenario. By using the artificial and unlikely CC-AEC scenario to assess the no-action alternative, the DOI deliberately skewed its analysis against maintaining the status quo in favor of an alternative that took land into trust. Rather than conducting an objective analysis of alternatives, the EIS is a post-hoc rationalization of the agency's preferred alternative. Because the DOI analysis of alternatives is founded on flawed assumptions, it is impossible to fairly evaluate the comparative merits of each alternative.

The Ninth Circuit, in Center for Biological Diversity, emphasized the importance of basing an EIS on reasonable assumptions.[47] There, the court held that the agency failed to take a "hard look" at the environmental consequences of its proposed action by using a flawed assumption, and thus, the agency action was deemed arbitrary and capricious and violated NEPA. Similarly, the DOI's EIS analysis rests upon several irrational and flawed assumptions regarding closure of the casino. This Court should conclude that the EIS was inadequate and require DOI to prepare a new or supplemental EIS that assesses reasonable alternatives, based

[47] The flawed assumption in that case stemmed from the Bureau of Land Management's (BLM) transfer of federal land to a mining company that already conducted mining operations on that land. In conjunction with its decision, the agency prepared an EIS which compared the proposed land transfer with a no-action alternative in which the United States would remain the owner. If the land remained publicly owned, the mining company could continue to mine the land, but the federal government would then be able to regulate its actions under a federal mining law (the Mining Law of 1872) that imposed certain regulatory requirements on mining companies (i.e., the submission of a Mining Plan of Operation). In contrast, if the land were transferred to the mining company, the mining activities would not be regulated in that manner. The court concluded that the agency improperly assumed that there would be no change in the mining company's activity regardless of whether it was regulated. According to the court, "[t]he BLM's assumption in the FEIS that the environmental consequences of the land exchange alternative and the no action alternative would be the same was arbitrary and capricious." 623 F.3d at 642.

upon proper assumptions, rather than irrational ones that justify the DOI's determination. See, e.g., Center for Biological Diversity, 623 F. 3d at 633.

2. Property Taxes Not Paid And Dispute Continues (PTNP-DC)

The PTNP-DC scenario in the FEIS and the ROD assumed that, despite the Supreme Court's decision in Sherrill, were the DOI to deny all or part of the OIN's land-into-trust application (causing denied lands to be subject to state and local taxation and regulation), the OIN would continue to dispute State and local jurisdiction and refuse to pay lawful taxes. As a threshold matter, it is not rational to assume that this dispute over sovereignty will continue indefinitely, and an irrational assumption should not provide a justification for taking significant amounts of land into trust for the OIN. Although the dispute between the OIN, New York State, and its localities has continued for a long time, at some point, the litigation will end and the at-issue lands will either be subject to state and local jurisdiction, or they will not. The dispute cannot continue indefinitely. See, e.g., Oneida Indian Nation of New York v. County of Oneida, 617 F.3d 114, 125-131 (2d Cir. 2010), cert. denied 2011 U.S. LEXIS 7494, 2011 U.S. LEXIS 7567 (Oct. 17, 2011) (dismissing the Oneida land claim).

Additionally, it is beyond dispute that the OIN has refused, and presently refuses, to pay lawfully-owed taxes, and has failed to comply with many state and local laws (and even some federal laws). Therefore, in evaluating alternatives, the OIN's refusal to comply with federal, state and local laws was a relevant factor that should have raised "red flags" and militated against the decision to grant the OIN's land-into-trust application. Instead, throughout its analysis in the FEIS and ROD, the DOI twisted the OIN's demonstrated defiance of federal, state and local laws into a factor that actually supported the application through the DOI's concern that if the OIN did not prevail, it would continue to flout all laws. However, it is unlikely that the DOI's appeasement of the OIN will cause the OIN to obey federal law and consider, but not be bound

by, requirements of state and local land use, health, safety and environmental laws. In short, it is arbitrary and irrational to ignore the OIN's past, present and promised future defiance of laws, and to grant the land-into-trust request in the hope that the OIN will now choose to comply with at least some laws.

Based on the OIN's incorrect assertion that its recently acquired fee lands were exempt from state and local regulatory laws (an argument rejected by the Supreme Court in Sherrill), the OIN chose not to comply with state or local land use or environmental laws and, in some cases, federal environmental laws and regulations. This conduct continued even after the Sherrill decision when the legal status of the OIN lands was no longer in dispute. The DOI failed to sufficiently account for the OIN's repeated violations of State and local environmental laws and regulations. The ROD recognized the State and local government statements that the OIN has not complied with State and local laws and zoning regulations. See ROD at 27. Nevertheless, the DOI references two sections of the FEIS (sections 3.9.5 and 4.9.5) analyzing the OIN's past management of its lands which allegedly "show that there have not been significant adverse effects on environmental resources," and another four sections of the FEIS (sections 3.2, 3.8.6, 4.2, and 4.8.6) analyzing land resources and land use which "show that the permitted uses of Nation lands under Nation law are generally consistent with the uses of surrounding non-Nation lands, with the primary exception being the Turning Stone Resort & Casino." Baldwin Decl. at Exh. L (ROD at 28). This conclusion is devoid of merit and belied by the Administrative Record.

As the evidence in the Administrative Record cited below demonstrates, the OIN has failed to comply with State and local laws, and it has consistently ignored State wetland, ground and surface water, wildlife, air quality, and solid and hazardous waste management laws and

regulations. This conduct has undoubtedly had a significant adverse effect on the environment and the OIN's non-compliance with such laws should not have been considered as a factor supporting the OIN's trust application. Rather, it should have weighed against the OIN's trust application. At the time the ROD was issued, the DOI was aware that the OIN:

(1) Constructed and operated a major air pollution source (a co-generation plant) without the requisite state and federal permits. See Baldwin Decl. at Exh. PPP (AR001162-63) (O'Brien & Gere February 2006 Report at 19-20); id. at Exh. QQQ (AR067784) (Letter from Madison County Attorney to BIA);

(2) Buried demolition debris on its land in violation of appropriate waste management standards. See id. at Exh. PPP (AR001175) (O'Brien & Gere February 2006 Report at 32);

(3) Refused to comply with state regulations governing underground petroleum bulk storage facilities at its SaveOn gas stations which are designed to prevent petroleum spills. See id. at Exh. PPP (AR001179-1180) (O'Brien & Gere February 2006 Report at 34-35); id. at Exh. RRR (AR000255, AR000261) (Letter from NYSDEC to DOI);

(4) Constructed Turning Stone without first obtaining necessary permits and approvals or complying with applicable State and local laws. See id. at Exh. SSS (AR000358-59) (O'Brien & Gere January 2006 Report at 36-37);

(5) Damaged the surrounding wetlands when it constructed Turning Stone and a golf course. See id. (AR000334-336);

(6) Damaged air quality in surrounding areas such as the Vernon-Verona-Sherrill Central School District campus. See id. (AR000340-341);

(7) Constructed numerous golf courses without any permits or legally mandated environmental review. See id. (AR000334);[48]

(8) Violated other laws critical to the public welfare including dumping, wetlands, and storm sewer regulations, fire safety and building codes, and laws regulating the storage of gasoline. See id. at Exh. PPP (O'Brien & Gere February 2006 Report at 26-35); Exh. RRR (AR000260-63) (Letter from NYSDEC to DOI); Exh. QQQ (AR067784) (Letter from Madison County Attorney to BIA).

Accordingly, the DOI's suggestion that the transfer of land into trust would not result in any environmental changes wholly ignores the OIN's past conduct and irrationally assumes the OIN's future conduct will conform to the requirements of law and regulation. The record before the DOI demonstrates that the transfer of lands into trust for the OIN and removal from State and local jurisdiction will indeed have direct and significant adverse environmental impacts. The DEIS, FEIS, and the ROD each failed to consider proper alternatives that would mitigate environmental impacts and consequences, as required by NEPA. As such, the ROD was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

3. Property Taxes Not Paid And Foreclosure (PTNP-F)

In this taxation/jurisdiction scenario, "the [OIN] would not pay property taxes on the lands not acquired in trust and New York State and local governments would exercise jurisdiction over those lands," and such properties might be foreclosed upon or sold by the OIN in advance of foreclosure. Baldwin Decl. at Exh. L (ROD at 13). This scenario likewise rests upon flawed assumptions. As with the PTNP-DC scenario, PTNP-F assumes that the OIN would choose not to pay real property taxes on any of its properties even though such taxes were found

[48] Defendants' Answer to Plaintiffs' Second Amended and Supplemental Complaint admits that the OIN built a co-generation plant and golf courses, and, of course, Turning Stone. See Compl. ¶ 261; Ans. ¶ 261.

to be due and owing by the Supreme Court. In contrast to the PTNP-DC scenario, however, PTNP-F assumes that not only would the OIN willfully refuse to pay property taxes, but that the OIN would also, as a result of such defiance, lose its land through tax foreclosure sales. Even Mr. Cason recognized the irrationality of this position. When asked about this scenario during his deposition, Mr. Cason conceded that this scenario was "not realistic." See Baldwin Decl. at Exh. TTT (Cason Dep. Trans., at 164:17- 19); see also id. at 163: 17-19. Mr. Cason explained that foreclosure was not a realistic possibility because "the Oneidas and the counties would have pursued and completed their litigation on the topic; and at the end of that process, if it was found that they legally owed the property taxes, that a rational man standard would apply and they would pay those rather than forfeit the property." Id. at 163:25-164:6.[49] Moreover, in response to a "final entreaty" to take more OIN SavOn gas stations into trust by former DOJ and DOI official, personal acquaintance of Mr. Cason, and lobbyist for the OIN, Thomas Sansonetti, Mr. Cason noted that "the future opportunity to continue Sav-On operations do not depend on our trust decisions. If the [sic] are competitive operations they can operate in fee." Baldwin Decl. at Exh. SS (ARS004558-63). Plaintiffs agree.

DOI's "doomsday scenario" actually came about from the direct input of OIN's lawyers (Zuckerman Spaeder) during meetings with, and letters submitted to, Malcolm Pirnie. As documented in prior submissions to this Court,[50] this scenario was discussed during a two-day meeting between OIN's lawyers and Malcolm Pirnie on June 7-8, 2006 and documented in a

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49 Mr. Cason also recognized the obvious conclusion that, at some point, the litigation will conclude, thus calling into question the logical foundation of the PTNP-DC scenario as well. See Baldwin Decl. at Exh. TTT (Cason Dep. Trans., at 163:25-164:6).

50 Plaintiffs have previously described Zuckerman Spaeder's influence on this issue in detail to the Court and will not repeat it here. See Declaration of David M. Schraver in Support of Plaintiffs' Motion to (A) Compel Production of Administrative Record Documents and (B) Authorize Discovery dated October 30, 2009 ¶¶ 21-31 (Docket No. 141-3).

June 14, 2006 Zuckerman Spaeder letter. See Baldwin Decl. at Exh. AA (AR076401-076405). On the same day (June 14, 2006) a Zuckerman lawyer sent the letter to Malcolm Pirnie's Chief Scientist and Senior Associate, who in turn directed other Malcolm Pirnie workers to "READ THIS IMMEDIATELY" while advising that the letter attached was "Zuckerman notes with respect to tax scenarios. May influence your thinking on your sections." See Baldwin Decl. at Exh. UUU (FOIA-021424). This scenario was then inserted into the DEIS, carried forward into the FEIS, and ultimately adopted in the ROD.

As with the PTNP-DC scenario, PTNP-F should have been rejected outright because the Supreme Court's Sherrill decision held the OIN's land is subject to real property taxes; the scenario assumes property taxes are due and owing; and the land is subject to foreclosure for non-payment.[51] If, as the DOI concludes, Turning Stone "is now operating lawfully under IGRA," (Baldwin Decl. at Exh. L (ROD at 12), then the OIN is financially able to pay property taxes without impairing its enterprises or frustrating its goals of economic self-sufficiency. As explained in the Jarrell Report, the OIN can still generate income in excess of $60 million each year even after paying real property taxes. See id. at Exh. FFF (AR013111-013112)(Jarrell Report, at ¶ 96-99). Therefore, the threat to continued Indian ownership of the land is entirely self-inflicted by the OIN, namely, the OIN's voluntary decision to not pay real property taxes that are owed under the Supreme Court's decision in Sherrill. That the OIN would engage in repeated, obstinate acts of civil disobedience that would ultimately cause the loss of all OIN-owned fee properties and choose to destroy its $2 billion casino and resort enterprise out of spite

[51] Mr. Cason informed OIN Representative Ray Halbritter of this in a letter dated June 10, 2005: "[I]t is our opinion that Court [sic] in Sherrill unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real property taxes." Baldwin Decl. at Exh. MM (AR005715).

is not a credible scenario.[52] Accordingly, the DOI's decision to treat the prospect of persistent defiant conduct by the OIN as a reason to grant the Application to take land into trust exposes the DOI's decision-making as not only irrational, but also biased.

In sum, three out of the four taxation/jurisdiction scenarios used in the FEIS and the ROD are fundamentally flawed and taint the DOI's reasonable alternative analysis. Accordingly, the DOI is required to prepare a new or supplemental EIS that assesses reasonable alternatives as required by NEPA, based upon proper assumptions, rather than the irrational ones underlying the DOI's Determination.

B. The Determination Is Arbitrary And Capricious Because It Relies Upon The Unrealistic Assumptions Contained In The FEIS

Even assuming, arguendo, that the DOI was not required under NEPA to prepare an EIS, the irrational and unreasonable assumptions contained in the FEIS are relied upon throughout the ROD. Under the APA's arbitrary and capricious standard of review, decisions which are irrational, tenuous or unwarranted are invalid if "an irrational derivative inference is sufficiently central to the [agency's] conclusion." New England Health Care Emps. Union 1199, S.E.I.U., A.F.L.-C.I.O. v. N.L.R.B., 448 F.3d 189, 194 (2d Cir. 2006). See also Tarbell v. Dep't of Interior, 307 F. Supp. 2d 409, 420-26 (N.D.N.Y. 2004) (BIA's decision must bear "rational connection" to evidence).

The extraordinary assumption underlying the CC-AEC and PTNP-F scenarios is that OIN businesses will shut down if land is not taken into trust. This assumption underpins the DOI's conclusions as to the section 151.10 factors, specifically the socioeconomic impacts of the Determination, even where the CC-AEC and PTNP-F scenarios are not expressly referenced.

[52] If, as the DOI concludes, the OIN would pay more in "payments" than the Counties would be due in property taxes (see Baldwin Decl. at Exh. A (FEIS at 5-3)), it is illogical to assume, from a rational economic actor perspective, that the OIN would make those voluntary payments instead of paying lesser amounts in mandatory property taxes.

For example, the ROD concludes that "the net contribution under the Proposed Action would be higher than the Preferred Alternative, which in turn would be higher than the County-Proposed Alternative." Baldwin Decl. at Exh. L (ROD at 23).[53] Such a conclusion assumes that the OIN "contributions" – consisting primarily of income, property and sales taxes paid by OIN employees – would cease if the land is not taken into trust. These illogical assumptions pervade the ROD and are the lynchpin for the DOI's findings that view any existing benefits of OIN operations (to local governments or to the tribe itself) as benefits of taking land into trust. As discussed below, such treatment is fundamentally unsound. There is simply no economic basis to assume that the OIN would shut down its enterprises, forfeit substantial revenues, sacrifice the benefit of the enterprises to tribal members, and forfeit its lands simply out of spite. Mr. Cason recognized this fact in his deposition and Plaintiffs agree with his assessment. Baldwin Decl. at Exh. TTT (Cason Dep. Trans., at 164:19).

V. THE DOI FAILED TO ADEQUATELY CONSIDER THE FOLLOWING FACTORS SET FORTH IN 25 C.F.R. 151.10

Where an agency regulation has specified a list of enumerated factors for the decision-maker to consider, the agency must consider every factor. If the agency fails to consider any factor, its action is arbitrary and capricious. See Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032, 1038-40 (10th Cir. 1995) (court had "consistently admonished the Secretary to analyze all relevant factors [under the BIA guidelines issued under the Indian Mineral Leasing Act of 1938] and [had] reversed rulings that either disregarded certain factors or treated one factor as determinative."); State Farm, 463 U.S. at 43 (court must overturn an agency decision if

[53] In fact, a draft version of the ROD assumed that if the OIN lands were not taken into trust, Turning Stone would close, and there would be "a high probability that most, if not all, of these employees would be laid off, and become a burden to State and local government." Baldwin Decl. at Exh. MMM (ARS001590). This assumption, pervasive throughout the ROD, excludes any number of other reasonably probable outcomes that would result from the OIN lands not being taken into trust, including that the OIN enterprises would not close down.

the agency failed to consider the relevant factors or clearly erred in its judgment). Section 151.10 lists criteria that "[t]he Secretary will consider" and section 151.11 states that the Secretary "shall" consider those factors, affording greater weight to comments from affected governments. Accordingly, the DOI is required to analyze each individual factor set out in the relevant regulatory framework in deciding a land-into-trust application, and its conclusion on each factor must be a rational outgrowth of the relevant evidence available to the DOI. Moreover, the DOI's finding on each factor must have a rational evidentiary basis. See Carlton v. Babbitt, 900 F. Supp. 526, 531 (D.D.C. 1995) (decision arbitrary and capricious because agency had explained consideration of some statutory factors, but not others); Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 683 (D.D.C. 1997) (decision is arbitrary and capricious where it "merely states the category heading and then ignores the evidence and analysis of its experts in making conclusory statements about each factor").

Assuming, arguendo, that section 151.10 applies, if the DOI's conclusion as to one factor under that regulation is irrational, its aggregate determination must also be rendered invalid. Otherwise, the DOI would be empowered to effectively ignore factors legally mandated for its consideration by making conclusory statements that those factors support its predetermined conclusion or by declaring that they do not apply, as it has done here in an abdication of its responsibilities under the IRA and 25 CFR Part 151.

A. The DOI Did Not Consider Whether the OIN Was A Recognized Tribe Under Federal Jurisdiction As Of June 18, 1934 Under 25 C.F.R. § 151.10(a)

The first consideration under the DOI's land-into-trust regulations is the "existence of statutory authority for the acquisition and any limitations contained in such authority." 25 C.F.R. § 151.10(a). The Determination purports to take land into trust for the OIN under section 5 of the IRA, 25 U.S.C. § 465. As discussed above, an indispensable requirement for the Secretary to

acquire land in trust for a tribe under the IRA is that the tribe was recognized and under federal jurisdiction as of June 18, 1934. See Carcieri, 555 U.S. at 392. The State first noted in its comments on January 30, 2006 that the DOI had no statutory authority to take land into trust for the OIN because, inter alia, there were serious questions regarding whether the OIN was a recognized tribe under federal jurisdiction on June 18, 1934. Baldwin Decl. at Exh. O (AR000286 n.2); see also id. at Exh. P (AR001113 n.2) (February 28, 2006 State comments). The ROD and the Administrative Record are devoid of any analysis or evidence that the DOI considered the recognition of or the status of federal jurisdiction over the OIN in 1934. The Federal Defendants all but admit that the issue was not considered by the DOI: "the ROD does not explicitly address the question of whether the Oneidas were under federal jurisdiction in 1934 (because it [was] issued before Carcieri was decided)." (Dkt. No. 169 at 35.) Regardless of when the Supreme Court decided Carcieri, its "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 & n.12 (1994) ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.").

Even if the Court does not grant Plaintiffs' Motion on the grounds that the OIN was not recognized and under federal jurisdiction on June 18, 1934, it must vacate the Determination because the DOI failed to consider this threshold issue.

B. The DOI Did Not Adequately Consider The OIN's Need For Additional Land Under 25 CFR 151.10(b)

A central consideration under section 151.10 is the need of the tribe for additional land. 25 C.F.R. § 151.10(b). The Administrative Record and the ROD are devoid of a justification of

tribal need supporting the DOI's unprecedented determination to take over 13,000 acres into trust for the OIN, except unsubstantiated and generalized conclusions.[54]

The DOI concluded that "no demonstration or finding of need for land in trust status is required where, as here, the land to be acquired is located within or adjacent to the tribe's reservation." Baldwin Decl. at Exh. L (ROD at 34). Such a reading is not supported by the plain language of Part 151 requiring consideration of "the need of the individual Indian or the tribe for additional land" and, as demonstrated above, almost none of the Subject Lands are within or adjacent to any OIN reservation, as reservation is defined in the DOI's regulations. See supra Section II.A.[55] Even if the DOI's reasoning were not flawed for these reasons, and the DOI were not required to evaluate the OIN's need for the land to be held in trust status, it decided to do so. See Baldwin Decl. at Exh. L (ROD at 35-39). Having decided to apply the "need" criterion, to be sustained the Determination must rest on sound reasoning and must bear a rational connection to the evidence before it. An agency's decision must be considered on the basis offered by the

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[54] The DOI's lack of meaningful evaluation of this mandatory factor is also demonstrated by its failure to account for trust land that had purportedly been transferred to it six years earlier under 40 U.S.C. § 523. Compare Baldwin Decl. at Exh. VVV (AR010041) (Fax from BIA to OIN Counsel) ("BRAC properties undecided."); id. at Exh. A (FEIS at 4-13) (Verona Test Site "could be transferred to the BIA to be held in trust for the benefit of the tribe . . . however, it is neither clear if nor when this land will be held in trust for the [OIN]"), with Dkt No. 111-8 (Letter from Dennis R. Smith, GSA to David Moran, BIA (May 28, 2002)) ("The GSA hereby transfers the Property to the BIA to be held in trust by the Department of the Interior, for the benefit and use of the Oneidas"); (Dkt. No. 72) (Letter from Steven Miskinis to Court (January, 7, 2009)) ("The trust acquisition was mandated by 40 U.S.C. § 523, and accordingly was non-discretionary."). Notably, a draft ROD noted that "[t]here are 513 acres of Air Force property in Oneida County, not included on the tax rolls, which may be provided to one or both Oneida tribes, as part of the Base Realignment and Closure (BRAC) land distribution regulations. The exact distribution of these properties has not yet been determined." Baldwin Decl. at Exh. MMM (ARS001597) (Draft ROD) (emphasis added). If, as the DOI argues, this transfer (specifically, a transfer to the OIN) was mandatory and occurred in 2002, then the former Air Force lands purportedly in trust for the OIN should have been properly analyzed in consideration of the purpose and need of the OIN for additional lands taken into trust.

[55] The related assertion offered by the DOI that "no demonstration or finding of need for the land in trust status is required where, as here, the land to be acquired is located within or adjacent to the tribe's reservation," citing 25 C.F.R. § 151.3 (Baldwin Decl. at Exh. L (ROD at 34)), is misplaced. As noted above, the OIN fee land is not within the OIN reservation as defined by the DOI regulations; and in any event, section 151.3 sets forth threshold criteria for what tribes are eligible to have land taken into trust; it does not alter the criteria set forth in section 151.10.

agency. See generally Butte County, 613 F.3d at 196-97 (holding that an "agency's action must be upheld, if at all, on the basis articulated by the agency itself"). The ROD does not withstand such scrutiny.

1. The DOI Was Pre-Disposed To Take Significant Amount Of Land Into Trust Prior To Any Analysis of Need

Instead of engaging in a balanced and reasoned evaluation, the documents in the Administrative Record reveal that at the outset – before any formal notice had been given to State and local governments of the Application or the submission of written comments by those entities or the decision to prepare an environmental impact statement – the DOI arbitrarily determined that it would take approximately 10,000 acres into trust. See Baldwin Decl. at Exh. K (Produced without Bates numbering) (Internal DOI e-mail) ("Jim Casson [sic] told the Oneida to prioritize their properties for the fee-to-trust process. He said he only felt comfortable bringing in 10,000 of the 17,000 plus acres at this time so the Oneida have about 10,000 in their Groups 1 & 2 priority properties."). The 10,000 acre figure would later be referred to by the DOI as a "limit" or "direction" from Mr. Cason. Id. at Ex G (ARS001065) (Internal DOI e-mail) ("[T]he total acres in group 1 & 2 just under the 10,000 acres that Mr Casson [sic] considered his limit of being comfortable with at this point in time."); id. at Exh. WWW (Internal DOI e-mail) ("Tom is just basing his options on that old direction from Mr. Cason of around 10,000 acres."). Indeed, as late as March 2007, a 10,000 acre alternative was the preferred alternative for the DOI. See id. at Exh. XXX (Internal DOI e-mail). It was not until the following month that that figure changed, enlarged to 13,000 acres, to make the "Oneida somewhat happier." Id. at Exh. N (Internal DOI e-mail).

2. The Justification For The Need to Accept 13,000 Acres Into Trust Is Unsupported By Analysis Or The Facts in the Administrative Record

The DOI's discussion of "necessity" almost concedes the absence of any need to take 13,000 acres of land into trust. Section 7.3.1 of the ROD all but admits that neither the number of tribal members nor the economic status of the OIN support the Application. See Baldwin Decl. at Exh. L (ROD at 35) ("[W]hile tribal membership and residence is a permissible consideration in the context of need, no mathematical formula compels a determination of how much trust land is needed."); id. ("Like tribal membership, no mathematical formula concerning the wealth (or lack thereof) of a tribe is determinative of its need for land in trust.").

The DOI's inability to articulate any economic need for anything like 13,000 acres is not a surprise given the enormous wealth of the OIN, whether viewed on an aggregate or per member basis. See id. at Exh. II (Supplemental Jarrell Report ¶¶ 32-33). And in light of the DOI's view that all of the OIN activities can be operated lawfully without being taken into trust, and the reality that the OIN businesses can operate competitively without being taken into trust, there simply is no economic justification for the DOI's decision.

As a result, the DOI falls back on unsupported generalities:

> Acquisition of the Subject Lands in trust will help to address the Nation's current and near term needs to permanently reestablish a sovereign homeland for its members and their families, preventing alienation of the lands or involuntary cessation of the Nation's various uses of the lands. The Nation's ability to exercise governmental authority over the lands and its uses, and to protect it for future generations, will promote the health, welfare, and social needs of its members and their families.

Id. at Exh. L (ROD at 36). The OIN has the financial wherewithal to continue its activities whether or not the land is in trust, and even the DOI itself does not believe that the OIN will shut down its operations if the land is not taken into trust.

The generalized assertion that having the land in trust "will promote the health, welfare and social needs of" members similarly provides no support for a finding of need. There is no suggestion that OIN members currently suffer from either health or economic distress or any explanation of how taking the land into trust will enhance or "promote" some greater level of health or welfare. Unless, however, the DOI means by this even greater economic advantage to the OIN, which can hardly be considered need. In fact, the DOI references the significant number of tribal programs and governmental functions currently operated by the OIN without the benefit of land in trust. See, e.g., Baldwin Decl. at Exh. A (FEIS at 3-245) (listing "Government Programs and Administration, Legal, Judicial, Men's Council, Children and Elders Center, Cultural Center, Health Services, Housing, Family Services, Program Development and Evaluation, Recreation and Youth, and Government Programs and Administration" among OIN government programs); id. at FEIS at 3-247 (table listing "Milestones for Nation Government Program and Services"); id. at FEIS at 4-382 ("With regard to the Nation, it has made significant progress in developing programs and services and delivering benefits – job security and member distributions, health care facilities and insurance, educational scholarships, housing grants, and cultural programs to its members in the past 15 years.").[56] The inclusion of these items in the Administrative Record further demonstrates the lack of need for land to be taken into trust.

Finally, the apparent contention that some land in trust is necessary to promote "cultural and social expression" and "political self-determination" (Baldwin Decl. at Exh. L (ROD at 8)),

[56] With similar vagueness, the DOI states that the significance of checkerboard jurisdiction "would partially depend on the different amounts of land entering trust in the various alternatives and in which municipalities. The Preferred Alternative reflects these concerns to the extent practicable while addressing the Nation's immediate and shorter-term needs." Baldwin Decl. at Exh. A (FEIS at 2-57). There is no discussion of what those immediate needs are and how trust status satisfies them. Indeed, if the immediate need to take land into trust for the benefit of the OIN is simply to avoid State and local taxes that the OIN lawfully owe under Sherrill, the DOI has failed to demonstrate the OIN's inability to continue to prosper while paying its tax arrears and future accruals. See supra section III.A.

even if true, hardly supports action involving 13,000 acres. The acreage of land used by the OIN for public and community services (178 acres) and tribal housing (860 acres) totals little more than 1,000 acres.[57] Id. at Exh. A (FEIS at 3-17). The DOI also concludes that the OIN needs "historic and cultural sites under Oneida sovereignty and control." Id. at Exh. L (ROD at 8). And lands classified as "wild/forested/public parks/open space" that "include" the OIN's hunting, fishing and festival sites encompass another 472 acres. Id. at Exh. A (FEIS at 3-11; 3-17). Responding to the substantive "needs" cited could be accomplished with an approximate 1,510 acres of land.

3. The Administrative Record Reflects A Concern Not With Need But A Desire To Rectify Perceived Wrongs To The OIN

Much of the DOI's circuitous "consideration" of the OIN's need for land in trust status seems to rely upon its own notion of "justice" in providing the OIN with sovereignty over large swaths of the 300,000 acres reserved to the use and cultivation of the ancient Oneida tribe in its 1788 treaty with the State. See, e.g., Baldwin Decl. at Exh. VV (ARS000904) (Internal DOI e-mail) ("[T]his land was essentially stolen by New York State . . . [s]o it comes down to which has the higher priority: justice for the Oneida's stolen reservations lands or, to quote the Sherrill Case, New Yorkers 'justifiable expectations' of jurisdiction over Indian lands by exercising jurisdiction for 200 years. The Supreme Court ignored justice in favor of 'justifiable expectations' but pointed to the fee-to-trust procedure for remedy, essentially passing the buck for political expediency."). Moreover, the Administrative Record reflects other unsubstantiated and grossly inappropriate assumptions concerning the purpose and need for agency action by the DOI, often containing mischaracterizations of the law:

[57] There is no analysis of how many acres of OIN land correspond to a particular cited need. Instead, the DOI breaks up OIN holdings by the State's Office of Real Property Tax Services classifications. Baldwin Decl. at Exh A (FEIS at 3-10 to 3-12).

> The socioeconomic environment in middle upstate New York is one that appears to be highly biased against Native Americans; and one that can only be described as racial prejudice. Only by placing their property into trust and not subjecting their properties to local politics and taxation can the Nation be expected to continue Native American Gaming operations that supply the revenue to support the Nation's social and welfare programs, as intended by Congress when they passed the Indian Gaming Regulatory Act.

Baldwin Decl. at Exh. DD (ARS005039) (DOI correspondence with Malcolm Pirnie).[58] Such conclusions lack evidentiary foundation, misstate the law, and are outside the scope of the DOI's regulations.

As outlined above, see supra Section III.A., there is no economic need for the OIN to have land taken into trust as the OIN is already – and will continue to be – an economically vibrant and successful tribe, with diverse enterprises that bring in hundreds of millions of dollars annually, and is financially able to pay even the highest estimate of property taxes considered by the DOI without impairing its business enterprises and economic viability.

C. The DOI's Evaluation Of The Impact of Removing Land From Tax Rolls As Required By 25 CFR 151.10(e) Is Arbitrary and Capricious

Under section 151.10(e), the Secretary must consider the impact of the removal of land from the tax rolls on the State and its subdivisions. The Determination removes significant amounts of land from the tax rolls of the Counties, local municipalities and school districts in what is an already economically depressed area. Notwithstanding faulty assumptions made by the DOI, the combined annual anticipated loss of county, municipal and school taxes resulting from the Determination is at least $14.39 million,[59] not accounting for any potential increase in

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[58] Moreover, it appears that certain facts extraneous to the OIN's need were considered in deciding how much land should be taken into trust. See Baldwin Decl. at Exh. N (Internal DOI e-mail) ("[Cason] has also added properties under the Stockbridge-Munsee land claim area just to establish a policy, since the courts are using the doctrine of laches and properties will never be returned to tribes, only monetary compensation is possible, there is no reason to not take land into trust for which another tribe files a land claim.").

[59] This figure includes the casino and resort tax lot, which should be assessed pursuant to the Town of Verona's assessment. See infra Section V.C.3. According to the DOI, without the casino and resort tax assessment, the

tax rates or assessed value. The DOI failed to properly assess the significant impact loss of taxes would have and instead presents contrived arithmetic to purportedly demonstrate certain "offsetting" benefits from the OIN.

From the outset, the DOI dismissed as insignificant the loss of substantial tax revenue and never meaningfully considered the impact of permanently removing lands from local tax rolls. In fact, before significant substantive analysis occurred, the DOI was providing Malcolm Pirnie with conclusions that it "expected" to reach regarding impacts to the local communities: "The benefits of the regional economic boost to the economy are expected to outweigh the potentially minor negative impacts on social services and infrastructure. Increasing the tax base through increased tourism or regional growth generally provides more than adequate funding to pay for increases in services and infrastructure, even without taxing tribal operations." Baldwin Decl. at Exh. DD (ARS005041); see also id. at ARS005040 (tax loss not a "valid issue"). Even at the time of drafting the ROD, the DOI did not believe that the tax loss to be suffered by local governments was "valid." Baldwin Decl. at Exh. VVV (AR010040-41) (Correspondence from DOI to OIN counsel) attaching draft ROD outline) ("Reduction of local property taxes is not an impact of the decision . . . the determination will not result in a valid reduction in annual budgets of the local governments.").

The DOI concluded that tax losses would be insignificant and insubstantial losses, See id.at Exh. DD (ARS005040), and would be offset by the OIN's voluntary payments to local towns or service districts and/or taxes paid by the employees of OIN enterprises. The ROD states that "voluntary payments through service agreements . . . in combination with other direct and indirect contributions that the Nation has made to the State and local governments, more

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Determination would result in a $2.19 million annual reduction of the tax rolls. Baldwin Decl. at Exh. L (ROD at 45).

than offset the alleged annual loss of revenue resulting from the Nation's non-payment of real property taxes." Id. at Exh. L (ROD at 22). That conclusion echoes the FEIS, which concluded that "[w]hile forgone taxes could result in an adverse effect on local government revenues, the service agreements and the property, sales, and income taxes directly and indirectly generated by the Nation and its employees would continue to have a positive effect on the local economy." Id. at Exh. A (FEIS App. M at 12). For the reasons discussed below, these conclusions are clearly arbitrary and unsupported by the Administrative Record and the detrimental impacts of removing property from tax rolls outweigh any truly offsetting measures by the OIN.

1. The ROD And FEIS Give Undue Consideration To The OIN's Non-Binding Commitments To Local Municipalities

Although the ROD never attempts to quantify this impact, the DOI appears to accept the fact that the loss of property tax that will be suffered by the State, Counties and local jurisdictions imposes the costs of local services that are used by the OIN such as schools, road and bridge maintenance and repair, police and fire protection, upon a smaller group of non-Indian residents.[60] The DOI assumes that this result will be adequately addressed by voluntary payments by the OIN. See Baldwin Decl. at Exh. L (ROD at 47) ("It can reasonably be expected that the Nation will continue to pay local governments for services provided."); id. at Exh. L (ROD at 31) ("This commitment, while non-binding, is anticipated to help avoid and/or offset potential negative jurisdictional and socioeconomic impacts in the future with the Subject Lands in trust."). But the assumption that the OIN will continue to make and honor non-binding commitments in return for State and local government services ignores the facts that (1) an

[60] Indeed, it seems as though the DOI made a conscious choice not to provide those calculations. Baldwin Decl. at Exh. YYY (ARS001980) (DOI Briefing Paper on Jarrell Report) (including handwritten note "Not to be addressed" next to description of request for an estimate of the property tax burden per household).

expectation of continued payments is contradicted by the OIN's actual behavior; and (2) the OIN will have less incentive to make voluntary payments after the Subject Lands are taken into trust.

The OIN views any such payments as completely voluntary. The OIN's view of the payments is set forth in the letter that forms the basis for the DOI's assumption that such payments can be relied on to offset tax losses. That letter, from OIN Representative Ray Halbritter to the DOI, characterizes the payments as "grants," "gifts," and "donations." Baldwin Decl. at Exh. A (FEIS App. J) (Letter from OIN Representative Ray Halbritter to James Cason, Associate Deputy Secretary of the Interior (Jan. 7, 2008)).

The DOI's assumption that the OIN will continue these voluntary payments is unsupported by the Administrative Record, and is accordingly arbitrary and capricious. The ROD cites a "voluntary services agreement" with the Verona Volunteer Fire Department (id. at Exh. L (ROD at 58)) as an example of such a payment in the past, but omits the fact that the OIN unilaterally changed the formula under which it made such payments to the fire department to an inadequate amount. See id. at Exh. ZZZ (AR003016-18) (Letter from Secretary/Treasurer Verona Fire District to Deputy Supervisor, Town of Verona [Oct. 2, 2005]). In addition, the OIN has used its "silver covenant" payments to pressure municipalities to follow OIN dictates in the past. The OIN withheld a $150,000 pledge from the Stockbridge Valley Central School District for the 2004-05 school year because the town refused to accede to the OIN's demand to fire a teacher who was critical of the OIN. See id. at Exh. AAAA (AR004088-96) (Affidavit of Randy C. Richards dated June 21, 2005 at ¶¶ 4, 12-22); id. at Exh. BBBB (AR004098-101) (Affidavit of Michael Oot dated June 20, 2005) at ¶6); id. at Exh. QQQQ (AR001443) (Letter from Madison County Attorney to DOI).

Strikingly, the ROD notes, but the DOI ignores the impact of, the fact that following the Supreme Court's decision in Sherrill in 2005, the OIN unilaterally ended the silver covenant payments (id. at Exh. L (ROD at 47)). What the Administrative Record shows is that, in fact, any payments by the OIN are entirely subject to OIN discretion and can and will be terminated or reduced whenever the State, Counties, municipalities or school districts take any action that the OIN considers contrary to its interests. This makes basic budgeting planning difficult for local governments. In view of the OIN's behavior, it would have been reasonable to expect that the DOI would have considered a scenario where the OIN decided to stop making such payments or decrease them, and what that would mean for the affected governments.[61] Such a discussion is absent from the ROD.

The DOI further assumes that future "gifts" from the OIN will "avoid and/or offset potential negative jurisdictional and socioeconomic impacts" associated with the Determination, but fails to analyze the breakdown of past gifts or determine if this is true as to past behavior. Thus, the ROD notes, "[t]he Nation has made direct payments to local governments totaling $38.5 million since 1995 in several categories of spending" (ROD at 47), but fails to account for the fact that $10.1 million of that figure was used for capital improvements specifically to service OIN properties, and not to pay municipalities for services rendered to the OIN that would be accounted for by property tax payments. Baldwin Decl. at Exh. FFF (Jarrell Report at ¶ 115; Ex. 19). These payments also include mandatory payments made to reimburse State agencies for oversight activities at the casino provided for in the compact between the OIN and the State (the "Gaming Compact"), which are irrelevant to any discussion of local property taxes. See infra Section V.C.2. The DOI's failure in this regard is a failure to adequately evaluate the impact of

[61] In contrast, the DOI evaluated the far-fetched scenario in which the OIN owes property tax, refuses to pay, and suffers a foreclosure of its property and closing of its billion-dollar enterprises. See supra at Section IV.A.3.

removing land from the tax rolls as it must do under section 151.10(e) and a failure to rationally connect its assumptions and conclusions to the evidence before it.

2. The DOI Erroneously Concluded That OIN Employees' Property, Sales, And Income Tax Payments And Payments Under The Gaming Compact Offset The Loss Of Property Taxes

Another unsubstantiated premise that runs through the ROD is the proposition that any (1) property taxes paid by an OIN employee or vendor, (2) sales taxes paid by OIN employees on purchases from non-tribal retailers; (3) income taxes paid by OIN employees, and (4) payments made to the State Police and State Racing and Wagering Board under the Gaming Compact should be treated as tax payments by the OIN for purposes of ameliorating the impact of removing property tax revenue from local governments and school districts. There is no logical basis for treating these taxes and fees as an offset to removal of OIN property from tax rolls as they will be paid regardless of whether land is taken into trust, and the implicit reliance on the presumption that these payments would not be made if OIN land is not taken into trust renders the DOI's analysis under section 151.10(e) arbitrary and capricious. See supra Section IV.

The treatment of taxes paid by an individual who is employed by the OIN as an offset to the loss of tax revenue resulting from taking OIN land into trust requires at least three facts to be in existence: (1) the individual OIN employee would have to own property or be taxed in the same communities in which OIN land to be taken into trust is located; (2) the individual would be able to pay taxes only if the OIN land is taken into trust (or put another way, the employment would cease if the OIN's land is not taken into trust and if the individual OIN employee ceases to be an OIN employee he would not be able to pay any taxes);[62] and (3) the property taxes paid by the individual OIN employees in the affected communities would be enough, cumulatively, not

62 And, for property taxes, neither the OIN employee nor any subsequent owner of that individual's property would be able to pay any taxes on the property.

only to pay for municipal services provided to the individuals' properties, but also to the OIN properties transferred into trust. The Administrative Record contains no evidence that supports the existence of those conditions.

The real basis for the offset conclusion is the unfounded assumption that if the OIN land is not taken into trust the OIN will shut down their businesses, all their employees will lose their jobs, no other employment will be available, and no one else who is employed and able to pay taxes will purchase the individual (former) OIN employees' properties, work in the area, or pay taxes. It is true that the OIN has threatened to shut down its businesses if the land is not taken into trust, but the threat is not credible, and, more importantly, the DOI decision-makers did not believe the threat. See supra Section IV.A.3. Consequently, there is no basis for treating taxes paid by OIN employees as an offset under section 151.10(e).

Even if OIN-employee property taxes could logically be considered as an offset to the transfer of OIN land into trust status, there can be no fact-based conclusion that the taxes collected in affected local communities offset property taxes that would be lost by taking OIN land into trust. And any such finding is counterintuitive at best. The property tax from OIN employees will be used to pay for services rendered to those employees' properties, not to OIN lands for which no taxes would be paid if they are brought into trust.

Similarly, as noted, payments to the State Police and the State Racing and Wagering Board pursuant to and for services contemplated by the Gaming Compact cannot be treated as OIN "contributions" to offset the impact of removing property from County, local and school district tax rolls. The DOI included such payments, however, in its analysis of "Net Nation Financial Contributions to State and Local Governments," (Baldwin Decl. at Exh. L (ROD at 47-48)) and included these payments in its analysis of the "Net Payments" of the OIN. See id. at

Exh. A (FEIS 4-201 to 4-217, Table 4.7-31 to Table 4.7-44). If, as the DOI concluded, Turning Stone is "operating lawfully under IGRA," (id. at Exh. L (ROD at 12)), then the OIN would be required to pay the State for these services, regardless of whether Turning Stone is taken into trust. In fact, the casino would not be operating in accordance with the terms of the Gaming Compact that governs operation of Turning Stone if the OIN breached its obligations to reimburse the State.

3. The DOI Incorrectly Concluded That The Tax Assessment On The Casino Lot Was Barred Under IGRA

In its arbitrary consideration of the adverse impacts on local governments as a result of the Determination, the DOI concluded that the Town of Verona's tax assessment of the lot containing Turning Stone was "in major part, unlawful." (id. at Exh. L (ROD at 52)). The Town of Verona assessed the value of the lot at $22.55 million for the land and $340 million for the improvements, for a total of $362.55 million. Id. The DOI determined that because such an assessment is "based on Turning Stone Casino tax lot's continued use for gaming under IGRA" it was invalid, and the proper assessment of the casino and resort property for purposes of section 151.10(e) evaluation was the assessment of the lot only – $22.55 million. (Id. at Exh. L (ROD at 53)) The DOI does not have authority to make such a determination under the IRA; the DOI cites no official body that has such authority which has found the assessment to be unlawful. In fact, the DOI's position is incorrect as a matter of law.

a. IGRA Does Not Bar Property Tax Assessment Of The Property Upon Which Turning Stone Sits

IGRA does not prohibit taxation of fee lands upon which a tribe conducts gaming operations. Section 2710(d) of IGRA states that except for assessments agreed to under a tribal-state gaming compact, "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment

upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4) (emphasis added). A failure to authorize an act is not the equivalent of a prohibition on that act. See Catholic Soc. Servs., Inc. v. Thornburgh, 956 F.2d 914, 923 (9th Cir. 1992), vacated on other grounds, 509 U.S. 43 (1993) (finding that although a statute does not "authorize" an act, it does not "prohibit" it either).

The Town of Verona's basis for assessing property taxes on the Turning Stone tax lot is not IGRA, but rather the Supreme Court's decision in Sherrill. And the Town's ad valorem tax is on the property, not the OIN or any other person, and is not within the ambit of section 2710(d)(4). Accordingly, IGRA does not apply to prohibit the Town of Verona's tax assessment on the land and improvements on the land on which Turning Stone sits.[63]

Moreover, section 2710(d) by its terms does not apply to the OIN. IGRA states that Class III gaming activities are "lawful on Indian lands only if such activities are (A) authorized by an ordinance or resolution that – (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this section, and (iii) is approved by the Chairman." 25 U.S.C. § 2710(d)(1) (emphasis added). As the Supreme Court unmistakably held: "The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." Sherrill, 544

63 The cases cited in the ROD are distinguishable from the present situation. Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994), determined that state license fees on betting activities on tribal lands was preempted by IGRA. Id. at 435. The license fees constituted a tax on gaming operations, not a property tax on improvements made to the same tax lot as the gaming operation, and were pre-empted by IGRA. Similarly, the principles espoused in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), are not applicable to the OIN. White Mountain found certain motor vehicle licenses and fuel taxes on timber operations that were conducted solely on a tribal reservation over which the tribe exercised sovereignty were preempted by federal law where those fees and taxes threatened policies furthered by the federal law. Id. at 148, 150 (noting that this is "not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall"). Here, the OIN does not exercise sovereignty over its land under Sherrill, and the activity regulated and protected by federal law – gaming – is not threatened by a property tax that includes non-gaming improvements made to the land. See Baldwin Decl. at Exh. FFF (AR013111-12) (Jarrell Report at ¶¶ 96-99).

U.S. at 203. Since the OIN does not have jurisdiction over the casino and resort property, it cannot benefit from section 2710(d) of IGRA.

b. Even If IGRA Does Apply To The OIN And Casino Improvements, It Does Not Prevent Local Property Taxes On Other Entertainment And Recreational Improvements Made To The Land

Even assuming, arguendo, that IGRA bars property tax assessments on the OIN's gaming-related improvements on the land, the DOI has arbitrarily extended such protection to encompass all other improvements on the land. The Turning Stone tax lot includes parts of three golf courses, an outdoor driving range, the hotel tower, the event center, conference center, a showroom, and restaurants and retail stores. Baldwin Decl. at Exh. CCCC (AR048952). The DOI's decision as to the tax assessment for the casino and resort lot, however, ignores all of these significant improvements to the land because "the contributing operations are incapable of generating sufficient revenues to operate profitably as stand-alone ventures" (id. at Exh. A (FEIS at 4-215)), and thus, the DOI concluded they are "gaming-related." (id. at Exh. L (ROD at 53)). Much as it baldly concluded that it would have arrived at the same exact Determination had it evaluated the OIN application under section 151.11, the DOI concludes it would have arrived at the same Determination if taxes were due and owing at the full assessment. See id. at Exh. L (ROD at 50). Such an incredible statement is arbitrary and capricious because it ignores a disparity of $340 million in the assessed tax value for one lot and an over $12 million difference in estimated annual tax losses to the State, Counties, municipalities and school districts.

IGRA's purpose, according to the DOI, is to "protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3); See Baldwin Decl. L (ROD at 51). The DOI stretches the bounds of that purpose beyond rational bounds to cover all of the OIN's business enterprises on the casino and resort tax lot because "[a]ll of these endeavors, along with the Turning Stone Resort & Casino's promotional allowance program, operate at a net loss." Id. at

Exh. A (FEIS 3-283). There is simply no legal or rational basis for extending IGRA's policies to protect improvements to taxable land that relate to entertainment and recreational endeavors that happen to be funded by the tribe's gaming proceeds. Such logic would extend IGRA's purported tax protections to any OIN business that was operating at a loss and funded by the OIN's substantial gaming revenue. This is a matter of revenue recognition, not of IGRA's preemption of state tax law. The DOI's decision to ignore all of the $340 million in improvements to the property – whether pertaining to gaming or not – renders its consideration of section 151.10(e) arbitrary and capricious.

4. The DOI Incorrectly Concluded That The OIN's "Contributions" Outweigh The Property Taxes Lost Due To The Determination

The DOI's conclusion that the Determination "is projected to result in a net contribution to New York State and local governments of approximately $16.94 million" is wrong. Table 4.7-40 of the FEIS (Baldwin Decl. at Exh. A page 4-210) contains the figures relied upon by the DOI in reaching this erroneous conclusion. The table adds "Nation Payments" "Taxes Paid by Nation Employee[s]," and "Taxes Paid from Multiplier Effect" to come up with a total figure of $24.48 million in OIN "contributions" to the State, Counties, municipalities and school districts. The DOI then subtracts $1.82 million in "Estimated Fiscal Costs Attributable to the Nation" and $5.72 million in "User Cost Paid by Agreement and Charges" to arrive at a positive "net contribution" of $16.94 million. That arithmetic is faulty because the contributions from the OIN include $5 million in payments under the Gaming Compact, and $18.3 million in taxes from OIN employees ($11.69 million) plus a multiplier effect ($6.61 million). Accordingly, a more accurate projection is $1.18 million in OIN payments pursuant to voluntary service, utility and infrastructure agreements minus the $2.54 million in estimated fiscal costs and user costs paid by

agreement (not including the $5 million in cost under the Gaming Compact) to arrive at a net negative impact of $1.36 million based upon estimated costs attributable to the OIN.

The extent of error in the DOI's reasoning is even more material to an analysis of economic cost as defined by loss of property tax revenues. Using the same faulty calculations described above, when replacing the estimated fiscal costs attributable to the OIN with property tax loss estimates, the DOI projects a net benefit to the State, Counties, municipalities and school districts of $16,660,000 (without including the casino lot) and $4,459,600 (using the Town of Verona's tax assessment). See Baldwin Decl. at Exh. A (FEIS App. E, Tables 18 & 26). Factoring out payment under the Gaming Compact, tax payments from OIN employees, and taxes paid from the multiplier effect, the net negative impact based on property tax loss is $1,638,800 (without including the casino lot) and $13,839,100 (using the Town of Verona's tax assessment).

D. The DOI Did Not Adequately Consider Potential Jurisdictional Problems And Conflicts Of Land Use Per 25 CFR 151.10(f)

The DOI is required under section 151.10(f) to consider potential jurisdictional problems and conflicts of land use that would result from taking land into trust. The conclusions offered by the ROD and FEIS are not rationally connected to the evidence that was before the agency due to its failures of both factual support and logical reasoning.

From the outset of the decision-making process, the State and local governments repeatedly emphasized to the DOI the fact that the proposed land-into-trust scheme would frustrate the application of New York environmental, health, land use, and other regulations over nearby non-trust lands. See, e.g. Baldwin Decl. at Exh. DDDD (AR002399-400) ("When the governance of communities and neighborhoods is divided up over two sets of noncontiguous parcels, neither set of parcels can be effectively governed."); id. at Exh. RRR (AR00263-64)

(State and Counties Comments on DEIS) (calling for analysis as to "whether the federal/OIN regulatory regime will provide public health, safety, and welfare and environmental protection at least equal to that of the State and local governments it may replace"). But the ROD and FEIS do not reflect meaningful analysis of that evidence. Instead, the reasoning behind the Determination rests upon a number of logical failures that render it arbitrary and capricious.

1. Reliance On The Applicability Of Federal Environmental Law Is Insufficient To Satisfy Section 151.10(f) Analysis Where New York State Law Is More Proscriptive Than Federal Law

The DOI notes in many places that the OIN complies with federal law (e.g. environmental law), to which trust land is subject.[64] But this fails to address the issue presented by section 151.10(f): jurisdictional problems and conflicts of land use which may arise from the Determination. The key jurisdictional problem is the "checkerboard of alternating jurisdictions . . . [which] would 'seriously burde[n] the administration of state and local governments'" that concerned the Supreme Court in Sherrill, 544 U.S. at 219-220 (emphasis added).[65]

Where state and local laws are more proscriptive than federal law, it is fallacy for the DOI to say that the applicability of federal law to trust land is enough to alleviate any jurisdictional issues for surrounding communities. The ROD and FEIS gloss over the fact that

64 See Baldwin Decl. at Exh. L (ROD at 61-67) §§ 7.6.3.2.1 (danger to wildlife protected by New York regulations ignored due to OIN compliance with Federal Endangered Species Act); 7.6.3.2.2 (danger to air quality protected by New York regulations ignored due to OIN application for EPA permit); 7.6.3.2.3 (Chronic Wasting Disease dangers governed by New York regulations ignored due to OIN development of management plan with U.S. Department of Agriculture); 7.6.3.2.4 (State's concerns over water protection ignored due to OIN compliance with Rivers and Harbors Act of 1899 and federal permitting); 7.6.3.2.6 (OIN's past solid waste disposal failures ignored due to OIN's utilization of EPA Uniform Hazardous Waste Manifest); 7.6.3.2.7 (State's lack of information as to OIN petroleum bulk storage facilities ignored due to compliance program based on EPA standards); 7.6.3.2.10 (danger from OIN pesticide use ignored due to applicator licensing under federal regulations); 7.6.3.3 ("The Subject Lands will continue to be regulated by Federal laws, including environmental, health, and safety laws."). See also id. at Exh. A (FEIS at 4-393) ("Federal health, environmental, and safety statutes apply to Indian trust land and typically address the same issues as comparable New York State regulations and local ordinances.").

65 That the State will continue to have criminal jurisdiction over lands held in trust hardly eliminates the issue, as the Sherrill opinion makes clear. 544 U.S. at 220.

New York law regulates conduct that federal law does not, and the DOI has not evaluated how that conduct can meaningfully be regulated on land not in trust if surrounding parcels are taken into trust. Instead, the DOI discredited the impacted governments' comments about jurisdictional issues by denigrating the value of state and local regulations, stating that "their land management policies include a high degree of political influence not conducive to managing tribal lands fairly for the benefit of Indian tribes." Baldwin Decl. at Exh. DD (ARS005038).[66]

An example of the DOI's logical failure is the conflicts that will arise from the Determination under New York's wetlands protection law, Environmental Conservation Law ("ECL") Art. 24. State law defines wetlands differently than the federal Clean Water Act, and notably calls for a 100-foot buffer area surrounding a wetland requiring permits for development. See Baldwin Decl. at Exh. A (FEIS at 3-62 to 3-64). The OIN developed certain lands without consultation with the NYSDEC required by Article 24, including the construction of a golf course and separate dredging operations. See id. at Exh. SSS (AR000334) (O'Brien and Gere report (Group 1 parcels) at ("Development of the Group 1 parcels was performed without the required consultation with the NYSDEC, or the opportunity for public participation or the incorporation of measures to protect the wetland or buffer areas."); id. at Exh. PPP (AR001169) (O'Brien and Gere report (Group 3 parcels). As a result, the OIN's Atunyote golf course encroached on land defined as wetlands under State law but not by federal law, directly implicating a jurisdictional problem. See id. at Exh. SSS (AR000336**,** AR002888-89) (O'Brien and Gere report (Group 1 parcels Appx. A, Fig. 5-6) (aerial photograph of golf course and map of NYSDEC wetlands). Notwithstanding purported "mitigation" efforts by the OIN (see id. at Exh. A (FEIS at 3-64 to 3-65)), the result is that the OIN's development of the golf course was

[66] Indeed, the BIA directed Malcolm Pirnie that the BIA would not "evaluate the effects of [the OIN's] 'continued non-conformance,' because the acquisition of land in trust would remove the land from local regulatory control." Baldwin Decl. at Exh. AAA (AR027066).

not in compliance with the ECL, and poses potential storm water impacts on nearby parcels. Eliminating State jurisdiction will make it virtually impossible for the State to effectively regulate wetlands in the area, since OIN development may degrade hydrology and wildlife habitats in adjacent wetlands and subject them to contaminants. See id. at Exh. SSS (AR000334) (O'Brien and Gere Report (Group 1 parcels). The FEIS mentions the wetlands issue, but dismisses the impact on State jurisdiction by pointing to the applicability of less restrictive federal law.[67]

Similarly, New York environmental laws regulating air quality are stricter in a number of respects than federal law. See id. at Exh. A (FEIS at 3-77 to 3-79) (New York State regulates hydrogen sulfide, beryllium, fluorides, total suspended particulates, and air toxins, none of which are regulated by the EPA). The OIN constructed a cogeneration facility at Turning Stone Casino without federal or State permission, despite the cogeneration facility qualifying as a major source of air emissions under the Clean Air Act and Article 19 of the ECL. Id. at Exh. SSS (AR000339-40) O'Brien & Gere Report (Group 1 parcels). Even if the facility conforms to federal law, it has the potential to violate the State's standards for clean air. See id. (facility has potential to emit nitrogen oxide levels qualifying it as a major source of air pollution). Because air pollution by its nature is not limited to property boundaries, it is a vivid example of the external impacts that result from a jurisdictional checkerboard. Id.

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[67] The DOI also states that taking land into trust "does not involve construction or alteration of the physical environment" (Baldwin Decl. at Exh. A (FEIS 4-58)) by which it apparently means that because the OIN took the position, pre-Sherrill, that only federal law applied, there is no issue with the OIN's non-compliance. Id. at Exh. A (FEIS at 4-65) (state jurisdictional wetland encroachment by OIN not a problem because only federal jurisdiction applied pre-Sherrill). But even assuming that would be an adequate explanation for past conduct, it does not address the impact of a loss of state jurisdiction in the future. Nor does it address the OIN's demonstrated disregard for federal regulation as well. See id.at Exh. EEEE (AR000538) (O'Brien & Gere Report (Group 2 Parcels) (noting the failure to obtain state and federal permits for dredging operations).

In the same regard, it was also improper and arbitrary for the FEIS to summarily rely upon the OIN's own unspecified environmental and land-use protections as a mitigating factor against "the types of effects potentially resulting from the trust action" when the OIN have demonstrated disregard for State environmental protection laws and standards. Baldwin Decl. at Exh. A (FEIS, at ES-44); id. (FEIS, at ES-45) (in addition to the protection of federal environmental laws, "the land would also be regulated by Nation laws and ordinances covering building construction, land use, public safety, hunting and fishing, historic preservation, and environmental protection."). Indeed, the FEIS stated that it failed to analyze whether the OIN's ordinances are comparable to State and local environmental protections. See id. (FEIS App. M at 13-14) ("It is not necessary or appropriate to engage in a side-by-side comparison or critique of the protectiveness of Federal/Nation laws versus New York State/local laws. . . . It would undermine tribal self-government to compare and contrast tribal laws against state and local laws, and require equivalency between them as a prerequisite for placing land in trust. Instead, pursuant to the land-into-trust regulations, the [Secretary] considers the jurisdictional problems and potential conflicts of land use that may arise by placing land in trust. 25 C.F.R. § 151.10(f)."). It is arbitrary for the DOI to conclude that comparison of State laws and tribal ordinances is improper but at the same time rely on these ordinances to conclude that any adverse affect to the State and local governments from removing State jurisdiction would be mitigated.

2. Agreements With The OIN Are Not Suitable Replacements For State And Local Regulatory Jurisdiction

The ROD and FEIS refer to agreements between the OIN and various levels of government as a presumptive solution to problems arising from jurisdictional checkerboarding warned against in Sherrill. See Baldwin Decl. at Exh. L (ROD at 57-59). Agreements, of

course, can be terminated (or, in the case of the OIN, unilaterally modified, see supra Section V.C.1. without regulatory control. The DOI's assumption that the OIN will continue to abide by agreements without any means for government enforcement renders the Determination unwarranted, especially in light of the OIN's past conduct (and assertions of tribal sovereign immunity). See supra Section IV.A.2.

The DOI's treatment of water resources reflects this flawed reasoning. Section 7.6.3.2.4 of the ROD acknowledges that the OIN has had issues with insufficiently protecting water resources on its lands. The ROD refers to agreements between the OIN and the City of Oneida regarding water usage. Baldwin Decl. at Exh. L (ROD at 62-63). But the ROD and FEIS do not cite to any evidence of an agreement concerning water quality between the OIN and the State itself, ignoring the fact that water quality standards are set and enforced by the State (not municipal) governments and are not the subject of the OIN/City of Oneida agreement. See id. at Exh. RRR (AR000264 n.11) (NYSDEC Comments on DEIS) (state maximum contaminant levels for organic contaminants regulate several contaminants which are not federally limited). See, e.g., id. at Exh. SSS (AR000344-350) O'Brien and Gere Report (Group 1 parcels) (analyzing individual water protection provisions of ECL and related regulations, including Protection of Waters, Dam Safety, Flood Control, Water Supply, State Pollutant Discharge Elimination System, Approval of Plans for a Wastewater Disposal System, Approval of Realty Subdivisions, Wellhead Protection Program, and Floodplain Development Permits); id. at Exh. O (AR000310-11) (State Comments land-into-trust application) (NYSDEC must issue permit before construction of facility for discharge of even sanitary wastewater into holding pond or ground may occur; federal Clean Water Act does not protect groundwater or impose permit requirement).

3. The Determination Relies On Unsubstantiated and Irrelevant Conclusions As To Jurisdictional Conflicts

The DOI determined from the outset – before any environmental impact statement was drafted – that the jurisdictional concerns of the State, Counties and local municipalities would not affect the decision to bring land into trust. In a letter from the DOI instructing Malcolm Pirnie to "express" certain points in the EIS, DOI instructed Malcolm Pirnie that "State jurisdictional issues should not be considered substantial reasons to deny the fee-to-trust transfer." Baldwin Decl. at Exh. DD (ARS005038). In fact, the DOI advised Malcolm Pirnie to not seriously regard the State's, Counties' and local municipalities' comments under section 151.10(f): "The objections received from local and state authorities over the loss of jurisdiction are considered to be a control issue, rather than a means of environmental preservation or achieving the most beneficial use of the properties." Id. In addition, the DOI's consideration of any jurisdictional implications of the Determination was infected by its notion of "justice" as it ignored the primary concerns of the Sherrill court. See Baldwin Decl. at Exh. VV (ARS000904) (Internal DOI e-mail). This is particularly arbitrary in light of the fact that under the appropriate standard – 25 C.F.R. § 151.11 – the DOI is required to give "greater weight" to the concerns of the affected governments.[68]

The DOI also dismissed the very concept of jurisdictional issues, because "America is a patchwork of various connecting and overlapping jurisdictions. The proposed fee-to-trust transfer would eliminate some layers of bureaucracy in transferring the properties from Federal, State, county, municipality and school district jurisdiction to Federal and Tribal jurisdiction, but would not alter the need for mutual cooperation that is necessary for any and all government

[68] At a minimum, it demonstrates that the DOI's conclusion that it would "still acquire the Subject Lands in trust" if it applied section 151.11 is an arbitrary and capricious abuse of discretion.

agencies to function." Baldwin Decl. at Exh. FFFF (AR056124) (Internal DOI correspondence); see also id. at Exh. A (FEIS at 4-288 to 4-289) (comparing OIN checkerboarding by DOI fiat to checkerboarding created in other parts of the country by 1887 federal statute). But section 151.10(f) does not allow, or even contemplate, that the DOI evaluate the justice of past land transactions, let alone assume that the interplay of tribal and state jurisdiction is somehow comparable to the relationship of municipal governments in the state system or to compare that structure with the jurisdictional relationships resulting from the creation of Indian tribal sovereignty over land within New York. That section requires the DOI to decide whether taking land into trust will cause jurisdictional or land use problems based on the evidence before it.

Notably, the Administrative Record demonstrates that for most of the decision-making process, the DOI labored under an incorrect conclusion that "[w]hile the NYSDEC and county governments have alleged environmental violations by the Oneida Indian Nation, these were determined to be regulatory issues over which the NYSDEC and local governments had no authority to regulate." Baldwin Decl. at Exh. MMM (ARS001587) (Draft ROD); see id. at Exh. AAA (AR027066) (DOI correspondence with Malcolm Pirnie). As Sherrill makes clear, in fact the OIN fee land at issue is (and has been) subject to state jurisdiction.[69] This legal fallacy prompted the DOI to ignore past OIN transgressions. For example, the State's expert informed the DOI that "significant acreage of New York State regulated wetlands were destroyed or impaired" due to, inter alia, chemical fertilizers, herbicides and pesticides used on golf courses and other facilities on the OIN parcels, id. at Exh. SSS (AR000334) O'Brien & Gere Report (Group 1 parcels), but those concerns are summarily dismissed without justification in the ROD.

[69] The apparent belief of the DOI (no doubt consistent with the OIN's view) seems to be that pre-Sherrill the OIN in fact exercised governmental jurisdiction. But that is not the holding of Sherrill. The Supreme Court did not hold that it was removing the OIN's jurisdiction; it held that the OIN could not create tribal jurisdiction by acquiring the land in fee and unilaterally asserting jurisdiction – i.e., that until some basis had been established for tribal jurisdiction there was none. Sherrill, 544 U.S. at 203.

Id. at Exh. L (ROD at 64) (removal of state pesticide regulation that "may place the environment and public health at risk" is not evidence of risk "that has resulted from past Nation pesticide management policies").

4. The DOI Dismisses The OIN's Non-Compliance With Applicable State Law By Deciding To Remove State Jurisdiction

The DOI's assumption that because OIN behavior violative of state and local laws and rules occurred during a period when the OIN refused to acknowledge New York's jurisdiction, the problem will be solved by simply removing that jurisdiction, underlies its analysis of section 151.10(f) land use issues. See Baldwin Decl. at Exh. L (ROD at 61, § 7.6.3.2). ("The Department observes that many of these concerns appeared to stem from disputes over which government had jurisdiction at the time, an issue that this decision will resolve with respect to the Subject Lands after they are acquired in trust.").[70] The DOI concludes, for example, that "[w]ith respect to all of the lands to be placed into trust, local zoning will not apply and, hence, there will be no non-conformity with local zoning among these Nation lands." Id. at Exh. L (ROD at 60); id. at Exh. AAA (AR027066) (reflecting DOI decision that OIN's "continued non-conformance" would not be evaluated in the EIS because "the acquisition of land in trust would remove the land from local regulatory control"). But of course the non-conformity is a problem not only because it represents a current violation of applicable law but also because removing the

[70] Strikingly, the ROD justifies the OIN's non-compliance with applicable State and local law by concluding "jurisdictional disputes continue" (Baldwin Decl. at Exh. L (ROD at 69)), despite the clear import of Sherrill. Elsewhere, the DOI admits that under Sherrill the State had jurisdiction. Id. at Exh. DD (ARS005038); see also id. at Exh. GGGG (noting that after Sherrill, the EPA would be transferring Oneida environmental permits to the State, demonstrating that even the EPA believed that the land was under State jurisdiction). There is no dispute that the State and local governments have jurisdiction over the land and there is no dispute that many of the OIN's land uses are in violation of State and local laws and regulations; and the only disputes that existed, and continue today, arise from the OIN's refusal to follow Sherrill. Id. at Exh. SSSS (AR003442) (describing OIN refusal to comply with State and local law after Sherrill).

land from local land use laws will disrupt safety, quality of life and provision of services in bordering parcels.

The failure in the DOI's reasoning is illustrated by the OIN's non-conformance with zoning regulations.[71] Zoning rules, which under the New York General Municipal Law are controlled by local government, provide communities with a means for implementing a consistent plan of development. Removing some parcels of land from local land use regulation would thwart this goal by preventing communities from implementing a coherent scheme of land use. Where the use of some plots is unpredictable and uncontrollable, a community is deprived of the right to determine its own spatial arrangement, and its "justifiable expectations" of State and local government regulatory jurisdiction. Sherrill, 544 U.S. 215-16. Indeed, in light of the need to maintain "local zoning . . . controls that protect all landowners in the area," the Supreme Court characterized the land-into-trust procedure as one which specifically should be "sensitive to the complex interjurisdictional concerns" involved. Id. at 220-21.

The FEIS notes that the majority of the OIN lands at issue are currently conforming, but fails to adequately assess the environmental or economic impact of the OIN's non-conformance. See Baldwin Decl. at Exh. A (FEIS at 4-290 to 4-291). One striking example of noncompliance is the placement of Turning Stone less than two miles from local schools. See id. at Exh. SSS (AR000358-359) (O'Brien and Gere Report (Group 1 parcels) (describing placement of OIN gaming expansion near Vernon-Verona-Sherrill Central School District Campus).[72] The DOI

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[71] The OIN's failure to abide by other applicable laws and regulations is highlighted at Section IV.A.2.

[72] This is precisely the same concern the Supreme Court had in Sherrill when it noted that "[i]f OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area" and disapprovingly cited Cayuga Indian Nation v. Union Springs, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) where the court granted injunctive relief to the Cayuga tribe to "block application of zoning regulations to property – 'located within 300 yards' of a school – under renovation by the tribe for use as a gaming facility." Sherrill, 544 U.S. at 220 & n.13.

makes no serious effort to analyze the outside impact of Turning Stone in terms of noncompliance with local zoning and land use laws. Land area and number of lots alone are not rational ways to measure the impact of non-conforming use on the surrounding community.

The DOI also concludes without basis that the OIN will not make major changes to its current land uses, (id. at Exh A (FEIS at 4-19)) ("All existing uses on Nation lands . . . would generally continue under Alternative A (Proposed Action)"), but both past experience and the DOI's own statements contradict that notion.[73] The figures demonstrate that there has been significant land use change on OIN lands between 1987 and 2005. Id. at Exh. A (FEIS at 4-40, Table 4.2-1) (demonstrating where former uses included 7 acres for recreation and entertainment, current OIN use totals 1,340 acres for recreation and entertainment, while commercial use has expanded from 15 acres to 161 acres). Moreover, the DOI acknowledges that at the time of the ROD, the OIN had a number of new land uses under way. Id. at Exh. L (ROD at 40) (listing nightclub, tennis facilities, wedding venues, and additional golf courses among new commercial projects). In any event, the Determination removes the authority of the State and local governments to regulate and restrict land use changes in the future.

5. The DOI Failed To Consider The OIN's Past Behavior And The Determination's Effect on Easements and Rights of Way

The Determination must also be vacated because the DOI's conclusion that "[p]lacement of the [OIN's] lands into trust will not affect any valid existing rights-of-way" (Baldwin Decl. at Exh. L (ROD at 65)) ignores the OIN's past disregard to utility rights-of-way and easements and State law intended to protect utility facilities. Much like the DOI's blind reliance on OIN

[73] The premise that jurisdictional issues between the OIN and the State can be cured simply by making a determination that one has exclusive jurisdiction over the lands in question is not logically sound. Even if it were, it would not support the Determination. Making a final decision to not take any land into trust would be just as conclusive and provide just as much jurisdictional certainty because under Sherrill, the State has regulatory jurisdiction over OIN fee lands.

statements that are contradicted by the tribe's past behavior, the DOI concluded that the OIN "intends" for all rights-of-way to remain in place after the Determination and that it is in the best interest of the OIN to work collaboratively with local governments and service providers, but it did not analyze the OIN's past conduct or the effect the Determination would have on enforcement of those rights-of-way. Id. at Exh. L (ROD at 66).

The City raised specific concerns during the decision-making process regarding access to its water main line located on a 50-foot right-of-way over OIN land. See id. at Exh. HHHH (AR044980) (City of Oneida Scoping Comments); id. at Exh. IIII (AR005700-01) (City of Oneida Application comments); id. at Exh. JJJJ (AR005539) (City of Oneida Group 3 comments). The City noted that the OIN had failed to notify it of actions the OIN took that restricted access to the water main for maintenance. Id.[74] In addition, the City of Oneida noted that on one occasion the OIN "threatened to excavate and cut off a water main located in the highway right-of-way on West Road" and on another occasion "excavated and planned the placement of fencing on the water main right-of-way." Id.[75]

Notwithstanding these concerns, it is clear that the DOI failed to substantively analyze the OIN's past conduct or the fact that the OIN would no longer be subject to State law (16 N.Y.C.R.R. Part 753) requiring notice of proposed excavation near underground utility facilities

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74 The City also raised concerns about its sewer line easements on OIN properties in light of the OIN's past inconsistent and arbitrary interactions with the City regarding connection to and extension of the OIN's sewer line. Baldwin Decl. at Exh. HHHH (AR044982).

75 National Grid PLC ("National Grid") also complained of a number of OIN actions that precluded National Grid from accessing its easements on OIN land and that severely damaged gas pipelines. See Baldwin Decl. at Exh. KKKK (AR066298-304). Notwithstanding that the OIN and National Grid entered into an agreement concerning National Grid's access to facilities on OIN land, National Grid's comments provide more examples of the OIN's disregard for rights-of-way and easements and State regulations intended to protect utility facilities and, in turn, the public. In response to National Grid's comments, the DOI merely concluded that the OIN "has stated that it intends for all rights-of-way, including those used to access utility infrastructure, to remain in effect after placement of lands into trust" and that the OIN and National Grid were discussing mechanisms for continuity of service. Id. at Exh. LLLL (AR005316). The DOI made no such conclusions with regard to the City's access to the water main.

such as a water main. The Administrative Record is devoid of the DOI's consideration of the OIN's behavior regarding the water main right-of-way or the City of Oneida's concerns. The Federal Defendants tacitly admit that they did not evaluate the comments: in response to Plaintiffs' allegations concerning the OIN's behavior vis-à-vis the City's right-of-way and the National Grid's easements, the Federal Defendants admit the allegations were raised in public comments, but state that "Defendants are without sufficient information or knowledge to either admit or deny the allegations." (Ans. ¶¶ 235-237).[76] In other words, the Federal Defendants admit the DOI received these comments, but did not investigate or consider them. By failing to consider past OIN conduct, the DOI's naked conclusion that rights-of-way will not be affected by the Determination is arbitrary and capricious.

E. The Determination Was Made Without Regard To Whether The BIA Is Equipped To Discharge Additional Responsibilities Resulting From The Acquisition Of Land-in-Trust As Required By 25 CFR 151.10(g)

Another mandatory criterion of sections 151.10 and 151.11 is "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(g). The ROD notes that "the Department has also observed some difficulties in its own administration of those [Indian trust] assets . . . ." Baldwin Decl. at Exh. L (ROD at 69). Notwithstanding this observation, the DOI concludes that "[a]cquisition of the Subject Lands in trust, however, is anticipated to impose limited additional responsibilities on the BIA beyond those already inherent in the Federal trusteeship to the Nation," with scant elaboration as to what those responsibilities are and no consideration of whether the BIA is equipped to handle them. Id. at Exh. L (ROD at 69).

[76] Tellingly, the OIN does not (and cannot) deny the allegations concerning its conduct regarding the City's water main right-of-way. (Dkt. No. 136, ¶ 237.)

The Administrative Record alludes to certain responsibilities of the BIA with regard to the OIN. Namely, if the lands are taken into trust, the BIA must continue to fund the position of OIN fire marshal, (id. at Exh. L (ROD at 58)), and must provide "assistance programs" and "technical assistance whenever a tribe may need it" to meet federal environmental regulations. Id. at Exh. DD (ARS005038). The Government Accountability Office ("GAO") also notes that "BIA's responsibilities include the administration of education systems, social services, and natural resource management, among other things." Id. at Exh. TT (GAO Rept. at 9). Notably, since the Sherrill decision, the OIN has accepted all of the Tribal Priority Allocation (TPA) funds from the BIA for which it is eligible to support tribal government functions. Id. at Exh. A (FEIS at 3-248 to 3-249).

Notwithstanding the unprecedented size and nature of the Determination, the Administrative Record contains no objective evaluation of the BIA's capacity to discharge its responsibilities as to the Subject Lands after they are taken in trust. The Administrative Record contains no evaluation as to what effect trust status would have on the BIA's TPA obligations to the OIN to support the OIN's governmental functions, or whether the OIN would continue to request all funds for which it is eligible. None of these issues are substantively evaluated in the Administrative Record in terms of the BIA's ability to handle additional responsibilities.

There are serious doubts as to whether the BIA has the resources to discharge additional responsibilities resulting from the Determination and, at the least, these doubts should have been considered under section 151.10(g):

- The OIN application involves land in quantity, status and location (i.e., a variety of commercial properties) in developed areas that is highly unusual if not unique in the context of DOI trust land responsibilities. The Determination takes into trust over twice the amount

of all land taken into trust nationwide by the Secretary in 2005 for a total of 87 tribes. Baldwin Decl. at Exh. TT (GAO Rept. at 3).

- It purportedly took six and a half years for the BIA to acknowledge receipt of administrative custody and accountability of an 18-acre parcel of land that comprised part of the former U.S. Air Force Base in Verona, New York.
- The Eastern Regional Office of the BIA is located in Nashville, Tennessee, over 800 miles from the Subject Lands, restricting the BIA from regular visits and oversight.
- The OIN does not exercise tribal sovereignty over the Subject lands. Sherrill, 544 U.S. at 203.
- The trust land will be used for commercial uses, including new businesses planned by the OIN. Baldwin Decl. at Exh. L (ROD at 39) (listing nightclub, tennis facility, wedding venues, and new golf courses).

These factors are typical considerations for the DOI when evaluating the criteria in section 151.10(g), but they have been ignored in this case. See, e.g., Baldwin Decl. at Exh. MMMM (Miami Tribe of Oklahoma v. Muskogee Area Director, 28 IBIA 52, 54 (IBIA 1995) (affirming Area Director's determination that BIA did not have ability to assume additional responsibilities resulting from taking land into trust where land was 500 miles from regional office, outside current jurisdictional boundaries of the tribe, and had variety of commercial and cultural uses)); see also id. at Exh. NNNN (McAlpine v. Muskogee Area Director, 19 IBIA 2, 9 (IBIA 1990) ("The ability of BIA to discharge the necessary trust functions on newly acquired trust property is an important consideration in determining whether or not a trust application should be approved.")).

Instead, the Administrative Record demonstrates that the DOI never analyzed the section 151.10(g) criterion, but rather simply concluded that the criterion was satisfied because it deemed the Subject Lands to be contiguous in nature. See Baldwin Decl. at Exh A (FEIS at ES-43); id. at Exh. L (ROD at 69). Reviewing a map of the Subject Lands easily disproves this conclusion. Id. at Exh. A (FEIS at 2-44). In draft responses to comments submitted during the EIS process, the DOI took the position that it apparently was not required to consider whether the BIA was equipped to handle additional responsibilities for taking land into trust because it had believed the OIN land was considered "restricted-fee":

> 25 CFR 151. 10(g) pertains to situations where the BIA acquires land for a tribe in fee status. Acquiring land in fee status means that the BlA purchases the land on behalf of the tribe and therefore must administer it. To do so, the BIA must be 'equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status'. The Oneida Indian Nation's lands are considered restricted-fee (not fee status) as they are within the Oneida's Reservation established by the Treaty of Canandaigua 1794. The offered case for the Miami Tribe of Oklahoma was for an off reservation trust acquisition with lands to be acquired in fee status. The Board of Indian Appeals upheld the Area Director's decision to decline the tribe's trust request because the local Miami Agency (not the BIA) was 500 miles from the subject property and 'well outside the former reservation and current jurisdictional boundaries of the Miami Tribe in Oklahoma'. Second, 151.11(a) applies to off-reservation acquisitions. As stated previously, the Oneida Indian Nation's trust application is on reservation pursuant to 151.10.

Baldwin Decl. at Exh. OOOO (AR054780); see also id. at Exh. ZZ (AR011365-66).[77] But the DOI recognized that the OIN land was not restricted fee. Id. at Exh. MM (AR005715) (Letter from James Cason to Ray Halbritter), and the Second Circuit recently found that the OIN abandoned its claims under the Nonintercourse Act in the Madison County tax litigation, and vacated Judge Hurd's decisions finding the OIN land restricted against alienation. Oneida Indian Nation of New York v. Madison County,

[77] Notably, this is a similar argument to the one espoused by the DOI to avoid the requirement to consider the need for additional land. See supra section V.B.

2011 U.S. App. LEXIS 21210, at *41, *96. The DOI apparently realized it was still required to determine whether the BIA had the ability to deal with additional responsibilities, and that response was revised in the FEIS to state that a determination under section 151.10(g) "will be reflected in the Record of Decision." Baldwin Decl. at Exh. A (FEIS App. M at 3); see also id. at Exh. A (FEIS App. M at 768-69) (noting comment and directing commenter to FEIS App. M at 3). Yet there is no analysis or evidence in the Administrative Record that demonstrates the DOI considered the issue after changing its interpretation or at any point in the process.

VI. THE DOI'S INTERPRETATIONS AND APPLICATION OF ITS LAND INTO TRUST REGULATIONS IS IRRATIONAL AND WILL PERMIT LIMITLESS FUTURE TRANSFERS OF LAND ACQUIRED BY THE OIN INTO TRUST

As demonstrated above, the DOI's interpretation and application of its regulations reflected in the ROD lacks any reasoned determination of necessity, disregards the concerns of affected states and local governments, and effectively renders jurisdictional conflict and tax impacts of the DOI's action unimportant. If the DOI can transform its obligations in deciding a land-into-trust application in this way, it would permit carte blanche transfer of land into trust on an ongoing basis, so long as the land is located within what the DOI considers to be the OIN's 300,000-acre reservation. The DOI specifically considered this and counseled the OIN to apply for even more land to be taken into trust in the future. See, e.g., Baldwin Decl. at Exh. L (ROD at 39); id. at Exh. G (ARS001065); id. at Exh. VV (ARS000904-05) ("Mr Cason did leave open the door for fee-to-trust applications in the future . . . . He acknowledged that a different administration may look at things different and left the door open for that to happen, which is a considerable consolation."); id. at Exh. VV (ARS00905) ("The [OIN] are unlikely to sue, but will file a new application.").

This will prevent the State, Counties, and local municipalities from effectively governing their respective lands and provide safety and reliable administration of law for their residents. It may ultimately spell the demise of communities within the 300,000-acre (450 square mile) area. The DOI's conduct in evaluating the OIN application is fundamentally at odds with the Supreme Court's finding in Sherrill that "the Secretary must consider, among other things, the tribe's need for additional land; '[t]he purposes for which the land will be used'; 'the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise.'" Sherrill, 544 U.S. at 221.

Under the DOI's interpretation of its obligations, for future OIN land-into-trust applications the DOI will not have to evaluate the OIN's need for additional land to be held in trust status. Baldwin Decl. at Exh. L (ROD at 34-35) ("[N]o demonstration or finding of need for land in trust status is required where, as here, the land to be acquired is located within or adjacent to the tribe's reservation."). Nor does the DOI, according to the ROD, need to evaluate whether the OIN is successfully managing its own affairs or is economically self-sufficient. Id. at Exh. L (ROD at 35) ("Section 5 of the IRA is not limited to landless or impoverished tribes, or to tribes that are incompetent to handle their own affairs."). Moreover, under the DOI's interpretation of 25 C.F.R. Part 151, it is not required to scrutinize the OIN's justification of anticipated benefits or give greater weight to the concerns raised by the State, Counties or local municipalities because the DOI considers such applications to be "on-reservation" applications. Id. at Exh. L (ROD at 32); id. at Exh. AAA (AR027068) (DOI correspondence with Malcolm Pirnie). Nor will the DOI be obliged to consider whether the OIN will be receiving approximately 500 acres of additional land in trust under 40 U.S.C. § 523, because the DOI

considers those transactions as "separate" from land-into-trust applications. Id. at Exh. A (FEIS at 4-13) ("[T]he disposition of excess federal lands is a separate and distinct action and is not part of the proposed action."). If other land into trust decisions for the OIN are considered "separate," then by the DOI's reasoning, future applications will not have to consider land taken into trust under the Determination. The harm suffered by the State, Counties and municipalities from removal of additional lands from the tax rolls will not be "substantial." Baldwin Decl. at Exh. DD (ARS005040) (DOI correspondence with Malcolm Pirnie). Significantly, under the DOI's rationale, it will not have to require elimination of tax liens on additional parcels to be taken into trust, nor must it resolve title issues "prior to issuing a fee-to-trust decision." Id. at Exh. L (ROD at 54). The DOI has effectively written all of these requirements out of its regulations and, in doing so, eviscerated the fundamental considerations of Sherrill.

CONCLUSION

For all the foregoing reasons, Plaintiffs are entitled to summary judgment declaring the Determination arbitrary, capricious, in excess of the Secretary's statutory authority, and otherwise unlawful and enjoining the Federal Defendants from taking the Subject Lands into trust.

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