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 OPPOSITION TO THE UNITED STATES' AND DEFENDANT-INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs 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 (the "State") and Madison County and Oneida County (the "Counties") submit this memorandum of law in opposition to the motions for summary judgment of the Federal Defendants and the Oneida Indian Nation of New York ("OIN").

The Federal Defendants and OIN move for judgment dismissing Plaintiffs' remaining causes of action challenging the Department of Interior's ("DOI") decision to take 13,003.89 acres of land into trust for the benefit of the OIN (the "Determination"). In support of their respective motions for summary judgment on all fourteen of Plaintiffs' remaining claims, the Federal Defendants and OIN each list just four "undisputed" facts (Dkt. Nos. 236-2, 240-2) that, they argue, provide a basis for that comprehensive relief. Thus, the Federal Defendants contend that the entire review of the case is a question of law and offer only one "fact" (outside of three facts concerning the recognition of, and federal jurisdiction over, the OIN) to support their motion: that the DOI issued a record of decision ("ROD") that was allegedly "supported by" the Administrative Record. (Dkt. No. 240-2, ¶ 1). This is not a fact, but rather the legal conclusion the Federal Defendants wish the Court to make; a conclusion for which the Federal Defendants offer no support. A voluminous administrative record does not mean that the agency action is supported by that record. The question on a summary judgment motion is not whether a record was compiled or whether some isolated fact is present in the record that may provide some support for some aspect of the DOI's Determination. The question is whether there is a set of undisputed facts from which the Court may properly conclude that the claims set forth in the Complaint fail as a matter of law.

The answer to that question is resoundingly no. Quite simply, the fact that the DOI compiled a record and issued the Determination does not mean that: the DOI had statutory authority to take land into trust for the OIN; the DOI applied the correct regulatory standard in evaluating the OIN's application to take 17,370 acres into trust (the "Application"); the DOI evaluated the Application in a manner that was consistent with its published policies and past practices or provided some rational explanation for the DOI's repeated departures from those policies and practices; the conclusions set forth in the ROD are rationally supported by the facts in the Administrative Record; and the DOI otherwise acted in a manner that was not arbitrary and capricious. And the Defendants do not offer undisputed facts that would support judgment as a matter of law on these issues. The Determination is not supported by "substantial evidence" in the Administrative Record. (OIN Mem.[1] at 9). Rather, the record and relevant non-record facts that can and should be considered on these motions demonstrate exactly the opposite. Plaintiffs submit that, as demonstrated in their summary judgment motion, the undisputed facts support a grant of judgment in their favor. At the very least, the Plaintiffs have demonstrated disputed issues of material fact and principles of law that preclude judgment in Defendants' favor.

Lack Of Statutory Authorization. As a matter of law, and per the DOI's land-into-trust regulations, the DOI was required to determine whether it had statutory authority to take land into trust for the OIN. As confirmed by the Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009), that inquiry necessitates determining whether the applicant tribe was a

[1] Plaintiffs use the following abbreviations herein: Defendant-Intervenor Oneida Nation's Memorandum of Law Supporting Its Motion For Summary Judgment, Dkt. No. 236-1 ("OIN Mem."); United States' Memorandum of Law In Support Of Motion For Summary Judgment, Dkt. No. 240-1 ("U.S. Mem."); Plaintiffs' Memorandum of Law In Support Of Motion For Summary Judgment, Dkt. No. 237-1 ("Pl. Mov. Mem."); Declaration of Aaron M. Baldwin In Support of Plaintiffs' Motion For Summary Judgment, dated November 15, 2011, Dkt. No. 238 ("Baldwin Mov. Decl."). Plaintiffs submit with this memorandum the Declaration of Aaron M. Baldwin In Opposition to the Federal Defendants' and OIN's Motions For Summary Judgment (hereinafter "Baldwin Opp. Decl.").

recognized tribe under federal jurisdiction on June 18, 1934 when the Indian Reorganization Act ("IRA") was enacted. The DOI failed to make this determination in the ROD. Nor could it have rationally reached that conclusion in light of the contemporaneous DOI records that demonstrate that the Oneidas in New York had no tribal organization and no reservation of their own when the IRA was enacted and that the federal government did not exercise supervision and control over the Oneidas in New York at the time – all prerequisites to taking land into trust under the IRA. The Federal Defendants concede that the "DOI did not expressly take up the question," but suggest that the Court should affirm the Determination because on any remand, the DOI would arrive at the same result "regardless of what submissions Plaintiffs and other parties might wish to place before the Department," freely ignoring the contemporaneous DOI-authored documents that demonstrate the OIN is not eligible to have land taken into trust under the IRA. (U.S. Mem. at 19, 27). This is the paradigm of arbitrary and pre-determined decision making.

Application Of The Wrong Standard. Plaintiffs have highlighted undisputed facts from the Administrative Record that demonstrate that the DOI evaluated the Application under the wrong criteria in its land-into-trust regulations. The OIN's land does not fall within the regulations' definition of "reservation" and, accordingly, the Application should have been evaluated under the "off-reservation" criteria that are more deferential to the concerns of the State and affected subdivisions. Instead, the DOI incorrectly evaluated the Application under the "on-reservation" criteria and concluded in a footnote that it would reach the same exact result had it applied the correct criteria. The Federal Defendants argue that the Determination should be affirmed in any event, because the DOI found that it would have arrived at the same result no matter what criteria it applied. (U.S. Mem. at 47). The import of this argument is that either the DOI is not obligated to apply the correct regulatory criteria, or that there is absolutely no

difference between the two different sets of criteria. This result is contrary to the plain language of the regulations and to DOI statements outside of the Determination.

Departures From DOI Policy. By issuing the Determination, the DOI has acted in contravention of established policies to not take land into trust for tribes that can successfully manage their own affairs and to eliminate tax liens before approving a land-into-trust application. The policy not to take land into trust for successful tribes was issued in a memorandum to all Indian Affairs directors, and reissued in a BIA manual years after the DOI's promulgation of the land-into-trust regulations. The policy to eliminate tax liens before deciding to take land into trust is established in the DOI's land-into-trust regulations and was communicated to representatives for Plaintiffs during the decision-making process on a number of occasions by the Associate Deputy Secretary responsible for the Determination. The DOI did not offer a reasoned explanation validating or even acknowledging these departures as deliberate changes in policy rather than casual noncompliance. These breaks with existing policy and practice are not, as the Federal Defendants argue, "irrelevant." (U.S. Mem. at 30). They are yet other instances of proceeding in an arbitrary manner.

Conclusions Not Rationally Related To The Administrative Record. In Plaintiffs' motion for summary judgment and below in this brief, Plaintiffs identify facts from the Administrative Record that demonstrate a number of the conclusions drawn by the DOI are not rationally supported by the evidence that was before it. For example, the DOI's conclusion that the Determination would result in a positive tax impact on local governments and school districts is belied by the tax figures and estimates the DOI considered. Similarly, the DOI's conclusion that the Determination would not result in any adverse jurisdictional effects on the surrounding communities is not supported by the Administrative Record, which contains evidence that State

laws and regulations are more restrictive than the federal laws that would apply to trust land and that surrounding non-Indian parcels would be negatively impacted by the removal of State environmental laws. In response, the Federal Defendants do not contradict the facts supporting Plaintiffs' arguments, let alone set forth undisputed facts that support the DOI's conclusions. Instead, the Federal Defendants argue that even if the DOI's conclusions are incorrect and even if negative impacts result from the Determination, the Court should uphold the Determination anyway.

The Defendants also attempt to avoid the manifest unreasonableness of the DOI's conclusions by claiming that many of the analyses contained in the ROD were not required to be undertaken by the DOI, so if the Court finds fault with these analyses, it has to affirm the Determination anyway (but that the Court is free to rely on these analyses for support to affirm the Determination). The Defendants seek to contort the deference normally afforded to agency decisions to render the Determination unassailable.

The ultimate fallback position of the Federal Defendants is that despite the deficiencies in the Determination, the Court should affirm the DOI's actions because taking the land into trust will facilitate tribal self-determination. Thus, for example, the Federal Defendants contend that: notwithstanding that the OIN is self-sufficient and economically vibrant, the DOI is free to ignore its policy against taking land into trust because the Determination would "facilitate tribal self-determination" (U.S. Mem. at 30 (citing ROD at 33 n.5)); the DOI does not have to apply the correct regulatory criteria under its land-into-trust regulations because of "the Nation's justification for placing lands into trust" (i.e., tribal self-determination) (U.S. Mem. at 47 (citing ROD at 44)); the DOI is free to ignore adverse tax impacts to local governments and school districts – even if it grossly miscalculated those impacts – because of "the benefits to the Nation

of acquiring the Subject Lands into trust" (i.e., tribal self-determination) (U.S. Mem. at 53 (citing ROD at 44)); and the DOI can excuse jurisdictional impacts to surrounding communities and substantial non-conforming land use by the OIN because the land and the OIN's uses are "essential to the self-sufficiency of the Nation." (U.S. Mem. at 60 (citing ROD at 59)).

This approach makes a mockery of the DOI's land-into-trust regulations and it flies in the face of the Supreme Court's decision in Sherrill. The DOI's argument would allow the DOI to ignore all of the mandatory factors in its land-into-trust regulations and take land into trust for a tribe if only the DOI concludes that the action will further the vague goal of enhancing tribal self-determination. More specifically, in the context of the Application, the Federal Defendants' posture is that they are free to ignore the criteria in the DOI's own regulations because in the DOI's view, the only way to remedy the State's "tak[ing of] the vast majority of the Oneidas' historic Reservation in violation of federal law" is to "reestablish a sovereign homeland" for the OIN and to protect the OIN from "antagonistic" litigation by the Plaintiffs to collect unpaid taxes. (U.S. Mem. at 49). This, the Federal Defendants argue, is "ample justification" (id.) to take the land into trust. No such criteria exist, however, in the DOI's land-into-trust regulations.

Moreover, this is precisely the remedy that was rejected by the Supreme Court in City of Sherrill v. Oneida Indian Nation of New York. 544 U.S. 197 (2005). That Court found that the claimed illegality of the land transfers that led to the settling of former Oneida land by white settlers and nearly 200 years of state and local jurisdiction over such land was not a basis for the reestablishment of Oneida tribal sovereignty. Such sovereignty could be regained, if at all, only through a land-into-trust process that "takes account of the interests of others with stakes in the area's governance and well-being," Sherrill, 544 U.S. at 220, by obligating the Secretary to "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.'" Id. at 221. By disregarding the significance of those criteria and justifying the Determination based on some sense of correcting a perceived historic "wrong" that allegedly occurred over 200 years ago, the DOI seeks to supplant the policies underlying the Supreme Court's decision in Sherrill with its own judgment.[2] The Constitution does not grant the Executive Branch such power.

STATEMENT OF FACTS

The material facts relevant to this case and to the majority of the Plaintiffs' causes of action were set forth at length in the Plaintiffs' papers in support of their summary judgment motion. (Dkt. Nos. 237-239, 241-251). As such, they are not set forth again here separately, but instead only as necessary below in the context of each legal argument. In addition, Plaintiffs submit with this memorandum of law and two counterstatements of facts listing undisputed material facts demonstrating that neither the Federal Defendants nor the OIN are entitled to summary judgment.

ARGUMENT

I. THE STANDARD FOR REVIEWING MOTIONS FOR SUMMARY JUDGMENT

By the plain text of Federal Rule of Civil Procedure 56, summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see

[2] As the Supreme Court acknowledged in Sherrill, the removal of Indians from New York in the nineteenth century occurred with direct approval and support from the federal government, pursuant to the federal government's removal policy. 544 U.S. 197, 205-06 (2005). The Federal Defendants nevertheless misstate this history by portraying the removal of Oneidas from New York as illegal acts of the State. (U.S. Mem. at 9 n.2).

McClellan v. Smith, 439 F.3d 137, 144 (2d Cir. 2007).[3] For the reasons set forth below, the Federal Defendants and OIN have failed to meet their burden to establish their entitlement to summary judgment on any claims; in contrast, Plaintiffs have amply demonstrated that the ROD is legally and factually unsupported and should be set aside as arbitrary, capricious and contrary to law.

II. THE FEDERAL DEFENDANTS AND OIN FAIL TO DEMONSTRATE THEIR ENTITLEMENT TO SUMMARY JUDGMENT ON THE CARCIERI CLAIM (THIRD CAUSE OF ACTION); TO THE CONTRARY, THEIR SUBMISSIONS SUPPORT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

As set forth in Plaintiffs' moving papers for summary judgment, the actual historical record supports the conclusion that under the Supreme Court's interpretation of the IRA in Carcieri v. Salazar, the OIN is not eligible to have land taken into trust. The record demonstrates that at the relevant time in 1934:

- The Oneidas in New York were not organized as a tribe, had no tribal government, and largely resided with Onondaga tribe. (Dkt. No. 247, Declaration of David H. Tennant dated November 15, 2011 and exhibits attached thereto ("Tennant Decl.") at ¶¶ 17-26, 65, Exhs. C, E-L, TT at ¶ 2);
- The federal government did not recognize an Oneida tribe in the State. (Id. at ¶¶ 46, 63, 67, Exhs. AA at 19-20, SS at 36, UU at 6-7 (transcribed)); and

[3] In the specific context of dueling motions for summary judgment, the court "'must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" The Bronx Household of Faith v. Bd. of Educ. of the City of New York, 492 F.3d 89, 96-97 (2d Cir. 2007) (quoting Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002)); see also William W. Schwarzer et al. The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 499-500 (1992). This rule requires the court to "adopt a Janus-like dual perspective that sometimes forces a denial of both motions." Darnet Realty Assoc., LLC v. 136 East 56th Street Owners, Inc., 153 F.3d 21, 23 (2d Cir. 1998).

- The DOI rejected the view that the Oneidas in New York at the time were under federal jurisdiction. (Id. at ¶¶ 40-41, 53, 69-71, 73, 75, 77, 78, Exhs. U, V at 1-2, HH at 3, VV, WW, YY, ZZ, BBB, CCC at 1).

Unable to refute these facts, Defendants are forced to: raise an inappropriate and untimely procedural challenge; misconstrue the eligibility standard for benefits under the IRA as interpreted by the Supreme Court by attempting to separate the "recognized" requirement from "now under Federal jurisdiction;" and rely upon faulty assumptions to avoid the historic reality that the OIN is not eligible to have land taken into trust and that the DOI failed to properly consider its authority under the IRA to issue the Determination.

A. The OIN's Challenge To The Pleadings Is Three Years Late, Inappropriate In The Context Of Summary Judgment Motions, And, In Any Event, Without Merit

1. The OIN's Pleading Challenge Is Untimely And Procedurally Improper

In an attempt to avoid the import of a substantial factual record of DOI documents demonstrating that the OIN is not eligible to have land taken into trust under the IRA, the OIN argue that Plaintiffs' Third Cause of Action based on Carcieri is deficiently pled. Had Plaintiffs' Carcieri claim been susceptible to dismissal on the pleadings for being "implausible," the time to seek that relief was three years ago when the OIN moved to dismiss other claims. See Dkt. No. 51 (OIN's motion to dismiss Plaintiffs' First [Non-Delegation], Second [Tenth Amendment] and Seventeenth Causes of Action [IGRA]). As the Second Circuit observed in Ideal Steel Supply Corp. v. Anza, 652 F. 3d 310 (2d Cir. 2011), pleading challenges under Ashcroft v. Iqbal, 556 U.S. 662 (2009) or Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) focus solely on the allegations of the complaint, and are meant to weed out palpably implausible claims and thereby "allow the parties and the court to avoid the expense of discovery and other pretrial motion

practice." Id. at 325. Moreover, in making a belated pleading challenge to Plaintiffs' Third Cause of Action under Iqbal in the context of a motion for summary judgment, the OIN conflates the separate motion rules and practices under Federal Rules of Civil Procedure 12(b)(6) and 56. On the one hand, an Iqbal motion to dismiss under Rule 12(b)(6) requires the court to assess the sufficiency of the pleadings without reference to evidence that might be available to support the claim, whereas Rule 56 requires the court to consider "the record as a whole" – indeed, all evidence in admissible form – to determine the viability of the claim.[4] Given the voluminous record evidence submitted by Plaintiffs in support of the Carcieri claim, the OIN's Iqbal plausibility challenge is nonsensical and is particularly misguided in the context of cross-motions for summary judgment where Plaintiffs' evidence demonstrates much more than mere plausibility but rather their entitlement to summary judgment on this claim.[5]

Accordingly, the OIN's Iqbal pleading challenge is untimely and without merit.

2. Even If The OIN's Pleading Challenge Were Proper At This Late Stage, The Complaint Adequately Sets Out The Contention That The OIN Was Not A Federally-Recognized Tribe Under Federal Jurisdiction In 1934

The Third Cause of Action succinctly states Plaintiffs' claim based on Carcieri, that the OIN are not eligible to have land taken into trust under the IRA because they were not a

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[4] The differing tests under Rule 12(b)(6) and Rule 56 are well known. In applying Iqbal/Twombly in this case, this Court observed. "[t]o survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" New York v. Salazar, 2009 U.S. Dist. LEXIS 90071, *10 (N.D.N.Y. September 29, 2009) (quoting Iqbal, 29 S. Ct. 1937, 1949 and Twombly, 550 U.S. 544, 570). In deciding the OIN's motion to dismiss, the Court noted that it "must accept the allegations made by the non-moving party as true" and "draw all inferences in the light most favorable" to Plaintiffs. Id. But in doing so, the court is limited to the four corners of the complaint and may not consider evidence that party might possess. In contrast, under Rule 56, the court must consider the whole record.

[5] The OIN's untimely pleading challenge can only be viewed as part of its summary judgment argument, pursuant to which the OIN contends that the undisputed facts support entry of judgment in favor of the OIN under its own misguided reading of Carcieri – but that just begs the question as to what the Supreme Court held in Carcieri and what facts should be considered in connection with the OIN's land-into-trust application under the IRA. While the OIN believes it is entitled to summary judgment on the Carcieri claim without the Court ever considering the actual record evidence relating to the status of the Oneidas in New York in 1934 – who were neither tribally organized nor under federal jurisdiction – that contention is implausible. See infra at Section II.D; Pl. Mov. Mem. at 26-48.

recognized tribe under federal jurisdiction in 1934. (Second Amended and Supplemental Complaint, Dkt. No. 94 ("Compl."), at ¶¶ 145-56). In doing so, the Third Cause of Action complies with basic notice pleading requirements, informing the Federal Defendants that a specific statutory requirement was not met, and therefore, the Secretary is without authority to act on the OIN's Application. See Nat'l Ass'n of Letter Carriers v. U.S. Postal Serv., 604 F. Supp. 2d 665, 672-673 (S.D.N.Y. 2009) (rejecting Iqbal/Twombly challenge and holding complaint adequately alleged the Inspector General "exceed[ed] its authority by requesting protected health information directly from employees' health care providers without their knowledge or consent").

Moreover, pleading based on "information and belief" is warranted here because the facts underlying the Carcieri claim are distant in time and based principally in the contemporaneous historical records generated by the DOI, a defendant in this action. See Arista Records LLC v. Doe, 604 F.3d 110, 120 (2d Cir. 2010) ("The Twombly plausibility standard . . . does not prevent a plaintiff from pleading facts alleged 'upon information and belief' where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible.") (internal citations omitted). As set forth Plaintiffs' in moving papers (specifically, the Tennant Decl.), the pertinent facts are contained in DOI documents generated in the late 19th and early 20th centuries, consisting of correspondence between the DOI (and the Office of Indian Affairs) and New York Indians, and memoranda and reports prepared by the DOI (and Office of Indian Affairs) regarding New York Indians, DOI census reports, DOI Handbooks on Federal Indian Law, and Indian Claims Commission pleadings to which the Oneidas and United States were parties. (Pl. Mov. Mem. at 26-41).

The propriety of Plaintiffs' notice-based pleading was recognized by the Federal Defendants, who did not move to dismiss the complaint in November 2008 for failing to adequately plead the Carcieri claim and likewise make no pleading challenge here. (See U.S. Mem. at 17-28). Even after the OIN filed its moving papers, the Federal Defendants did not adopt this procedurally improper argument, apparently recognizing the futility of making a challenge to the pleadings as facially implausible when the State and Counties are moving for summary judgment on that claim. Of course, in light of the considerable historical records assembled and presented by Plaintiffs in moving for summary judgment on the Carcieri claim, any conceivable technical pleading deficiency would be cured easily by repleading. See Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F. Supp. 2d 535, 555 (S.D.N.Y. 2003) ("[T]he Court routinely grants leave to replead unless it determines that any amendment would be futile."). See generally Port Dock & Stone Corp. v. Oldcastle Ne. Inc., 507 F.3d 117, 127 (2d Cir. 2007) (plaintiff has right to amend unless futile to do so).[6]

3. The OIN's Self-Created "Tribal Termination" Pleading Requirement Misstates The Elements Of A Carcieri Claim

The OIN argues that the Third Cause of Action is deficiently pleaded because it does not allege facts "plausibly showing" that Congress terminated the Oneidas' federal recognition before the IRA's enactment. (OIN Mem. at 12). In framing the legal issue this way, OIN grossly oversimplifies the legal standard under Carcieri so as to be able to disregard the historical record as to the Oneidas' specific circumstances in New York. Even a brief review of that history shows why the "tribal termination" requirement makes no sense and amounts to a "red herring" because the Oneidas in New York were not organized as a tribe, let alone federally

[6] Furthermore, any lack of specificity in Plaintiffs' Carcieri claim is the direct result of the ROD's failure to discuss Carcieri. See infra at Section II.B.

recognized, in 1934. The vast majority of Oneidas emigrated to Wisconsin and Canada by the mid-19th century. (See Pl. Mov. Mem. at 26-28, 32-37; Tennant Decl. ¶¶ 14-26, Exhs. C-L). The Oneidas who removed to Wisconsin settled on a federal reservation, reconstituted their tribal organization there, and continued, as the newly denominated Oneida Tribe of Indians of Wisconsin ("OTW"), maintaining a government-to-government relationship with the federal Office of Indian Affairs at all times, including in 1934 when the OTW voted to adopt the IRA. (See Pl. Mov. Mem. at 26-28; Tennant Decl. ¶ 15, Exh. C (Reeves Report at 11); Exh. W (Handbook of Federal Indian Law)[7] at 417; Baldwin Opp. Decl. Exh. A (Complaint, Oneida Tribe of Indians of Wisconsin v. Village of Hobart, No. 1:10-cv-00137 (E.D. Wis. filed Feb. 19, 2010) at ¶¶ 4, 6-8).

In contrast, the few Oneidas who remained in New York were not organized as a tribe and were not under the supervision and control of the federal Office of Indian Affairs in 1934. (Pl. Mov. Mem. at 26-46). In this Oneida-specific historical context, where the vast majority of Oneidas removed to a federal reservation in Wisconsin and maintained a continuous relationship with the federal government, the question to be answered under Carcieri is not whether the "Oneida Tribe" was terminated. Rather, the critical and relevant question is whether the Oneidas who remained in New York were in fact, as of June 1934, organized as a tribe and under the jurisdiction of the DOI. Thus, Plaintiffs' alleged "failure" to plead Congressional termination of the historic Oneida Nation cannot serve as a basis for dismissing the Carcieri claim. In point of fact, the Federal Defendants advance no such argument.

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[7] Exhibit W to the Tennant Decl. is an excerpt from the 1941 DOI publication "Handbook of Federal Indian Law" prepared by long-time DOI Solicitor Felix Cohen. That Handbook continued to be published as an official publication of DOI through 1958. The Federal Defendants and OIN cite instead to a 2005 version not prepared or published by the DOI, but written by academics who share a certain point of view. (U.S. Mem. at 5; OIN Mem. at 13). By doing so, they seek to avoid the reality that the Oneidas in New York in 1934 were not federally recognized and under federal jurisdiction.

4. Plaintiffs' Present Motion for Summary Judgment Does Not Conflict With Plaintiffs' Prior Motion for Summary Judgment

The OIN – again unsupported by the Federal Defendants – contends Plaintiffs' Carcieri claim conflicts with Plaintiffs' earlier motion for summary judgment which, the OIN contends, was based on the allegation that that "the Nation" voted against adopting the IRA. (OIN Mem. at 11).[8] There is no conflict. As an initial matter, the OIN's argument and references to the "the Nation" blur and confuse the distinction between three separate "Oneida" groups in New York: (1) the historic Oneida Nation which resided in New York until the 19th Century; (2) the Oneida Indians who were living non-tribally in New York in 1934; and (3) the modern tribal entity OIN (Oneida Indian Nation of New York) formed sometime in the late 1940s or 1950s and recognized decades later by the Bureau of Indian Affairs.[9] The record shows that the historic Oneida Nation splintered into two factions in the early 19th Century, ending a cohesive tribal existence in New York and, in the view of DOI, ending its existence as a federally recognized tribe in 1805. (Pl. Mov. Mem. at 35; Tennant Decl. ¶ 63, Exh. SS at 36 (Claims Commission Answer)). The splintered Oneida Nation was then subject to further internal divisions that produced increasingly smaller factions, which were then dispersed by removal to Wisconsin and Canada. (See Pl. Mov. Mem. at 37 n.2; Tennant Decl., Exh. UU (1982 DOI memorandum at 2-3) (transcribed)).

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[8] The OIN incorrectly states the Court "denied the State's and Counties' motion for summary judgment with respect to the claim in Count Three that DOI lacked authority under the Indian Reorganization Act (IRA) to take land into trust for the Nation." (OIN Mem. at 3). That earlier motion was limited to the effect of the IRA vote in 1936, by which 69 Oneidas in New York voted (57-12) to reject the IRA and the ability of the OIN to avail itself to the Indian Land Consolidation Act. In denying that motion, this court recognized the Carcieri claim specifically reserved and remained to be decided. (Dkt. No. 132 at 23-24 n.13).

[9] The Federal Defendants also foster this confusion by referencing the Oneida Indian Nation of New York (the applicant set forth in the ROD) as the "Oneidas" or "Nation." (U.S. Mem. at 4, 22 & n.7). The OIN never went through the federal acknowledgement process. See Tennant Decl. Exh. UU (1982 DOI memorandum at 8-14) (transcribed).

The process of tribal disintegration and emigration resulted in only a few Oneidas remaining in New York who lived scattered among non-Indians and among non-Oneida Indians on several reservations belonging to other Indians, with these scattered Oneida Indians reflecting the remnants of the historic Oneida Nation. (Pl. Mov. Mem. at 26-28; Tennant Decl. ¶ 67, Exhs. W (Handbook of Federal Indian Law at 417), UU (1982 DOI memorandum at 1-5) (transcribed); Baldwin Mov. Decl., Exh. WW (Beckham Report at 2-10, 22-27, 65-66)). In 1934, few Oneidas resided in New York; none of them were organized as a tribe. (Pl. Mov. Mem. at 27-29; Tennant Decl. ¶ 67, Exh. UU (1982 DOI memorandum at 2-10) (transcribed); Baldwin Mov. Decl., Exh. WW (Beckham Report at 21-22, 66-67, 69)).[10] Thus, the 69 non-tribal Oneidas in New York who voted under the IRA are not the historic Oneida Nation that splintered apart in the 19th century or the modern tribal applicant that formed many years after 1934.

As explained in Plaintiffs' motion for summary judgment, the historic record demonstrates the DOI's ambivalence and confusion in permitting the non-tribal Oneidas in New York to vote after declaring them to be ineligible. (See Pl. Mov. Mem. at 32-34; Tennant Decl. ¶¶ 45-46, 50, 52-54, 56-57). The 69 non-tribal Oneidas who lived scattered in central and western New York in 1934 were allowed to vote on the very last day possible, and they resoundingly rejected the IRA in favor of maintaining the status quo, which consisted of continued supervision by the State.

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[10] The 32-acre parcel in Oneida, New York (Madison County), which was the subject of the Boylan case, was in 1934 owned in fee simple by William Rockwell, an Oneida Indian, who occupied the parcel along with his family. Tennant Decl. ¶ 67, Exh. UU (1982 DOI memorandum at 6-7) (transcribed); Baldwin Mov. Decl., Exh. WW (Beckham Report) at 21-22, 43-44). The modern tribal entity, the OIN, while deemed to have descended from the historic Oneida Nation, is a decidedly modern creation. (Pl. Mov. Mem. at 36; Tennant Decl. ¶ 65, Exhs TT (Waterman Affidavit), UU (1982 DOI memorandum at 8-10) (transcribed); Baldwin Mov. Decl. Exh. WW (Beckham Report at 59-64, 66-67, Conclusion #13)). The OIN has no connection to William Rockwell and his descendents, and thus has no connection to the 32-acre parcel as owned and occupied in 1934. Baldwin Mov. Decl. Exh. WW (Beckham Report at 10-22, 43-44, 69-70, Conclusion # 28).

No conflict exists between Plaintiffs' two motions. Plaintiffs' prior summary judgment motion was premised on the effectiveness of that 11th-hour vote, contending the vote precluded IRA land acquisitions on behalf of any tribal entity that subsequently formed out of the New York Oneidas who were alive and voted in 1936, including the later-formed OIN. That argument is consistent with the current motion. Indeed, both motions are premised on the same historic record consisting of contemporaneous DOI documents regarding the IRA vote. By allowing the vote of these scattered Indians, based on the possibility that some Oneidas were residing on a tiny remnant of the state-created reservation (see Pl. Mov. Mem. at 33-34; Tennant Decl. at ¶¶ 49-54) the DOI in no way found that the Oneidas in New York had a tribal organization in 1934, or that the federal government recognized the Oneidas in New York as a tribe in 1934. And the historic record affirmatively demonstrates that the DOI and Office of Indian Affairs did not exercise jurisdiction over the Oneidas in New York in 1934. (Pl. Mov. Mem. at 37-41; Tennant Decl. ¶¶ 69-86). The only way the non-tribal Oneidas in New York could have come under federal jurisdiction was by affirmatively voting to adopt the IRA and thereby reconstituting themselves as a federally recognized tribe with a cognizable tribal organization. (Pl. Mov. Mem. at 41; Tennant Decl. ¶ 80, Exh. EEE (Feb. 19, 1938 letter from Commissioner Collier at 3)).

B. The DOI Did Not Address The Appropriate Statutory Inquiry In Making The Determination

Both the Federal Defendants and OIN mischaracterize what the Secretary did, and did not, address in the ROD. The ROD implicitly reflects the Secretary's legal position in 2008 – expressly stated in contemporaneous legal filings in the First Circuit and Supreme Court in Carcieri – that the IRA contains no temporal restriction, reading "now" (as in recognized tribe "now under Federal jurisdiction") to mean "now or hereafter." See 555 U.S. at 388-93. Given

the Secretary's adamant (albeit incorrect) contention that the IRA contained no temporal limitation, it is hardly surprising that the Secretary did not consider the status of the Oneidas in New York in 1934. The ROD is completely silent as to whether the Oneidas scattered in New York were organized as a tribe in 1934, and likewise presents no facts showing that the DOI or Office of Indian Affairs in 1934 recognized the few Oneidas living in New York to be a tribe under federal jurisdiction. The Federal Defendants acknowledge that the ROD did not "expressly take up the question of whether the Oneidas were under federal jurisdiction as of 1934" but nonetheless contend the Oneidas' status under federal jurisdiction in 1934 "cannot reasonably be disputed." (U.S. Mem. at 19). That is a post hoc litigation position rather than an agency conclusion based in historical fact. See Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 80-83 (2d Cir. 2006) (agency action required explanation on the record, not post hoc rationalization). As explained below, the Federal Defendants, like the OIN, misstate the legal test in moving for summary judgment on the Carcieri claim in an effort to avoid the historic evidence regarding the actual status of the Oneidas in New York in 1934. As such, Plaintiffs are entitled to summary judgment on the Carcieri claim, not the Federal Defendants or OIN.

C. The Federal Defendants And OIN Misconstrue The Standard For Eligibility To Have Land Taken Into Trust Under The IRA

1. Federal Recognition As Of 1934 Is A Prerequisite To A Tribe Receiving Benefits of the IRA

The Federal Defendants (but not the OIN) assert that there is no requirement under Carcieri that the tribe be federally recognized in 1934 – that later recognition by the DOI can be combined with purported evidence that those Indians were in fact under federal jurisdiction in 1934 even though the DOI did not know it at the time. This unbundling of federal recognition and jurisdiction – so as to de-link tribal recognition from the 1934 temporal restriction – is inconsistent with the Supreme Court's majority opinion in Carcieri, contradicts the DOI's

position in Carcieri,[11] and is belied by both the text and context of the IRA. See generally Pl. Mov. Mem. at 19-21. It is nonsensical to contend that Congress, which looked to restrict the reach of the IRA to avoid adding to "the Indian problem" and increasing the financial burden on the federal government (during the Depression era), would have employed the phrase "members of a recognized tribe now under Federal jurisdiction" if Congress intended to provide for open-ended eligibility to allow IRA benefits to be extended to later-recognized tribes. Had such forward looking inclusiveness been intended, Congress easily could have (and would have) drawn a distinction between the timing for federal recognition as a tribe and existence of federal jurisdiction. For example, the pertinent sentence could have been written to allow IRA benefits to "members of any tribe now [in 1934] under Federal jurisdiction even if the tribe is not currently recognized by the Department of Interior" or even just "members of any tribe now [in 1934] under Federal jurisdiction."

By employing the language it did, Congress naturally and necessarily tied "recognition" and "jurisdiction" together for the purpose of the temporal 1934 limitation. From a grammatical standpoint, the phrase "members of any recognized tribe" is the subject of the predicate "now under Federal jurisdiction." The predicate modifies the complete subject; only a "recognized tribe" can be "under federal jurisdiction." In other words, federal recognition of a tribe occurs coincidentally with the exercise of federal jurisdiction, in keeping with good grammar and common sense, and as further supported by the legislative history regarding the addition of that temporal restriction.[12] (Pl. Mov. Mem. at 20-21; Tennant Decl. ¶ 9, Exh. A at 266). In any

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[11] In Carcieri, DOI steadfastly read the IRA to require both federal recognition and jurisdiction in 1934. See 555 U.S. at 395-96; Carcieri v. Norton, 398 F.3d 22, 30-31 (1st Cir. 2005). Even the OIN adhere to that natural reading of the IRA: "the Supreme Court construed the IRA to limit DOI's trust authority to tribes that were federally recognized and under federal jurisdiction when the IRA was enacted . . . ." (OIN Mem. at 10).

[12] The only support for splitting federal tribal recognition off from federal jurisdiction comes from the concurring opinions in Carcieri, which should not be followed. 555 U.S. at 397-99 (Breyer, J., concurring) (reading statute to impose time limit on jurisdiction but not recognition), 400-01 (Souter, J., concurring in part and dissenting

event, the proposed unnatural separation of federal recognition from federal jurisdiction does not help the OIN given the actual facts on the ground in New York in 1934. Those facts demonstrate that the Oneidas in New York in 1934 were not organized as a tribe, were not recognized as a tribe by the federal government and were not under federal jurisdiction.

2. The Federal Defendants Would Substitute An Unprincipled Standard For The IRA's Meaningful Temporal Restriction To 1934, Contrary To The Will of Congress, The Supreme Court's Decision in *Carcieri*, And The DOI's Own Position In *Village of Hobart*

The Federal Defendants employ a reading of "now under Federal jurisdiction" that renders meaningless that temporal limitation. Under the Federal Defendants' current litigation-inspired view, essentially any group of Indians would be eligible for IRA benefits. For example, a tribe that rejected a proposed treaty in the 18th century might meet the test even without any further contact with the federal government in the last 200 years, as might a group of Indians (like the Oneidas in New York) who overwhelmingly rejected the IRA and remained strangers to the federal Office of Indian Affairs. Under this view, such initial contacts themselves confer federal jurisdiction even if they lead nowhere. It appears now that the DOI believes that if a group of Indians at one time encountered the federal government in this limited way, those Indians remain "under federal jurisdiction" unless the tribe's status is terminated by Congress. (U.S. Mem. at 22). But this open-door, open-ended perpetual standard for federal recognition and jurisdiction, designed to extend IRA benefits to practically every Indian tribe, band or group in the United States, cannot be reconciled with the text and context of the IRA or Congress' specific intent in adopting the "now under Federal jurisdiction" temporal restriction to 1934.

in part) (advocating opportunity for respondents to pursue separate claim on jurisdiction, as opposed to recognition). Neither concurrence employs proper cannons of statutory construction or rules of grammar; both produce an unnatural open-ended eligibility standard that would have confounded the framers and adopters of the IRA who sought to define and limit the universe of Indians who could benefit from the IRA. The idea that large numbers of Indians might be added to the welfare rolls decades later based on post hoc re-interpretations of relationships between groups of Indians and the federal government in 1934 was anathema to Congress, which specifically sought to close the universe of Indians potentially eligible for benefits under the IRA.

Nor can it be reconciled with the DOI's position in Carcieri and in other land-into-trust decisions in which the DOI applied a meaningful standard that looked to the actual facts regarding the tribal applicant in 1934, including whether the tribe voted to adopt the IRA and whether the United States held land in trust for the tribe and otherwise supervised the tribe's affairs through the Office of Indian Affairs. (See Pl. Mov. Mem. at 22-23). In fact, the DOI employed just that type of meaningful temporal restriction in Village of Hobart v. Acting Midwest Reg'l Dir., Docket Nos. 10-107, 10-091, 10-092 (Tennant Decl. ¶ 11, Exh. B), which examined the IRA eligibility of the Oneida Tribe of Indians of Wisconsin. Had the DOI's proposed, watered-down, litigation-inspired standard been applied by the DOI in Village of Hobart, the DOI would have started and ended the analysis of IRA eligibility with the OTW's status under the 1794 Treaty of Canandaigua or the OTW's vote under the IRA in 1935. Instead, the DOI analyzed OTW's eligibility based on a comprehensive assessment of the tribe's actual status in 1934 including the federal government's actual supervision of trust lands, and the tribe's actual vote to adopt the IRA. Tennant Decl. ¶ 11, Exh. B at 10-18.

The Federal Defendants have not explained and cannot rationally explain why the Secretary applied a meaningful temporal restriction to the OTW in Village of Hobart, but are advocating for an entirely different, eviscerated standard by which to judge the IRA eligibility of OIN. Such an unexplained reversal in position is the definition of arbitrary decision-making. See Huntington Hosp. v. Thompson, 319 F.3d 74, 75 (2d Cir. 2002) (explaining that a Health and Human Services' regulation was arbitrary and capricious because the agency issued "two separate regulations construing the same act of Congress in a totally inconsistent manner"); Commc'ns. & Control, Inc. v. FCC, 374 F.3d 1329 (D.C. Cir. 2004) (agency could not apply its rules rigidly in one case and flexibly in others without explanation); JSG Trading Corp. v. United

States Dep't of Agric., 176 F.3d 536 (D.C. Cir. 1999) (reversing agency for adopting a new, more relaxed definition of commercial bribery without explanation).

3. The Federal Defendants And OIN Improperly Rely On An IBIA Decision

The Federal Defendants and OIN rely heavily on the Interior Board of Indian Appeals' ("IBIA") ruling in Shawano Cnty. v. Acting Midwest Reg'l Dir., 53 IBIA 62 (Feb. 28, 2011). (U.S. Mem, at 19-20; OIN Mem. at 11, 14-15). That administrative board's interpretation of Carcieri is entirely unpersuasive in its reasoning and offers only a simple and unsupported conclusion that the act of allowing a vote under the IRA confers federal jurisdiction on a tribe. The conclusion is nothing more than an ipse dixit, and constitutes dictum because the tribal applicant in Shawano, the Stockbridge-Munsee Community, Wisconsin, voted affirmatively to adopt the IRA, which the DOI previously viewed as the jurisdiction-conferring act. Indeed, that is precisely what Commissioner Collier, the principal architect of the IRA, believed would be the legal effect of a positive vote by the New York Indians, who otherwise were under the jurisdiction and direct control of the State. (Pl. Mov. Mem. at 41; Tennant Decl. ¶ 80, Exh. EEE at 3). Under Collier's view, had the Oneida Indians in New York voted to adopt the IRA as did the OTW and the Stockbridge-Munsee in Wisconsin, they would have been brought under federal jurisdiction.

In effect, the Federal Defendants and OIN argue for a rule that treats having the right to vote on the IRA the same as affirmatively voting to adopt the IRA even when those Indians voted overwhelmingly to reject the IRA. That argument is unsound on its face and the DOI's current position is belied by Commissioner Collier's clearly stated view that only a positive vote under the IRA would confer federal jurisdiction over the New York Indians.

To the extent the IBIA decision is viewed as adopting a blanket bright-line rule for

determining "under federal jurisdiction" within the meaning of the IRA which is satisfied if any group of Indians was allowed to vote under the IRA, that interpretation of the IRA is irrational and finds no support in the language of the IRA, its legislative history, or the Supreme Court's decision in Carcieri. Applying that irrational across-the-board rule to the "unique" and "peculiar" circumstances of New York Indians, who in 1934 were under the jurisdiction of the State in reverse of the normal state-federal roles (see Pl. Mov. Mem. at 37-41), is the height of arbitrary decision-making and is contrary to law. In any event, this court owes no deference to any legal constructions of the IRA by the IBIA (see Carcieri v. Salazar, 555 U.S. 379, 387-92 (2009)) and should reject out of hand the IBIA's ipse dixit dictum in Shawano.

D. The Historical Facts Establish Without Contradiction That The Oneidas In New York In 1934 Were Not Tribally Organized And Were Not Under The Supervision And Control Of The DOI And Office Of Indian Affairs

1. The Record Regarding The IRA Vote In 1936 Demonstrates The Absence Of Federal Recognition Of And Supervision Over the Oneidas

In keeping with their reliance on Shawano, both the Federal Defendants and OIN stress the fact that the Oneidas in New York were allowed to vote on the IRA, with OIN going so far as to say it is "fatal" to Plaintiffs' Carcieri claim. (OIN Mem. at 14, 15 n. 7; U.S. Mem. at 13, 19). In doing so, both the Federal Defendants and OIN ignore the historical facts regarding the vote by the New York Oneidas in 1936. That record – documented comprehensively in Plaintiffs' moving papers – demonstrates the absence of federal jurisdiction. The relevant historical facts show that the DOI and Office of Indian Affairs did not view the scattered Oneidas as a tribe; DOI officials in Washington were unaware of the Oneidas' purported reservation in New York; the Oneidas in New York were otherwise strangers to the federal Office of Indian Affairs, receiving no services from them; and the Oneidas in New York (along with other New York Indians) were under the direct, active jurisdiction of the State. (Pl. Mov. Mem. at 32-34;

Tennant Decl. ¶¶ 43-67 and corresponding exhibits). The DOI's decision to allow the vote was ambivalent and uncertain, with the DOI giving a handful of non-tribal Oneidas the chance to form a tribe under the IRA and thereby come under federal supervision if they so chose. Id.[13] But the record conclusively shows the Oneidas in New York (along with the other New York Indians) rejected the IRA in favor of maintaining the status quo under State supervision. See Tennant Decl. ¶ 80, Exh. EEE (Feb. 19, 1938 letter from Commissioner Collier at 3); id. ¶ 82, Exh. GGG (May 1939 Coleman Repot at 1). The record of the negative IRA vote in New York in 1936 thus conclusively demonstrates the absence of federal jurisdiction, not its presence.

2. The Federal Defendants' and OIN's Reliance on *Boylan* Is Misplaced

As explained in Plaintiffs' memorandum of law in support of their motion for summary judgment, the Boylan decision is an aberration in many respects; in any event, it does not answer the question of OIN's eligibility under the IRA for a host of reasons, including the fact that it documents events thirty years before the IRA vote. (Pl. Mov. Mem. at 43-45; Tennant Decl. ¶¶ 31-41 and corresponding exhibits). None of the findings in Boylan are temporally relevant to the IRA inquiry, and the record otherwise shows major changes occurred in the occupation and ownership of the 32 acres between the eviction in 1906, which gave rise to the Boylan litigation, and the IRA vote in 1936. Most notably, at some point in the intervening three decades, William Rockwell acquired sole ownership in fee of the entire 32-acre parcel, and only Rockwell and his family resided on it in 1934 – with no indication that the property in 1934 was treated as a reservation and no hint of any tribal organization existing at that time. Baldwin Mov. Decl. Exh. WW (Beckham Report at 10-22, 43-44, 66-67, 69). Because the modern tribal applicant has no

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[13] The historic record thus belies the OIN's claim that the Secretary called a tribal vote. (OIN Mem. at 15 n.7). It was a vote to enable the scattered Oneidas in New York to reconstitute a tribe if they chose to do so.

relationship whatsoever to the Rockwell family, none of the Boylan findings can benefit the OIN's application under the IRA. Id.; Tennant Decl. ¶ 65-66, Exh. TT (Waterman Affidavit).

On the merits – as discussed more fully in Plaintiffs' memorandum of law to support their motion for summary judgment – the federal courts in Boylan did not apply the controlling legal standards for determining whether a group of Indians constituted a tribe or band, as set forth in Montoya v. United States, 180 U.S. 261, 265-266 (1901) (Pl. Mov. Mem. at 45). Moreover, the courts reached a conclusion about the "tribal" status of the evicted families that, according to the OIN (OIN Mem. at 13, 16) is a political question that should have been answered by the DOI.[14] But the official view in Washington, expressed by successive administrations in the 1910s, 1920s and 1930s, reaffirmed, time and again, that the handful of Indians evicted from the 32-acre parcel were not tribal Oneidas; that the DOI had no jurisdiction over those families; and that the Department of Justice had no legal or factual basis to bring a suit to restore those Indians to the land in question.[15] (Pl. Mov. Mem. at 27-30, 43-45; Tennant Decl. ¶¶ 31-41 and corresponding exhibits).

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[14] The DOJ's political definition of "federally recognized tribe" unmistakably requires more than what the record shows or what the courts found in Boylan. The DOJ currently offers the following definition on its website:

> What does the term "Federally-Recognized Tribe" mean?
>
> "Recognition" is a legal term meaning that the United States recognizes a government-to-government relationship with a Tribe and that a Tribe exists politically in a "domestic dependent nation" status. Federally-recognized Tribes possess certain inherent powers of self-government and entitlement to certain federal benefits, services, and protections because of the special trust relationship.

See http://www.justice.gov/otj/nafaqs.htm#otj26 (last visited January 22, 2012) (attached as Exh. B to the Baldwin Opp. Decl.). Moreover, the DOI in 1982 specifically rejected the Boylan case findings with respect to the existence of purported "tribal" Oneidas, observing that the families evicted from the 32 acres had an informal ad hoc association that revolved around the land. Tennant Decl., Exh UU (1982 DOI memorandum at 6-7) (transcribed).

[15] In light of the clear position of the DOI and Office of Indian Affairs that the evicted Indians in Boylan were not tribally organized, were not federally recognized as a tribe, and were not under federal jurisdiction in 1934, mistaken judicial observations about a general continuing guardian-ward relationship with those Indians (OIN Mem. at 15-16) cannot salvage the OIN's eligibility under the IRA. Under delegated authority from Congress, the DOI was tasked with determining which Indians were under its jurisdiction in 1934, and thus were eligible to receive IRA benefits. In doing so, the DOI applied established federal Indian law and policy.

The Federal Defendants nonetheless argue that as a matter of law, the 32 acres were "continuously" subject to supervision by the United States under the Indian Trade and Intercourse Act. (U.S. Mem. at 23). Except for the one intervention by the Department of Justice in the Boylan case, no other supervision was in fact provided in relation to that land or its occupants – and, critically, the DOI did not take any steps after Boylan to intervene on behalf of the Indians restored to the 32 acres, adhering to the official Indian policy that these Indians were not tribal Indians under federal jurisdiction. (Pl. Mov. Mem. at 31-32, 46-47).

At most, the Federal Defendants can point to the "shadowy" and "uncertain" nature of the federal government's unexercised plenary power over Indian affairs and its potential to extend federal jurisdiction over New York Indians. Tennant Decl. ¶¶ 69-86, Exh. HHH (May 31, 1939 Commissioner Collier memorandum at 2). But as Commissioner Collier observed in 1938, the federal government did not in fact exercise jurisdiction over New York Indians and their reservations, and the federal government would not be able to do so without one of two events occurring: either (1) Congress enacting a law directing and funding the Office of Indian Affairs to assume jurisdiction over New York Indians and their reservations; or (2) the New York Indians adopting the IRA. Tennant Decl., Exh. EEE at 3. Neither happened.

3. The Treaty Of Canandaigua Does Not Establish The Status of Oneidas in New York in 1934

The Federal Defendants and OIN greatly overstate the significance of the 1794 Treaty of Canandaigua for purposes of determining the OIN's eligibility under the IRA. (U.S. Mem. at 13, 18; OIN Mem. at 11 ("classic example of federal recognition"); id. at 12-13 ("conclusive as to federal recognition"); id. at 18 (noting "uninterrupted annual federal annuities")). Given the disintegration of the historic Oneida Nation in the early to mid-19th Century, evidence relating to the 1794 Treaty is not conclusive of anything. In fact, the DOI specifically rejected the argument

that continued distribution of treaty cloth to individual Oneida Indians could support OIN's eligibility under the IRA. Tennant Decl., Exh. UU (1982 DOI memorandum at 5-6) (transcribed). In distributing treaty cloth to New York Indians under the 1794 Treaty, DOI does not make any findings that the distributees are organized or recognized as a tribe, and DOI does not consider the act of distributing treaty cloth to confer federal jurisdiction over the recipients. Id.

Of course, if the existence of the 1794 Treaty and continued payment of treaty cloth were "conclusive" on federal recognition and jurisdiction, the DOI would have analyzed the IRA application of the OTW very differently in Village of Hobart. There, DOI engaged in a comprehensive survey of the relationship between the DOI and the OTW as it existed in 1934, (Tennant Decl., Exh. B at 10-18) even though the OTW arguably had a continuous relationship with the federal government since the historic Oneida Nation's signing of the 1794 Treaty, including the OTW's receipt of treaty cloth. Baldwin Opp. Decl. Exh. A at ¶ 4 (OTW Complaint). The DOI did not rely on the 1794 Treaty to support a finding of federal recognition or jurisdiction for OTW, and instead looked to the full range of contemporaneous (1934) contacts between the DOI and OTW, including the DOI's administration of OTW trust lands and contemporaneous expressions by the Commissioner of Indian Affairs recognizing federal jurisdiction over the OTW. Tennant Decl., Exh. B at 15-18. That analysis would have been superfluous if the DOI believed 1794 Treaty rights conclusively answered the Carcieri question.[16]

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[16] The DOI's reliance on contemporaneous DOI correspondence in Village of Hobart renders hypocritical (and arbitrary) the DOI's current dismissal of such evidence as "passing opinions." (U.S. Mem. at 18).

E. The Federal Defendants' Motion For Summary Judgment Relies On The Demonstrably Wrong "Assumption" That The OIN Are Descendants Of Oneidas Living On The 32-Acre Parcel In 1934

The Federal Defendants curiously contend that the OIN satisfies the definition of "Indian" under the IRA not just because it meets the test of being an Indian tribe under federal jurisdiction as of June 18, 1934 (thus satisfying the IRA definition of Indian as "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction"), but also because it satisfies the definition of "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." (U.S. Mem. at 17-18 n.4).

It is not clear what the Federal Defendants believe this definition adds to the IRA analysis.[17] By referring to "such members," this alternative definition expressly incorporates the first definition's requirement that the tribe be under federal jurisdiction in 1934. But in making this alternative argument the Federal Defendants betray a remarkably superficial understanding of the history of the Oneidas in New York and the modern constituency of the OIN as the current tribal applicant. The Federal Defendants weakly contend that "it is reasonable to conclude that current members of the Tribe are descendants of members who were residing within the boundaries of the Reservation on June 1, 1934." (U.S. Mem. at 17-18 n.4). The only land in New York that may have had reservation status in 1934 – which DOI recognized as deriving from a reservation created and supervised by New York State – was the 32-acre parcel.[18] And as

[17] In any event, no such determination that the OIN satisfied this definition was made by the DOI in the ROD, and the Federal Defendants' argument is nothing more than another litigation-driven position not supported by the Administrative Record.

[18] The Federal Defendants and OIN emphasize the existence of the "not disestablished" reservation under the 1794 Treaty of Canandaigua as supporting OIN's eligibility under the IRA. (U.S. Mem. at 14, 21; OIN Mem. at 4, 39-40). The status of the OIN's historic reservation is the subject of ongoing litigation now pending before the Second Circuit. Oneida Indian Nation of N.Y. v. Madison County, No. 05-6408-cv(L) (2d Cir. petition for reh'g en banc filed Nov. 3, 2011). But even if the "not disestablished" reservation remains an applicable legal concept, nothing about the legal status of the historic reservation changes the facts on the ground in 1934 – the same facts

Professor Beckham points out, the handful of Oneidas who occupied that parcel at the turn of the century, and were evicted in 1906 and restored to the land through the Boylan litigation, moved away or died by the 1930s, except for a single family. When DOI dispatched an agent to investigate the possibility that a tiny fragment of the historic reservation was occupied by Oneidas in 1934, the agent found William Rockwell and his family living on the 32-acre parcel. The modern tribal entity (OIN) consists of members unrelated to Mr. Rockwell. Thus, the assumption underlying the Federal Defendants' argument that the OIN satisfies the alternative IRA definition of "Indian" is demonstrably false and does not support the OIN's eligibility under the IRA.

For all of these reasons, the Federal Defendants' and the OIN's motions for summary judgment on Plaintiffs' Third Cause of Action should be denied.

F. All Parties Agree That Remand To The Secretary On The Carcieri Issue Is Unnecessary

The parties agree that if the Court remands the Carcieri issue to DOI, the Secretary will not change the position taken in the ROD, rendering a remand futile. (U.S. Mem. at 27 ("There is no 'significant chance'… the Secretary will conclude that the Oneidas were not a recognized tribe under federal jurisdiction in 1934."); OIN Mem. at 10 n. 6 (referring to remand as "idle and useless" exercise)). The Secretary refused to address the Carcieri issue in 2008 when issuing the ROD and has demonstrated open hostility to the Supreme Court's decision by supporting Congressional efforts to overturn Carcieri and by adopting administrative standards that thwart the application of the IRA's temporal restriction to 1934. (Pl. Mov. Mem. at 24-26). Given

understood by Congress at the time it enacted the IRA. The historical record demonstrates the absence of federal jurisdiction over the New York Indians and their reservations in 1934, including the Oneidas and the remnant of their state-created reservation.

those realities, the courts remain the only fora in which Carcieri's requirements have a chance to be respected.

III. THE DOI ARBITRARILY DEPARTED FROM PRIOR POLICY WITHOUT EXPLANATION

The Supreme Court has recognized the "simple but fundamental rule of administrative law . . . that the agency must set forth clearly the grounds on which it acted." Atchinson, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). A corollary rule is that the agency must "explain the policies underlying its action" and adhere to its "duty to explain its departure from prior norms." Id. at 807-08. There are grounds upon which an agency may depart from its prior policies, but "[w]hatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." Id. at 808. An agency may have reasons for "following a procedure fairly adapted to the unique circumstances of this case" but "it must make these reasons known to a reviewing court with sufficient clarity to permit it do its job." Id. at 817. The Determination here fails to comply with these requirements.

A. The DOI Departed From Its Longstanding Policy Not To Take Land Into Trust For Self-Sufficient Tribes

Plaintiffs' Fourth Cause of Action alleges that the Determination is arbitrary and capricious because it departs from longstanding DOI policy without explanation. One such instance is the DOI's unexplained departure from its policy of not taking land into trust for tribes who are self-sufficient. The OIN contends "there is no such DOI policy" (OIN Mem. at 18) and the Federal Defendants, attempting to avoid their own policies, argue that the discord with "historical or long-standing Department policies is irrelevant." (U.S. Mem. at 30). Neither argument entitles Defendants to summary judgment.

1. The DOI's Longstanding Policy Post-Dates Promulgation Of The DOI's Land-Into-Trust Regulations

On April 21, 1959, the Commissioner of Indian Affairs wrote to all area directors and superintendents of the BIA to inform them that

> we 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. It would be far better for the Bureau of Indian Affairs to be able to concentrate its efforts on assisting those genuinely in need of assistance and be relieved of providing protection and help to those Indians wanting more land who are highly successful through their own efforts in a business or a profession or as a farmer or cattleman with large holdings.

Baldwin Mov. Decl. Exh. CCC. This memorandum was issued in response to a number of questions "concerning our policies on when Indians may acquire additional land in a trust status." Id. On August 3, 1960, the Commissioner of Indian Affairs sent another memorandum, modifying a part of the 1959 memorandum pertaining to individual Indians, stating in part that "when there is statutory authority lands should be conveyed to an Indian in a trust status unless it is obvious that the trust status will place him 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." Id. at Exh. DDD. The State referenced both of these memoranda in its comments to the DOI on the Application, but was apparently ignored by the DOI. Id. at Exh. O (AR000287-88 n.3); Exh. P (AR001113-4 n.3). These memoranda were incorporated and reissued in the Bureau of Indian Affairs Manual ("BIAM") as recently as February 1984. Baldwin Opp. Decl. Exh. C (1984 BIAM Reissue at 54 IAM 2.2.1F). When the BIAM was replaced by the new Indian Affairs Manual, the BIA did not designate a replacement for the BIAM section containing these

memoranda.[19] The BIA's website confirms that "[i]n cases where a BIAM Part/Chapter has not been replaced by an IAM Part/Chapter, the BIAM technically still applies." Baldwin Opp. Decl. Exh. E. Accordingly, the OIN's motion for summary judgment cannot be granted on the grounds that this policy does exist.

This policy not to take land into trust for tribes who are self-sufficient is supported by and consistent with the legislative history of the IRA. The purpose of the statute 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 . . . if we could put them on small tracts of land . . . they could make their own living." Baldwin Mov. Decl. Exh. UU (78 Cong. Rec. 11123 (1934)). The land-into-trust provision of the IRA was intended to "provide land for Indians who have no land or insufficient land." Id. at Exh. BBB (78 Cong. Rec. 11730 (1934)).

Much as they do with DOI documents demonstrating that the OIN was not recognized and under federal jurisdiction in 1934, the Federal Defendants argue that the DOI's noncompliance with its own policy is irrelevant, so long as the DOI complied with the regulations at 25 C.F.R. Part 151. This argument fails because Part 151 did not supersede the BIA policy memoranda – the BIAM was reissued in 1984, four years after Part 151 (then Part 120a) was promulgated. Compare Baldwin Opp. Decl. at Exh. C (1984 BIAM Reissue) with 45 Fed. Reg. 62034 (Sept. 18, 1980). There is nothing in 25 C.F.R. § 151.1 that conflicts with or supersedes the land-into-trust policies and objectives set forth in the BIAM. In fact, the BIAM's introduction to the 1959 memorandum notes that "[t]he Commissioner's memorandum of April 21, 1959, approved by the Assistant Secretary April 22, 1959, states the general principals [sic] and policy which must be observed in determining under what circumstances, individual Indians

[19] The BIA did issue a new IAM section for "Processing Discretionary Fee-to-Trust Applications," 52 IAM 12, however, it appears that this IAM chapter was released on June 24, 2010 – over two years after the issuance of the ROD and the commencement of this action. Baldwin Opp. Decl. at Exh. D (52 IAM 12).

or Indian tribes may be permitted to acquire land in a trust status." Baldwin Opp. Decl. Exh C (1984 BIAM Reissue at 54 IAM 2.2.1F) (emphasis added). Simply because the DOI policy would be inconvenient for the DOI in addressing this Application does not mean that it does not exist.

The IBIA cases cited by the Federal Defendants are inapposite. In both County of Mille Lacs v. Midwest Reg. Dir., 37 IBIA 169, 173 (Mar. 25, 2002) and Avoyelles Parish v. E. Area Dir., 34 IBIA 149, 153 (Oct. 27, 1999) (cited at U.S. Mem. at 30), the DOI made specific findings that each tribe "need[ed] additional land to promote the infrastructure necessary to support its members and its economic development" Mille Lacs, 37 IBIA at 173, or "needed new land in order to gain space for further economic development" because its land was "fully utilized," Avoyelles Parish, 34 IBIA at 153 – in other words, that there was an actual economic need for land to be taken into trust. The DOI has made no such finding here, and it could not. Having found that no economic activity by the OIN is prohibited even if the land is not held in trust, Baldwin Mov. Decl. Exh. L (ROD at 12, 39), and in the face of the undisputed evidence that the OIN's economic success would endure even if it had to pay taxes and otherwise comply with applicable state and local regulatory law, id. Exh. FFF (AR013112) (Jarrell Report at ¶ 98), there was no conceivable way for the DOI to determine that economic need compelled placing over 13,000 acres into trust. The OIN simply does not need trust status to engage in further productive economic activity. Regardless, neither IBIA decision contravenes (or expressly discards) the DOI policy not to take land into trust for tribes who are self-sufficient. Nor is there a no finding (or discussion) by the IBIA in either case that the relevant tribe is a "big operator" or "highly successful through their own efforts in a business or a profession or as a farmer or cattleman with large holdings." The tribe in County of Mille Lacs applied for 120 acres to be

taken into trust, and the tribe in Avoyelles applied to have 1.308 acres taken into trust. Those decisions are not analogous here, where the DOI accepted over 13,000 acres into trust for an already self-sufficient tribe.

2. The DOI Is Not Free To Ignore This Policy Without Explanation Whenever It Chooses To

An agency is not free to disregard its policies and practices without explaining why it is doing so. Atchinson, 412 U.S. at 817. The Federal Defendants' argument that the DOI is free to ignore applicable policies (U.S. Mem. at 30) in issuing the Determination is precisely what makes it arbitrary and capricious. It cannot be disputed that the OIN has the ability to manage its own affairs and is a "big operator." The OIN owns over 17,370 acres of land. Baldwin Mov. Decl. Exh. L (ROD at 6). The DOI recognized 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." Id. at Exh. A (FEIS at 3-246).[20] The OIN generates between $300 and $400 million in income per year from its business enterprises. See Baldwin Mov. Decl. Exhs. FFF (AR013094) (Jarrell Report at ¶ 49), VV (ARS000904) (Internal DOI e-mail). The DOI concluded that these enterprises are not dependent on the Determination and can operate without trust status. Id. at Exh. L (ROD at 12, 39). Further, the OIN is financially capable of paying the property taxes assessed on all of its properties. Id. at Exhs. FFF (AR013112) (Jarrell Report at ¶ 98), II (Supplemental Jarrell Report at ¶ 72). Consequently, by taking over 13,000 acres of land into trust for the OIN, the DOI has departed from its policy to not take land into trust for "big operator" tribes who can successfully manage their own affairs, and has not explained its

[20] Even if the Federal Defendants were correct that the DOI may ignore its policy, their argument that the Determination is authorized because the DOI found it necessary to take land into trust to facilitate tribal self-determination and economic development (U.S. Mem. at 30) is contradicted by this finding in the FEIS.

justification for that departure. Nor has the DOI cited reasons for abandoning this policy and adopting one that is "fairly adapted to the unique circumstances" of the OIN. See Atchinson, 800 U.S. at 817.

B. The DOI Failed To Comply With Its Regulations And Policies Regarding The Elimination Of Tax Liens

Section 151.13 of the DOI's land-into-trust regulations requires that:

> 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). 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 and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

The regulations are unambiguous and mandatory: 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 and publication of the notice of final agency determination to take land in trust. In addition to the requirement of "elimination" of liens and infirmities before taking land into trust under 25 C.F.R. § 151.13, the DOI also ignored the policy communicated by Mr. Cason, that "it is Departmental policy not to accept into trust lands that are encumbered by tax liens." Baldwin Mov. Decl. Exh. MM (AR005716) (June 10, 2005 letter from James Cason to Ray Halbritter). Mr. Cason informed State representatives 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 into trust." Id. at Exhs. HH (AR049174) (Letter to Congressman John McHugh), NN (AR049067) (Letter to Sen. Charles Schumer).[21]

The DOI simply failed to comply with these regulations and policies. On their motions for summary judgment, the Federal Defendants and OIN argue that the regulations do not mean what they state, and that the DOI was not required to follow them. Both propositions are inaccurate. Contrary to the apparent arguments of the Federal Defendants and OIN, the mere fact that the tax liens are being challenged does not empower the DOI to ignore its regulations. Even a lien that may be subject to challenge would render title unmarketable until a court of competent authority can authoritatively decide the lien's validity. See Lynbrook Gardens, Inc. v. Ullmann, 291 N.Y. 472, 477 (1943) (finding title unmarketable where Supreme Court of the United States could later render unconstitutional foreclosure statute under which sale was made to putative purchaser: "At the time when the deed is tendered questions of law which have not yet been judicially determined by the courts may cast a shadow of doubt upon the title; the shadow is removed when a court which can authoritatively decide those questions of law has spoken."). See also Midurban Realty Corp. v. F. Dee & L. Realty Corp., 247 N.Y. 307, 311 (1928); 1 Joseph Rasch, Hon. Robert F. Dolan, N.Y. Law and Practice of Real Property § 22:29 (2d ed. 1991) ("The existence against the property of unpaid taxes or tax liens constitutes such a defect in title as to make it unmarketable."); id. ("[T]he fact that the land is subject to a local assessment renders title unmarketable, unless the proceeding in which the assessment was made is void upon its face.").

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[21] Notwithstanding the multiple pronouncements of Mr. Cason and the numerous references to this policy in the Administrative Record, the OIN incorrectly assert that no such policy exists. (OIN Mem. at 19). As demonstrated by the cited documents, the OIN is wrong.

Moreover, the Administrative Record demonstrates that the title examination process was irregular throughout the DOI's consideration of the Application. The Title Standards: 2001: A Guide for the Preparation of Title Evidence in Land Acquisitions by the USA (referenced in Section 151.13) plainly contemplates issuance of preliminary title opinions ("PTOs") in the acquisition of land 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 Mov. Decl. Exh. JJ at 3. The DOI has documented this practice of obtaining PTOs in a number of checklists and outlines for the land-into-trust process. See, e.g., id. at Exh. GGG (AR007315) (BIA Standard Fee To Trust Checklist) (listing steps for the request and receipt of PTOs from the Solicitor's Office before issuance of Final Title Opinions); id. at Exh. HHH (FOIA-045877) (OIN Fee to Trust 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, App. 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 for April 1, 2006. Id. at Exh. III (FOIA-045887). A Government Accountability Office ("GAO") report on the land into trust process listed the obtaining of PTOs as a step to be completed before issuing a decision letter to the applicant and publishing a notice of decision in the Federal Register. See id. Exh. TT at 16.

Notwithstanding its standard practice, the DOI did not obtain PTOs for the Determination. Shortly after the Application was received, the BIA requested the DOI Solicitor's Office to issue a PTO for each parcel for which the OIN applied for trust status.

Baldwin Mov. Decl. Exh. KK (AR007022) (April 29, 2005 DOI memorandum). As late as August 2, 2006, the DOI was still obtaining PTOs for the Application. Id. at Exh. LL (AR004981) (Internal DOI e-mail). By January 2007, however, those within the DOI expressed doubt on how the Solicitor's Office "will pass on the title with the tax liens filed against them; how long it will take Boyd [Peterson] to complete a legal description review for all the tracts (300+)" and the process to procure the PTOs was abandoned. Id. at Exh. JJJ (Internal DOI e-mail at 2).

1. The DOI's Interpretation of Its Regulations Is Contrary To Their Plain Meaning And Is Not Entitled To Deference

The Federal Defendants cite the ROD for the proposition that "the requirements for acquiring title to land in trust do not call for liens to be removed to the satisfaction of the local taxing authority; liens must be addressed to the satisfaction of the Federal government pursuant to Federal title standards." U.S. Mem. at 65; Baldwin Mov. Decl. Exh. L (ROD at 54). Implying that this conclusion by the DOI modifies the applicable regulations, the Federal Defendants conclude that the liens need only be "addressed" to the "satisfaction" of the DOI, and that the express "elimination" requirement is inapplicable. The Federal Defendants are simply wrong: no authority stands for the proposition that an agency can simply disregard its mandatory regulations when compliance with those regulations would be inconvenient. Nor can the DOI justify its reading on the ground that it is entitled to deference in construing its own regulations. Where an agency's interpretation of its regulations is plainly erroneous or contrary to the regulations' plain meaning, the agency's construction is not entitled to deference. Christensen v. Harris County, 529 U.S. 576, 588 (2000) ("Because the regulation is not ambiguous . . . deference is unwarranted."); Lin v. Department of Justice, 459 F.3d 255, 262 (2d Cir. 2006) (court only affords deference to agency interpretation where it is not plainly erroneous,

inconsistent with regulation, or inconsistent with a previous interpretation); Rochester-Genesee Regional Transp. Auth. v. Hynes-Cherin, 531 F. Supp. 2d 494, 520-21 (W.D.N.Y. 2008).

The Federal Defendants are also mistaken when they state that the DOI "retains discretion to revisit this issue" – section 151.13 provides no discretion in the case of liens that render title unmarketable.[22] Section 151.13 states that the Secretary "shall" require elimination of such encumbrances, and the word "shall" indicates a mandatory directive unless there is reason to interpret it otherwise. See United States v. Maria, 186 F.3d 65, 70 (2d Cir. 1999) ("in laws, regulations, or directives . . . the ordinary understanding of 'shall' describes a course of action that is mandatory"); DGR Assocs., Inc. v. United States, 94 Fed. Cl. 189, 208 (Fed. Cl. 2010) ("shall" is "language of command" and is "presumptively mandatory" as opposed to "may" which implies discretion).

Simply put, section 151.13 does not provide for liens to be "addressed to the satisfaction of the Federal government," Baldwin Mov. Decl. Exh. L (ROD at 54) (OIN Mem. at 55), it provides for mandatory "elimination" of liens, such as those here, that render the title unmarketable. In denying the Federal Defendants' motion for summary judgment, the Court will not "deprive" the DOI of discretion to interpret what constitutes "adequate provision" under its regulation, (U.S. Mem. at 69), because there is no "adequate provision" language in that regulation.

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[22] The OIN cite a number of regulations that provide for satisfaction or waiver of title defects depending on the federal government's interests. (OIN Mem. 56). These regulations, however, expressly provide for this discretion whereas section 151.13 does not. Most notably, the OIN cite the DOI's regulation at 43 C.F.R. § 2201.8(c)(1)(i), which provides that "[t]itle to the non-federal lands must be acceptable to the United States. For example, encumbrances such as taxes, judgment liens, mortgages and other objections or title defects shall be eliminated, released or waived in accordance with requirements of the preliminary title opinion of the Office of the Solicitor of the Department of the Interior or the Department of Justice, as appropriate." Thus, the DOI knows how to promulgate regulations to account for discretion to remove liens and encumbrances but chose not to do so in 25 C.F.R. § 151.13. The DOI is bound by the unambiguous terms of the regulations it has promulgated.

The contentions by the Federal Defendants and OIN that "final approval action" under section 151.13 means when title to the property "is ready to be transferred" (OIN Mem. at 55) are belied by: (1) section 151.14, which calls for "formal acceptance" of land into trust by issuance of an instrument of conveyance; and (2) section 151.12(b) which calls for the DOI to publish notice of the DOI's final determination "[f]ollowing completion of the Title Examination provided in § 151.13 of this part." Section 151.13 requires "elimination" of liens prior to "approval". Following that, section 151.12(b) calls for a 30 day waiting period, and section 151.14 then provides for the "formal acceptance" when title is ready to be transferred.

The construction advanced by the Defendants allows the DOI to disregard its responsibilities under section 151.13 without any judicial review, thereby potentially making failures of title examination unreviewable and potentially depriving holders of liens or other encumbrance rights of any recourse.[23] Such a construction effectively rewrites the land-into-trust regulations. See Christensen, 529 U.S. at 588 ("To defer to the agency's position [interpreting an unambiguous regulation] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

The DOI published the 151.12(b) notice on May 23, 2008. Baldwin Mov. Decl. Exh. OOO (providing notice of "Final Agency Determination" published to "comply with the requirement of 25 C.F.R. 151.12(b)"). It is undisputed that that the Secretary did not eliminate the tax liens before publishing of the notice of final agency action under 151.12(b). Thus, the

[23] This failure in reasoning is evident in the DOI's statement that "[i]f litigation over the taxability of the casino tax lot is pending at the time the Department could formalize acceptance of the casino tax lot into trust, the Department will require the Nation to provide a letter of credit to the United States for the difference between" the total taxes levied on the tax lot and the amount provided for in the OIN's letter of credit. Baldwin Mov. Decl. Exh. L (ROD at 54). The DOI does not state that it will refrain from taking land into trust if the OIN refuses to procure additional letters of credit. If the DOI will refrain, the DOI would have to wait before "formalizing" acceptance of the lands in any event. Yet, the Federal Defendants argue that it would be an "unduly narrow construction" of its regulations if the DOI were forced to wait until the tax litigation is resolved before deciding to take the land into trust. (U.S. Mem. at 68). If the DOI does not refrain and takes the land into trust, the Counties may be deprived of validly assessed taxes.

DOI did not comply with the plain meaning of its unambiguous regulations and the Determination is arbitrary and capricious.[24]

2. The DOI's Arbitrary Acceptance Of Letters Of Credit Does Not Eliminate The Tax Liens

The tax liens on OIN lands that the DOI seeks to take into trust render title to those lands unmarketable. See Midurban Realty, 247 N.Y. at 311; 1 Joseph Rasch, Hon. Robert F. Dolan, N.Y. Law and Practice of Real Property § 22:29 (2d ed. 1991); see also Lynbrook Gardens, 291 N.Y. at 499. Accordingly, the Secretary "must" require "elimination" of the liens before deciding to take the land into trust. 25 C.F.R. § 151.13. In lieu of eliminating the tax liens or reaching an agreement between the tax assessors and the OIN, the DOI instead decided to capriciously accept highly qualified letters of credit and a commitment from the OIN to procure additional letters of credit. Letters of credit do not remove tax liens, nor do unenforceable commitments to obtain letters of credit in the future. See N.Y. Real Property Tax Law § 1110 ("Real property subject to a delinquent tax lien may be redeemed by payment to the enforcing officer . . . ." (emphasis added)); 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).

The Counties have also not agreed to the letters of credit, as would be required pursuant to the DOI policy communicated by Mar. Cason. Even if letters of credit were generally

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[24] The OIN's contention that Plaintiffs have no standing to challenge an agency determination made in violation of mandatory regulations and that directly impacts Plaintiffs is without support in law or logic. 25 C.F.R. § 151.12(b), which provides 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 . . . a notice of his/her decision to take land into trust" and calls for a 30 day waiting period, was promulgated to give affected members of the public the ability to seek judicial review of a decision to take land into trust. 61 Fed. Reg. 18082 (Apr. 24, 1996). The DOI's failure to abide by section 151.13 has a direct effect on the Counties who are no doubt affected by the Determination.

sufficient to eliminate tax liens on real property, there is no evidence produced in the Administrative Record that the DOI considered the significant risks of nonpayment under the letters that it accepted. Instead, the DOI blindly concluded that the "[l]etters of credit are adequate provision for tax liens on the Subject Lands" Baldwin Mov. Decl. Exh. L (ROD at 55), and that "[t]he letters of credit are guarantees of payment after placement of the lands into trust," id. at Exh. L (ROD at 54), without any analysis produced in the Administrative Record. Among the most significant risks and deficiencies of the letters of credit are the credit risk of the issuer, RBS Citizens, NA ("Citizens"), the termination risk, the risk that Citizens will not honor the letters because of a lack of clarity in the drawing conditions and the risk of being unable to satisfy unrealistic drawing conditions.

Any payment under a letter of credit is dependent on the solvency of the issuer. The documents produced in the Administrative Record contain no inquiry, analysis, or mention of Citizen's credit rating, which has been steadily downgraded since 2008 and is currently rated as C+. Baldwin Mov. Decl. Exh. LLL (Moody's rating). It is very possible that Citizens will not be able to pay the Counties on the letters of credit if and when the complex drawing conditions are satisfied. The DOI also failed to consider that the letters may be unilaterally terminated by Citizens on the anniversary date of the letters' renewal every year. Id. at Exhs. QQ (AR048513, AR048521), RR at 2. In addition, the drawing conditions for the letters of credit are significantly qualified and the amounts to be paid thereunder are subject to an opinion of independent counsel.[25] The letters of credit require a final judgment in the pending litigations to make determinations that the properties are not subject to a tax exemption and setting the proper level

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[25] Plaintiffs invite the Court's attention to the letters of credit attached as Exhibits QQ and RR to the Baldwin Mov. Decl., instead of relying on the OIN's misleading characterizations that "[t]he letters of credit are triggered, and payment occurs, if the courts finally decide that certain state tax exemptions do not apply to the Nation's land." (OIN Mem. at 54). In fact, payment is dependent on a number of other requirements and circumstances.

of assessment. There is no assurance that a final judgment by a court would satisfy these two criteria. Moreover, it may not be possible to obtain the opinion of independent counsel concerning the amount to be paid because such an opinion would be a mixed issue of law and numerous facts. In any event, the DOI's acceptance of the letters of credit conditions the Counties' authority to collect lawfully-owed taxes upon the "opinion" of an unelected, unappointed, and unidentified non-governmental "independent counsel." For the reasons noted, contrary to the assertions of the Federal Defendants (U.S. Mem. at 66), the letters of credit do not "ensure" satisfaction of the tax liens.[26]

As explained, the DOI departed from its own policies in making the Determination without providing a reasoned explanation, and therefore the Defendants are not entitled to summary judgment.

IV. THE FEDERAL DEFENDANTS AND THE OIN ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' BIAS CLAIM

A. Plaintiffs Have Standing To Bring Claims Asserting Bias

Contrary to Defendants' belated assertions, Plaintiffs have standing to address the DOI's biased process as a violation of fundamental due process. Fair and balanced adjudication is a fundamental tenet of the protections against federal power guaranteed by the Fifth Amendment. See Withrow v. Larkin, 421 U.S. 35, 46-47 (1975) (fair tribunal is a basic requirement of due process applying to agencies as well as courts; "[n]ot only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." (internal citation omitted)). Faced with a record replete with evidence of bias, the OIN argues, for the first time after almost four years of litigation – including a motion to dismiss, extensive briefing before Magistrate Judge Peebles about whether Plaintiffs

[26] In light of these risks, any refusal to accept the letters of credit is not unreasonably withheld given the demonstrated prejudice that would be suffered by the Counties in agreeing to them.

were entitled to discovery in support of their bias claim, and appeal to this Court of Magistrate Judge Peebles' decision – that Plaintiffs lack standing to assert a due process bias claim.[27] Defendants' recent epiphany on the standing issue is misguided. Plaintiffs have standing to assert a due process claim based on bias and, as the Federal Defendants concede, to support claims that the Determination was arbitrary and capricious because of bias. Defendants' arguments that as a matter of law the record does not support a claim of bias are equally misplaced. Not only do Defendants misread the allegations of the Complaint, but they do not address the whole of the record, which supports more than an inference of impermissible bias.

1. Plaintiffs Have Standing To Assert A Due Process Bias Claim

The Second Circuit has expressly held that municipal corporations, such as the Counties,[28] are "persons" for purposes of the due process clause of the Fourteenth Amendment where they challenge the actions of a state other than the one in which they are located. See Township of River Vale v. Town of Orangetown, 403 F.2d 684, 686 (2d Cir. 1968). In Orangetown the court declared a municipal corporation a "person" for purposes of a Fourteenth Amendment due process challenge to a neighboring community's zoning ordinance. It reasoned that although municipalities could not sue state governments under the federal Constitution because they are instrumentalities of the state, they have no analogous relationship to any other type of defendant, and thus a town must be treated as a "person" with due process standing as long as it does not challenge actions of the State in which it is located. Id.; see also City of Boston v. Mass. Port Auth., 444 F.2d 167, 168 n.1 (1st Cir. 1971) ("A municipality may assert a

[27] In opposition to Plaintiffs' Motion to (A) Compel Production of Administrative Record Documents and (B) Authorize Discovery To Supplement Administrative Record, the Federal Defendants suggested (but did not oppose discovery on the basis of an argument) that Plaintiffs "likely" did not have standing to bring their due process claims. (Dkt. No. 169, at 41-42). Magistrate Judge Peebles permitted discovery on Plaintiffs' claims of bias. In appealing Magistrate Judge Peebles' decision to this Court, the Federal Defendants did not raise a standing argument. (Dkt. No. 185-1).

[28] Under New York law, a county is a species of municipal corporation. N.Y. Gen. Mun. L. § 2 ("The term 'municipal corporation,' as used in this chapter, includes only a county, town, city, and village.")

due process claim but not one attacking the laws of the state which created it."); Creek v. Village of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996) ("[I]t is one thing to hold that a municipality cannot interpose the Fourteenth Amendment between itself and the state of which it is the creature . . . and another to hold that a municipality has no rights against the federal government or another state."). Orangetown is still good law in this Circuit and so far as its reasoning is applicable here, binding on the court.[29]

Moreover, the Second Circuit has plainly suggested that the same is true under the Fifth Amendment in the circumstances present here. In Aguayo v. Richardson, cited by the Federal Defendants, (U.S. Mem. at 34), the court expressly declined to decide that New York City lacked constitutional standing to assert Fifth Amendment claims against the federal government based on discriminatory treatment "affecting its finances."[30] 473 F.2d 1090, 1100 (2d Cir. 1973). In doing so, Judge Friendly specifically noted that neither the rule that a municipal corporation may not assert constitutional claims against the state that created it, nor South Carolina v. Katzenbach (relied on by the Defendants for the proposition that states lack standing to assert Fifth Amendment claims), precluded standing for a municipal corporation in those circumstances:

> We also are by no means certain that the reasoning of Williams [v. Mayor of Balt.], that '[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution, which it may invoke in opposition to the will of its creator,' [289 U.S. 36, 40 (1933)], applies to a claim by a city that federal action violates the Fifth Amendment. The state, not the federal government, has 'created' the city. While a city is not a citizen entitled to privileges and immunities under section 2 of Article IV, or section 1 of the Fourteenth Amendment, we would not consider that the issue whether, for some purposes, such as a claim of discriminatory treatment affecting its finances, it might not be a 'person' entitled to protection under the Fifth Amendment was necessarily foreclosed by South Carolina v. Katzenbach . . . .

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[29] No court in this circuit has recognized an overruling of Orangetown.

[30] In quoting the language of Aguayo that a city would lack standing to assert due process claims "relating to its citizens," (U.S. Mem. at 34), the Federal Defendants conveniently omit to note that Judge Friendly was distinguishing that situation from a situation where the city was asserting claims in its own right for actions that affected the city's own finances, exactly the situation here.

473 F.2d at 1100-01. The Ninth Circuit has similarly expressed doubt that municipalities lack status as "persons" under the Fifth Amendment Due Process clause. See City of Santa Clara v. Andrus, 572 F.2d 660, 675 (9th Cir. 1978), cert. denied, 439 U.S. 859 (1978) (presuming a city is a "person" under the Fifth Amendment and noting that the court is "by no means convinced" of the argument that if the state is not a "person" than municipality is not); Cnty. of Santa Cruz v. Sebelius, 399 Fed. Appx. 174, 176 (9th Cir. 2010) (concluding that "at least for purposes of the [Fifth Amendment] claim before us, the counties are persons" but dismissing cause of action on other grounds).

Neither the Federal Defendants nor the OIN have cited any precedent in this Circuit that holds municipal corporations have no standing to raise due process arguments against federal action under the Fifth Amendment. The cases they do cite are either plainly distinguishable or rely on an incorrect premise. U.S. Mem. at 33-34 (citing City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 167 (D.D.C. 1980) and Santa Cruz County v. Leavitt, No. C07-02888 MJJ, 2008 WL 686831, at *8 (N.D. Cal. Mar. 11, 2008)). The reasoning of Andrus (and Leavitt, which largely relies on it) is faulty. Andrus relies on the (unsupported) premise that despite Supreme Court authority pointing out the similarity of private corporations, which are persons for purposes of the Fifth Amendment Due Process clause and municipal corporations (see Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890) ("[W]hile the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State.")), "municipalities and states are treated the same for virtually all legal purposes." Andrus, 532 F. Supp. at 167. That is inaccurate in the context of constitutional protections. Municipalities do not, for example, have the same sovereign status as the states that create them for federal Constitutional purposes, as the State is a sovereign entity entitled to sovereign

immunity under the Eleventh Amendment. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations."); see also In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 765 n.3 (3d Cir. 1989) (finding school boards to be persons under the Fifth Amendment because "unlike states, the school districts are limited bodies which exist for a particular and circumscribed purposes . . . [and] despite their link to the state that created them, do not partake of the state's sovereign immunity"). States and municipalities are also treated differently with respect to the Fourteenth Amendment Due Process clause: municipalities may not raise due process arguments sounding in action by the state that created them, but may sue other states and municipalities under the Fourteenth Amendment in district court. See Orangetown, 403 F.2d at 686; Williams, 289 U.S. at 40 ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (emphasis added)); Creek, 80 F.3d at 193. But where the states sue each other, the Supreme Court retains original jurisdiction. U.S. Const. art. III, § 2; 28 U.S.C. § 1251.

Strikingly, Defendants omit any mention of recent land-into-trust cases that addressed due process bias claims brought by States and municipalities against the DOI. See, e.g., South Dakota v. Dep't of Interior, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005) ("The Department of Interior's review of an application to take land in trust is subject to the due process clause and must be unbiased.") ("South Dakota III"), aff'd, 487 F.3d 548 (8th Cir. 2007). In South Dakota III, the State of South Dakota and Moody County challenged a land-into-trust application under the APA based on improper application of DOI regulations and the Director's bias. In discussing

the APA claims, the court explicitly applied a federal due process standard to the federal action, placing the focus on review of the DOI's alleged bias rather than on any purported standing deficiencies of the plaintiffs.[31] See also Cnty. of Charles Mix v. Dep't of Interior, No. CIV 10-3012-RAL, 2011 WL 1303125 (D.S.D. Mar. 31, 2011) (applying due process standard to bias claim in challenge to land into trust application where sole plaintiff was county);[32] South Dakota v. Dep't of Interior, 787 F. Supp. 2d 981 (D.S.D. 2011) (applying due process standard to bias claim in related opinion). Apparently, the DOI did not raise the standing argument in either South Dakota III or Charles Mix. In those cases challenging land-into-trust decisions on the same grounds advanced here, the standing of the state and municipal governments to assert such claims was unquestioned.

The OIN's argument that Plaintiffs do not have a property interest at stake is unpersuasive and the cases cited in support of that argument are inapplicable. The OIN rely on Cleveland v. United States, 531 U.S. 12 (2000) (cited at OIN Mem. at 21) for the proposition that a State's economic interest is not a "property" right. Cleveland addressed whether a state's gaming licensing is "property" under the federal mail fraud statute, qualifying its holding as such. Id. at 20 ("The question presented is whether, for purposes of the federal mail fraud statute, a government regulator parts with 'property' when it issues a license." (emphasis added)).[33] That is not the property at stake here. In any event, the Supreme Court more recently

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[31] Though the South Dakota court found a lack of bias, the substantive allegations of that case are not analogous to this action. South Dakota asserted bias based on evidence which had not been presented to the DOI and claimed actual bias based only on two errors made by the Director. Id. at 1012. By contrast, Plaintiffs have shown a pattern consisting of many more than two errors on the DOI's part, as well as actual bias evident in numerous internal DOI remarks exhibiting prejudgment.

[32] The Charles Mix court unhesitatingly permitted a county's direct challenge to the federal land-into-trust process as biased, though on a separate issue it expressed some doubts in *dicta* that counties had standing to bring a *parens patriae* suit on behalf of its citizens.

[33] The court also noted that it strongly considered that a different construction would "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." Id. at 24. Such a concern would not be relevant here.

ruled in construing a similar statute that the right to collect taxes qualifies as "property." See Pasquantino v. United States, 544 U.S. 349, 355-57 (2004) (holding that "the right to tax revenue is property in Canada's hands" and a "straightforward 'economic' interest"). Bd. of Cnty. Comm'rs v. Seber, 318 U.S. 705, 718 (1943), also cited by the OIN, stands for the proposition that Congress has the power to pass laws to withdraw lands from the state tax rolls, and is not germane to Plaintiffs' due process standing where the agency delegated that power exercises it in a biased and capricious manner.

For all these reasons, Plaintiffs have standing to raise their bias claims.

2. The Plaintiffs' Bias Claims Can Also Be Heard Under The APA

Even if Plaintiffs did not have standing to maintain a due process claim for bias, which they clearly do, the same bias argument states a claim under the APA, as conceded by the Federal Defendants. See U.S. Mem. at 35 ("Should the Court treat Plaintiffs' constitutional due process claim as an APA claim, the question becomes whether the Department acted arbitrarily and capriciously . . . ."). Indeed, Plaintiffs' claims under the APA of arbitrary and capricious conclusions and actions by the DOI incorporate a number of allegations substantiating bias by the DOI. See, e.g. Compl. at ¶¶ 4, 11, 94, 95, 135, 163-76; infra Section IV.B.

Agency action may be vacated by a federal court for reasons of bias or improper influence which "cause[d] the agency's action to be influenced by factors not relevant under the controlling statute." Tummino v. Torti, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (citing Town of Orangetown v. Ruckleshaus, 740 F.2d 185, 188 (2d Cir. 1984)). While decisionmakers are presumed to act in good faith, plaintiffs need not prove actual bias: the presumption may be defeated by a showing of "a risk of actual bias or prejudgment." Navistar Int'l Trans. Corp. v. E.P.A., 941 F.2d 1339, 1360 (6th Cir. 1991) (applying APA). It is sufficient to show "facts

supporting a conclusion that the 'risk of unfairness is intolerably high' under the circumstances of the particular case." Harline v. D.E.A., 148 F.3d 1199, 1204 (10th Cir. 1998). Risk of bias on the part of one member of a decisionmaking group may be imputed to the other members, such that if one or more DOI personnel are biased, the action of the agency as a whole must be invalidated. See Stivers v. Pierce, 71 F.3d 732, 748 (9th Cir. 1995) ("[W]here one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process."). Notwithstanding the OIN's proffered narrow definition of bias (OIN Mem. at 22), courts have also defined "bias" as "a fixed opinion - a 'closed mind on the merits of the case.'" Pharaon v. Bd. of Governors of Fed. Reserve Sys., 135 F.3d 148, 155 (D.C. Cir. 1998).

B. The Administrative Record Demonstrates That The DOI Proceeded In A Biased And Irregular Manner That Uniformly Benefitted The OIN

The Administrative Record is rife with evidence that DOI staff members shaped the process to accord with the desires of the OIN (frequently communicated through its lobbyist), prejudged the Application in favor of the OIN and against the Plaintiffs, departed from standard policies, and closed their minds to the merits of comments against the Application in service to a misguided sense of "justice". The Federal Defendants posit a single undisputed material fact as the predicate for their request for summary judgment on the bias claim – that the DOI issued the Determination and assembled the Administrative Record. (Dkt. No. 240-2). As discussed in detail below, infra at 50-64, the DOI's actions reflect a "closed mind" to issues that might be raised by outside comments and a predisposition to grant the majority if not all of the OIN's Application. See id. The assembly of an Administrative Record to justify a predetermined decision to take large amounts of land into trust does not render the Determination unassailable on judicial review.

Much as they did when Magistrate Judge Peebles found that Plaintiffs had demonstrated at least a "strong, preliminary showing of bad faith and improper motives" (Dkt. No. 183 at 46), the Federal Defendants and OIN seek to isolate each of Plaintiffs' allegations of bad faith and demonstrate, in a vacuum, that there was no improper motive or conduct.[34] Their motives for taking such an approach is obvious: the cumulative impact of the timing of contacts between the OIN and its lobbyist and DOI officials in relation to actions taken by the DOI concerning the Application, and the DOI's repeated departure from its own practices uniformly in favor of the OIN, demonstrate that the DOI was influenced by impermissible factors and is not entitled to any presumption of regularity.

As demonstrated in the Administrative Record, the DOI:

- Undertook to expedite the decision-making process at the instance of a highly paid lobbyist who was also a personal friend of the senior DOI official (James Cason) who undertook personal responsibility for overseeing and deciding the OIN application. See Baldwin Mov. Decl. Exh. E. (July 2005 Thomas Sansonetti request to James Cason to "accelerate the timeline for taking Oneida fee lands into trust"); id. at Exh. F (August 2005 internal DOI correspondence reflecting that "Jim Cason is very interested in making the Oneida trust acquisitions go as smoothly as possible");

[34] Nor can the Defendants establish that Plaintiffs' claim alleges permissible institutional bias on the DOI's part. Plaintiffs raise a valid claim of biased agency action if they show federal decision-makers did not objectively apply the criteria set forth in DOI's regulations and established practices. Claims of institutional bias are only invalid where they challenge a general policy of an agency, but due process is violated where an agency exhibits prejudgment in a specific case. See Ehrman v. United States, 429 F. Supp. 2d 61, 68-71 (D.D.C. 2006) (Foreign Service was right to dismiss claim aimed at general policy toward its agents, but plaintiff had valid APA and due process claim where agency failed to address claims it had misapplied its policies). Plaintiffs do not challenge general DOI policies, they challenge the application of those policies (or lack thereof) in this case. In fact, Plaintiffs have identified a variety of ways in which particular federal decision-makers on the OIN land-into-trust application deviated from existing DOI policies because they decided to take land into trust for the OIN before substantive evaluation of the Application was undertaken.

- In response to a request from the same lobbyist, Baldwin Mov. Decl. Exh. E (request to "creat[e] a special team within your organization to review and hopefully approve the lands described in the Tribe's application"), DOI removed decision-making authority from the Eastern Regional Office of the BIA so that the central office of the DOI (specifically James Cason) would make the decision on the Application. Id. at Exh. G (ARS001065) (internal DOI correspondence reflecting that the Determination would be made at the "Secretary/Assistant Secretary" level);

- Waited over five months to send official notice of the Application to affected governments, notwithstanding that its own regulations call for notice to those governments "[u]pon receipt a written request to have lands taken into trust." Compare 25 C.F.R. § 151.10 with Baldwin Mov. Decl. Exh. C (OIN Application dated April 4, 2005); and Baldwin Mov. Decl. Exh. J (notice to George Pataki dated September 20, 2005);

- Determined to take approximately 10,000 acres of land into trust for the OIN, before giving official notice to the affected governments, before the deadline for such governments to submit written comments on the Application and before such written comments were submitted. Baldwin Mov. Decl. Exh. K (internal DOI correspondence dated September 2, 2005 stating that Jim Cason "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 properties"); id. at Exh. J (September 20, 2005 notice to Governor George Pataki); id. at Exhs. O & P (State comments on OIN Application for Groups 1 & 2 (Jan. 30, 2006), and Group 3 (Feb. 28, 2006), respectively);

- Ignored long-standing DOI policy not to take land into trust for tribes who are self-sufficient and can manage their own affairs. See Baldwin Mov. Decl. Exh. CCC; see supra Section III.A;

- Instructed the Plaintiffs to file FOIA requests to obtain information submitted by the OIN purportedly supporting the Application, but refused to materially respond to the FOIA requests until years later (after it had issued the ROD), in violation of that statute. Plaintiffs' representatives were instructed by James Cason to file FOIA requests when they voiced concern about access to information provided by the OIN in support of the Application. Baldwin Mov. Decl. Exhs. GG (AR007242) & HH (AR049171) ("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."). Plaintiffs filed a number of FOIA requests from October 2006 through September 2007. (Dkt. No. 140-6). The DOI 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 initiated. However, the DOI was able to provide Plaintiffs with specific copy and production costs for which it required payment, well in advance of the actual production, (id. at App-023, App-048-50, App-063 to App-066), demonstrating that much of the delay resulted from privilege and exemption review. Thomas Blaser participated in that review, (Dkt. No. 168-4, at ¶¶ 3-4, 6), and as a central figure in the decision-making process, was well aware of the prejudicial effects the delay would have upon Plaintiffs' ability to comment during the process;

- Allowed the OIN to select a contractor for the EIS and blindly accepted the OIN's Memorandum of Agreement. See infra Section IV.B.1.;

- Applied a plainly inapplicable regulatory standard that is less deferential to the State and Counties' comments regarding action on the Application. The DOI's regulations define "reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that . . . 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." 25 C.F.R. 151.2(f). Notwithstanding this definition and the DOI's conclusion that "[f]ollowing the U.S. Supreme Court's decision [in Sherrill], the Nation lacks sovereignty over the lands as a matter of law," Baldwin Mov. Decl. Exh. A (FEIS at 1-8), the DOI applied its on-reservation regulatory criteria over the objections of the State. Id. at Exh. O (AR000291-94);

- Informed Malcolm Pirnie, the contractor selected by the OIN, that the State's jurisdictional and tax concerns were not "substantial" or "valid" before Malcolm Pirnie released the draft environmental impact statement ("DEIS"). Baldwin Mov. Decl. Exh. DD (ARS005040) ("[T]he tax issue is not necessarily a valid issue but fear was widely spread."); id. (ARS005037-38) (informing Malcolm Pirnie that 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"). The OIN claims that the DOI took "total control of the analysis and decision-making" (OIN Mem. at 28), but ignores that Malcolm Pirnie prepared a draft EIS outline weeks in advance of the DOI's confirmation of the OIN's contractor selection that expressly indicated its purpose was to "support[] the existing Oneida Nation land Fee-to-Trust application to BIA for 17,370 acres within the boundary of the Nation's aboriginal homeland and reservation established by existing treaties." Baldwin Opp. Decl. Exh. F (AR060417). Regardless of which entity ultimately selected Malcolm Pirnie, the Administrative Record demonstrates that the contractor was told its goal was to justify the Application. While the OIN still had a large role in controlling Malcolm Pirnie and feeding it faulty assumptions on which to base its analyses, the OIN's argument that the DOI had "total control" spotlights the DOI's behavior – the DOI told Malcolm Pirnie to disregard the concerns of the local

governments, ensuring that the analysis would be incomplete, unbalanced, and biased. Baldwin Mov. Decl. Exh. DD (ARS005037-40);

- Effectively precluded the Counties from participating in the scoping process for the EIS. The Counties requested cooperating agency status under NEPA on November 1, 2005, and November 7, 2005. Baldwin Mov. Decl. Exhs. U (AR080973-74), V (AR080975-76), but did not receive a response from the DOI until January 4, 2006, (id. at Exhs. W (AR080964), X (AR080965)). When the Counties received a draft memorandum of understanding on January 11, 2006 they were instructed to sign it as soon as possible, because 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;[35] Id. at Exh. Y (AR063312);

- Refused to consider the OIN's history of disregard for State law and regulation, even in the light of the Supreme Court's holding in Sherrill. For example, notwithstanding that OIN violated local zoning laws and State environmental laws, (Baldwin Mov. Decl. Exh. SSS (AR000334) (O'Brien and Gere report (Group 1 parcels) at 12) ("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.")), the DOI discounted the OIN's action as stemming from "disputes over which government had jurisdiction at the time." Id. at Exh. L (ROD at 61). This dismissal is arbitrary at best, however, since the DOI elsewhere admitted that the State had jurisdiction over the land, and since Sherrill recognized the State's jurisdiction. See Sherrill, 544 U.S. at 215 n.9 ("The relief the OIN seeks – recognition of present and future sovereign authority to remove the land

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[35] 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. Baldwin Mov. Decl. Exh. Z (ARS00191-200).

from local taxation – is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption of such relief would engender."); Baldwin Mov. Decl. Exh. DD (ARS005038) ("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." (emphasis added));

- Adopted irrational and contradictory assumptions in an attempt to minimize the negative tax impacts that will arise from the Determination. An assumption underpinning many of the DOI's conclusions regarding the impacts of the Determination is that OIN enterprises will shut down if they are not taken into trust. Baldwin Mov. Decl. Exh. A (FEIS 4-217 to 4-218). This assumption has no basis in fact and was not deemed credible by DOI officials. The OIN is so economically successful that it could pay all of the property tax on all of its land without threatening the viability of its enterprises. Id. at Exh. FFF (AR013111-12) (Jarrell Report at ¶ 96-99). In addition, Mr. Cason recognized that the OIN did not need trust status to continue its business operations. Id. at Exh. SS (ARS004558) ("The future opportunity to continue Sav-On operations do not depend on our trust decisions."); and

- Failed to follow its own practices and policies with respect to the assessment of title and removal of tax liens from property subject to a land into trust application, including accepting qualified letters of credit in lieu of acting in accordance with its own regulations and requiring elimination of tax liens on OIN properties. See supra Section III.B.

The DOI's bias also manifested itself through DOI's consideration of factors irrelevant under the governing regulations: specifically, a misguided, extralegal sense of "justice." See, e.g., Baldwin Mov. Decl. 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."). For this reason, DOI internally denigrated legitimate concerns expressed by the State and Counties, not on substantive grounds, but because it had prejudged their source. E.g. Baldwin Mov. Decl. Exh. DD (ARS005038) ("[T]heir land management policies include a high degree of political influence not conducive to managing tribal lands fairly for the benefit of Indian tribes."); id. ("State jurisdictional issues should not be considered substantial reasons to deny the fee-to-trust transfer."); id. ("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."). It is exactly this "remedy" that the Supreme Court found inappropriate in Sherrill when it cited the land-into-trust provisions of the IRA and the need to "take[] account of the interests of others with stakes in the area's governance and well-being." 544 U.S. at 220; see infra Section IV.

The Federal Defendants and the OIN counter allegations of bias on three specific grounds, based on the three examples of bias included in the Second Amended Complaint. (Dkt. No. 94, at ¶¶ 163-176). Those grounds are each treated below, but Plaintiffs' bias claim is not limited to these three examples, and the Defendants ignore the substantial evidence of bias previously developed and submitted in the moving papers to Magistrate Judge Peebles.[36] In light

[36] The OIN seem to take the position that Plaintiffs were required to amend the complaint to specifically allege any other evidence of bias. (OIN Mem. at 4). That is not, of course, the rule. Plaintiffs need not identify every factual detail of their claims in a pleading or amended pleading. See Fed. R. Civ. P. 8(a)(2) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief"); 6 Charles Alan Wright, Arthur R. Miller

of the uniform bias in favor of the OIN (and, against the State, Counties and local governments) exhibited by DOI staff as demonstrated above, however, there is – at the very least – a genuine issue of material fact as to whether the DOI's process was infected by bias independent of those examples.

1. The Selection of Malcolm Pirnie And Control Over It By The OIN Were Improper

a. The DOI Played No Meaningful Role In The Selection Of Malcolm Pirnie

Defendants argue that the selection of the EIS contractor Malcolm Pirnie by the OIN does not reflect bias because, despite the OIN's control over every step of the selection process, DOI retained sign-off authority. But that authority was not exercised in a meaningful way. The Federal Defendants' and OIN's motions lack any evidence that the DOI conducted the vetting process itself, or that the DOI undertook any investigation on its own to form basis for selecting any other vendor than the OIN's choice. That simply does not square with CEQ regulations which, as the Federal Defendants acknowledge, require, with limited exceptions, that the contractor be "chosen solely by the lead agency." 43 C.F.R. § 1506.5(c); U.S. Mem. at 38.[37] The DOI did not engage with the larger universe of contractors; it was hemmed in to the options as the OIN defined them, and only reviewed materials on the contractors' qualifications that the OIN provided.[38] It is not surprising that the DOI rubber-stamped the OIN's hand-picked

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& Mary Kay Kane, Fed. Prac. & Proc. § 1471 (3d ed. 2010) ("Rule 15 [on amendment of pleadings] reflects the fact that the federal rules assign the pleadings the limited role of providing the parties with notice of the nature of the pleader's claim or defense and the transaction, event, or occurrence that has been called into question; they no longer carry the burden of fact revelation and issue formulation, which now is discharged by the discovery process."); Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 192 (2d Cir. 2008) ("a complaint need not contain detailed factual allegations - such as the dates of misconduct and the names of [individuals] involved in the misconduct that the District Court required plaintiff to provide in the amended complaint").

[37] The OIN all but concedes that the CEQ regulations were violated by the DOI's concurrence with the OIN's selection when it argues that the Court should not overturn the Determination in any event. (OIN Mem. at 25).

[38] Notably, by that time, Malcolm Pirnie had already been under contract with the OIN for months to provide services related to "NEPA strategy and BIA planning process." Baldwin Opp. Decl. Exh. G (FOIA-143672) (Oct. 3, 2005 e-mail from Anthony Russo, Malcolm Pirnie, to David Almen). Zuckerman Spaeder, counsel for the OIN,

contractor, since the OIN's preference was apparently the only one it considered.[39] DOI's accession to its limited options is not surprising in light of its prejudice, described above, in the OIN's favor.

The Federal Defendants and OIN argue that the biased selection process is irrelevant unless there is some substantive problem with the EIS. That does not comport with Second Circuit law, which defines impermissible bias as including the consideration of irrelevant factors. Tummino, 603 F. Supp. 2d at 544; Ruckleshaus, 740 F.2d at 188. Nor does it excuse the DOI from ignoring the merits of the record before it. Although substantive problems with the EIS are not required to establish bias in violation of the APA, here they do nevertheless demonstrate that bias in this case. The substantive deficiencies of the EIS are addressed by Plaintiffs' discussion of the EIS in their summary judgment motion (Pl. Mov. Mem. at 67-80) and below. Briefing in support of that motion includes a lengthy description of the DOI's superficial review of environmental impacts and reliance on irrational assumptions. Id. Moreover, the ROD's heavy reliance on the EIS renders any defect in the EIS process a defect of the Determination. Baldwin Mov. Decl. Exh. L (ROD at 6-7). Preparation of a new EIS by an independent contractor would not be a duplication of efforts: a new EIS not based on irrational scenarios or contradictory premises would have a tangible effect on any resulting agency action. See infra Section IV.B.1.b.

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omitted this fact in its letter recommending Malcolm Pirnie to the DOI. Baldwin Mov. Decl. Exh. Q (Letter from Thomas B. Mason, Zuckerman Spaeder, to Franklin Keel (Oct. 12, 2005) (AR081034-35)).

[39] The Federal Defendants defend this by pointing to a FAQ on CEQ's website which merely states that the applicant may "undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction." (U.S. Mem. at 39; NEPA's 40 Most Frequently Asked Questions, No. 16, "Third Party Contracts," AR063656, available at http://www.nepa.gov/nepa/regs/40/11-19.HTM#16). Nowhere do the Federal Defendants provide evidence that the DOI offered direction to the OIN in its solicitation of a field of candidates.

b. Malcolm Pirnie Was Given Assumptions By The OIN That Belied Objective Evaluation Of The Application

The selection of the OIN's preferred contractor also allowed the OIN to provide Malcolm Pirnie with irrational scenarios and contradictory premises that infected the EIS process. Baldwin Mov. Decl. Exh. AA (AR076401-076405). A draft EIS outline prepared by Malcolm Pirnie on October 6, 2005, well before the DOI's October 28, 2005 blessing of the OIN's selection of Malcolm Pirnie, demonstrates that Malcolm Pirnie believed the EIS was a document intended to "support[] the existing Oneida Nation Land Fee-to-Trust application to BIA for 17,370 acres within the boundary of the Nation's aboriginal homeland and reservation established by existing treaties." Baldwin Opp. Decl. at Exh. F (AR060417). The Federal Defendants claim that evidence that the Determination was predetermined does not establish that the EIS is an advocacy piece. Specifically, the Federal Defendants argue that the draft EIS outline is "not substantive in nature." (U.S. Mem. at 40). The Federal Defendants fail to mention, however, that the outline explicitly states that a final EIS will "support[]" the Application for the full 17,370 acres stating that, "[a]s a percentage of their 300,000-acre reservation, the lands proposed to be taken into trust comprise approximately 6% of their established and recognized ancestral homeland." Baldwin Opp. Decl. at Exh. F (AR060417). The document demonstrates that Malcolm Pirnie operated under an assumption the Application would be granted in large part, if not entirely and that its role in drafting an EIS would be to support it.[40] The document also establishes that the EIS would be founded upon the flawed assumption that the "[e]xisting condition of lands is the baseline going forward for impact assessment." Id. at AR060421. Such an assumption would form the basis for the DOI to ignore

[40] This is why the OIN's argument that Malcolm Pirnie itself had no interest in the outcome of the EIS misses the point. (OIN Mem. at 25-26). Malcolm Pirnie may not have had a pecuniary interest in the outcome of the project, but it was controlled by the OIN throughout the process.

the OIN's intransigence in refusing to abide by state law. See infra Section XI.C-D. The Federal Defendants argue that the document does not demonstrate how many acres will comprise a preferred alternative, but ignore that by this point in the process, the DOI was already targeting taking 10,000 acres into trust. See Baldwin Mov. Decl. Exhs. K, G.

2. Delays in FOIA Production By The DOI Precluded Plaintiffs From Commenting On Materials Underlying The Application

The Defendants argue that DOI's refusal to abide by FOIA by delaying two years from the Counties' initial FOIA request to produce documents is irrelevant because document production questions do not go to the substance of the decision. (OIN Mem. at 30-31). This argument misses the point. The OIN had unfettered access to Malcolm Pirnie and the DOI throughout the development of the EIS, and were the driving force behind the decision-making process. E.g. Baldwin Mov. Decl. 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."); id. at Exh. T ("The Oneida lawyers basically forced the schedule on Malcolm Pirnie not really considering how long it takes to get things through DC."). By contrast, Plaintiffs were shut out of the process. When elected officials raised concerns about Plaintiffs' access to information underlying the Application, Mr. Cason directed the State and Counties to file FOIA requests. Id. at Exhs. GG (AR007242), HH (AR049171). Notwithstanding the direction from Mr. Cason, the DOI refused to materially respond to Plaintiffs' FOIA requests until well after the ROD was issued. See Pl. Mov. Mem. at 14-15. No matter how the Federal Defendants and the OIN characterize Plaintiffs' lawful FOIA requests, the DOI failed to comply with its obligations under

FOIA and its regulations.[41] At no point did the DOI obtain an agreement for an extension of time or judicial approval for a belated response.

The Defendants also imply that the DOI was burdened by the Plaintiffs' FOIA requests, and that the extensive delays were not intended to bias the Plaintiffs. (U.S. Mem at 42-43; OIN Mem. at 22). Notwithstanding the purported burden on the DOI, the agency was able to provide Plaintiffs with specific copying and production costs for their FOIA requests well in advance of the actual responsive production, indicating that the delay was not caused by the collection of documents. (Dkt. No. 140-6 at App-023, App-048-50, App-063 to App-066). In fact, the DOI complained that part of the delay was a result of determining whether documents were exempt from disclosure under FOIA – a process that was participated in by Thomas Blaser, a central figure in the decision-making process as a member of the DOI Solicitor's Office, and one who was acutely aware of the effect the delay would have upon Plaintiffs' ability to comment on the Application. See Dkt. No. 168-4, at ¶¶ 3-4, 6 (Declaration of Thomas Blaser); Baldwin Mov. Decl. Exh. WWW ("Tom [Blaser] is just basing his options on that old direction from Mr. Cason of around 10,000 acres."); id. at Exh. T ("I had cooperative agreement designation letters ready in December but Tom [Blaser] wanted MOUs that are still not signed yet and its mid March because everything going through the solicitor's office takes a long time. . . . 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."); id. at Exh. M ("I met with Tom Blaser and representatives from Malcolm Pirnie and lawyers representing the Oneida . . . . The Oneida lawyers want to leave these alternatives [that do not meet tribal need] in the DEIS so that the analysis demonstrates the negative impact on the Tribe by not meeting Tribal need. . . . They

41 Notably, the Federal Defendants do not dispute that FOIA was violated.

think it would demonstrate that all issues were thoroughly considered should a lawsuit be filed over the process. Tom agreed with them. I do not agree.").

Independent of Plaintiffs' remedies under FOIA for the production of documents, the delay between Plaintiffs' requests and the DOI's belated production (without any request for a stay or extended response period), is another example of the DOI's bias and the deprivation of Plaintiffs' due process throughout the decision-making process. The delay substantively affects the Determination as the Plaintiffs were precluded from commenting on information submitted by the OIN to purportedly support its Application during the decision-making period.[42] That bias as a whole renders the Determination invalid.[43]

[42] The OIN's suggestion that Plaintiffs's FOIA claims are waived because Plaintiffs waited until after the Determination to sue on their FOIA claims is without support. The OIN argues that Plaintiffs have no right to pre-decisional access to documents in order to address evidence it submitted. The OIN ignores the fact that the DOI is required to produce documents responsive to FOIA requests in no more than 30 days, see 5 U.S.C. § 552(a)(6)(A)(I); 43 C.F.R. §§ 2.12, 2.13, and that Plaintiffs properly appealed the DOI's noncompliance. The OIN also ignores the chief decision maker's instruction to Plaintiffs to utilize FOIA to obtain information underlying the Application. See Baldwin Mov. Decl. Exhs. GG (AR007242), HH (AR049171). Indeed, much of the OIN's argument is based on a miscomprehension of Plaintiffs' claims and the case law it cites. The cases cited at OIN Mem. at 30-31 are inapposite and do not preclude the offering of the DOI's inappropriate actions as evidence substantiating that the Determination was the result of bias. The cases do not deprive Plaintiffs of the right to have the Determination made by an unbiased decisionmaker, in a manner that is not arbitrary or capricious, merely because *some* of the DOI's culpable conduct is also violative of FOIA. This is recognized by the very authorities the OIN offers. See Edmonds Inst. v. Dep't of Interior, 383 F. Supp. 2d 105, 111-12 (D.D.C. 2005) ("The law is clear, however, that review under the APA is unavailable when another statute provides an adequate remedy.") (cited at OIN Mem. at 31). Here, even if Plaintiffs solely based their Fifth Cause of Action on the DOI's failure to abide by FOIA (they do not), the production of the responsive documents would not be an adequate remedy as the Determination has already been issued. See generally South Dakota, 787 F. Supp. 2d at 999 ("Because Plaintiffs did not have access to the complete administrative record before the RD, Plaintiffs were denied the opportunity to make their additional arguments to the decisionmaker who actually had the discretionary authority to consider the arguments. . . . Accordingly, the RD's noncompliance with Section 2.21(b) was not harmless and violated Plaintiffs' right to due process."). Indeed, the DOI's own FOIA Handbook demonstrates that the agency's FOIA responses can be tied to due process rights. See Baldwin Opp. Decl. Exh. H (383 DM 15 at 3.4(3)) (calling for expedited processing of FOIA requests where records "are needed in connection with a judicial or administrative proceeding when a delay in releasing the records will result in the loss of substantial due process rights.").

[43] Although Plaintiffs continue to assert that the DOI's significant FOIA production delays are illustrative of the DOI's bias during the decision-making process under the APA, violate the State and Counties' due process rights, evidence the DOI's arbitrary and capricious conduct with regard to considering comments from the affected governments, and constitute an undisputed violation of FOIA, to the extent the requested documents have been produced, Plaintiffs' Fifteenth Cause of Action appears moot.

3. The OIN's Lobbyist Thomas Sansonetti Unduly Influenced the DOI

The involvement of and correspondence from Thomas Sansonetti, a lobbyist for the OIN from the firm of Holland & Hart and former DOI solicitor who worked on OIN affairs while at the DOI (including the Sherrill litigation), illustrates the DOI's unwavering bias in favor of bringing land into trust for the OIN. Contrary to the OIN's efforts to limit the scope of Plaintiffs' arguments, a series of correspondence between Sansonetti and the DOI demonstrates that Mr. Sansonetti leveraged his professional and personal relationship with James Cason to personally lobby for the OIN, to great effect. The first written communication from Mr. Sansonetti disclosed by the Defendants is a July 20, 2005 letter asking Mr. Cason to expedite the OIN's application and to create a "special team" to work on the Application. Within a few weeks, BIA staff had been made aware of Mr. Cason's interest in "making the Oneida trust acquisitions go as smoothly as possible." Baldwin Mov. Decl. Exhs. E (AR083811-12), F (AR007818). By early September 2005, the DOI targeted 10,000 acres to take into trust which decision, as described above, was reached before the affected state and counties were notified of the Application. Id. Exh. K (Internal DOI e-mail). Weeks later, DOI correspondence reflected that Mr. Cason would be making the decision on the Application.[44] Id. Exh. G. The direct connection between Sansonetti's contact with Mr. Cason, Mr. Cason's important decisions as to the processing of the Application, and the DOI's (i.e., Mr. Cason's) prejudgment of the merits of the Application, are more than sufficient to create a substantial fact issue as to bias.

The Federal Defendants and OIN argue that the fact-finding process is informal and that there is nothing impermissible about contacts between Mr. Sansonetti and the DOI, and point to contacts between State and County officials and the DOI during the decision-making process.

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[44] Official notice that the decision making authority had been withdrawn from the Eastern Regional BIA office, where it would normally lie, and placed with the Central Office was not issued until February 2006, shortly after Mr. Cason visited Turning Stone with Mr. Sansonetti. Baldwin Mov. Decl. Exhs. H & I.

(U.S. Mem. at 44 ("Given that Plaintiffs readily availed themselves of the opportunity to meet with Cason, the fact that the Nation acted in the same fashion does not provide grounds to argue that the administrative process was biased against them"); OIN Mem. at 32-33 ("Mr. Cason made a similar trip to meet with County and local government officials in roughly the same time frame.")). The State and Counties, of course, did not employ a million-dollar lobbying effort headed by a friend and former colleague of James Cason. More to the point, Mr. Cason's contact with the State and Counties does not directly precede related changes in course at the DOI.[45]

V. THE DOI ARBITRARILY APPLIED INAPPLICABLE LAND INTO TRUST REGULATIONS THAT ARE LESS DEFERENTIAL TO PLAINTIFFS' TAX AND JURISDICTION CONCERNS

The DOI has promulgated two sets of criteria to evaluate land into trust regulations: 25 C.F.R. § 151.10 for on-reservation acquisitions and 25 C.F.R. § 151.11 for off-reservation acquisitions. A substantive difference between the two sets of regulations is that under the off-reservation acquisitions, the Secretary must also consider the location of the land "relative to state boundaries, and its distance from the boundaries of the tribe's reservation . . . [so that] 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.

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[45] The signature of Deputy Secretary Lynn Scarlett on the ROD does not cleanse the Determination of bias as the OIN suggests. (OIN Mem. 23-24). The Determination was primarily James Cason's responsibility and product. See, e.g., Baldwin Opp. Decl. Exh. I (AR064815) (Oct. 18, 2006 internal DOI email) ("Tom, David and I were able to get a meeting with Cason today to talk about the new alternative. The tribe tells us that based on recent conversations, that Jim may have refined his thinking about this. We need to check with Jim ASAP because the contractor needs to know how to proceed."); id. at Exh. J (AR008481) (Nov. 17, 2006 internal DOI e-mail) ("Blaser says [the draft EIS for the Oneida Nation fee to trust application] needs to get to the Fed Register by Mon. Therefore, they will likely be calling Jim to get his blessing."); id. at Exh. K (ARS001000) (Feb. 7, 2008 internal DOI e-mail) (referring to "Mr. Cason's Preferred Alternative"). For example, though the OIN application was for 17,310 acres, by March 2006 Mr. Cason proposed an alternative for 35,000 acres of land in trust for the OIN, more than twice as much as OIN owned and had applied for. See Baldwin Mov. Decl. Exh. T (Mar. 16, 2006 internal BIA e-mail) ("Jim Cason also added a 35 k acre alternative and that will add several months of data gathering that was not previously anticipated."). DOI staff were aware Cason would make the final decision. Id. ("They want you to make the recommendation, but plan to have Jim Cason make the final decision so the ROD may change to match his selection."). The simple act by Ms. Scarlet of adding her name to the ROD does not alter the character of the DOI's process as being entirely directed by Mr. Cason and the OIN.

The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) [affected governments' comments regarding tax impacts and potential jurisdictional conflicts] of this section." 25 C.F.R. § 151.11(b).

The DOI's regulations define "reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction . . . 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). In other words, to meet the definition of "reservation," (1) the tribe in question must exercise governmental jurisdiction over the land; or (2) the land must be contained within a former reservation that has been disestablished or diminished pursuant to a final judicial determination.

In the Determination, the DOI concluded that the OIN did not have governmental jurisdiction over the Subject Land and that the Subject Land was not subject to a final determination of disestablishment or diminishment.[46] Accordingly, the DOI should have applied its off-reservation criteria. Instead, the DOI expressly evaluated the Application under the on-reservation criteria listed at section 151.10. Baldwin Mov. Decl. Exh. L (ROD at 32). The Administrative Record demonstrates that DOI failed to consider all the requirements of section 151.11(b), and failed to grant the appropriate (or any) deference to the State's, Counties' and local municipalities' concerns regarding tax impacts and potential jurisdictional conflicts.

A. The Subject Lands Do Not Satisfy The DOI's Definition of Reservation

1. The OIN Does Not Have Governmental Jurisdiction Over The Subject Lands

[46] Both the United States and the OIN argue that the "Oneida reservation" has not been disestablished or diminished. (U.S. Mem. at 47); (OIN Mem. at 39-40); Oneida Indian Nat. of N.Y. v. Madison Cnty., Nos. 05-6408-cv (L), 06-5168-cv (CON), 06-5515-cv (CON), slip op. at 74-76 (Oct. 20, 2011). This position confirms that the off-reservation criteria should have been applied.

The Supreme Court held in Sherrill that "[t]he Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." 544 U.S. at 203-04 ("[T]he Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue."). The crux of the Supreme Court's holding was that a "checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at the OIN's behest – would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches," id. at 219-20, and if the OIN could "reassert sovereign control" little would prevent the OIN 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." Id. at 220.

The undeniable import of Sherrill is that the OIN does not have governmental jurisdiction over the Subject Lands. The DOI made such a finding in evaluating the Application by concluding that "[f]ollowing the U.S. Supreme Court's decision, the Nation lacks sovereignty over the lands as a matter of law." Baldwin Mov. Decl. Exh. A (FEIS at 1-8). In fact, the DOI cites the "Nation's ability to exercise governmental authority" as an intended benefit of trust status for the OIN justifying the Determination in the first place. Baldwin Mov. Decl. Exh. L (ROD at 36).[47]

On their motion for summary judgment, the Federal Defendants contend that the United States "does recognize the Oneidas as having governmental jurisdiction over their Reservation lands." (U.S. Mem. at 46). Even if the DOI made this finding in the Administrative Record (it did not), such a conclusion is wrong as a matter of law. Sherrill held that the OIN could not "revive" the sovereignty it lost hundreds of years ago, not that the OIN has tribal sovereignty but

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[47] Three pages after the Federal Defendants argue that the OIN has governmental jurisdiction over the Subject Lands, the Federal Defendants cite the DOI's finding that the Determination will be beneficial to the OIN because it will provide it the "ability to exercise governmental authority." (U.S. Mem. at 46, 49).

simply cannot exercise it, nor that the OIN has the right to exercise jurisdiction and will continue to exercise jurisdiction over the land. Sherrill, 544 U.S. at 216. Tellingly, the Federal Defendants' assertion contradicts the DOI's own findings in the ROD, FEIS and Administrative Record. An agency's determination must be evaluated on the grounds given by the agency, and no post hoc litigation positions can be used to justify an agency action. See, e.g., Atchinson, 412 U.S. at 807 ("[W]e must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process"); 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); Butte Cnty v. Hogen, 613 F.3d 190, 196-97 (D.C. Cir. 2010). Since the DOI found that the OIN does not have governmental jurisdiction over the land (and did not make a record-based finding that the OIN did), the decision to apply the on-reservation criteria cannot be justified by the Department of Justice now arguing in this litigation that the United States does recognize the OIN as having governmental jurisdiction (as if the DOI could recognize something the Supreme Court has found does not exist).

Similarly unpersuasive is the OIN's contortion of the DOI's regulations to mean that "governmental jurisdiction" is not actually the ability of a tribe to exercise governmental jurisdiction, but rather some unarticulated standard as to which tribe the "reservation belongs." (OIN Mem. at 40). This is not a construction advanced or considered by the DOI below. But even if it were, the Administrative Record demonstrates that the OIN is not the only tribe to which, allegedly, the "reservation belongs". Baldwin Mov. Decl. Exh. L (ROD at 11; 32-33) (recognizing claims of Stockbridge-Munsee and Oneida Tribe of Indians of Wisconsin); id. Exh. N (Subject Lands within Stockbridge-Munsee land claim area); Baldwin Opp. Decl. Exh. L (AR004424) (May 4, 1993 letter from Arlinda F. Locklear, Counsel for Oneida Tribe of

Wisconsin, to Hon. Bruce Babbitt, Secretary, DOI) ("[T]he only Oneida Reservation in New York is land in which the Oneida Tribe of Indians of Wisconsin shares a common, indivisible interest with the Oneida Indian Nation of New York, along with the Oneida of the Thames Band . . . . [T]he Oneida Reservation in New York is owned jointly by the Oneida Tribe of Indians of Wisconsin, the Oneida of the Thames Band, and the Oneida Indian Nation of New York."); id. Exh. M (AR012150-51) (June 14, 2001 Affidavit of M. Sharon Blackwell, Deputy Commissioner of Indian Affairs at ¶ 3) ("The Secretary of the Interior recognizes the Oneida Nation of New York and the Oneida Tribe of Wisconsin as successors-in-interest to the historic Oneida Nation signatories of those treaties [Treaty of Fort Stanwix and Treaty of Canandaigua].").

2. The DOI Concluded That The Oneida's "Reservation" Has Not Been Judicially Disestablished

In addition to not satisfying the first criterion for constituting a "reservation" under the land-into-trust regulations, the DOI concluded that the Subject Lands also do not meet the second, alternative criterion – falling within an area of land that has been subject to a final judicial determination of disestablishment or diminishment. Baldwin Mov. Decl. Exh. L (ROD at 32); Exh. A (FEIS at ES-5) ("The U.S. Supreme Court did not find that the U.S. Congress had disestablished or diminished the Oneida Reservation."). The Federal Defendants (U.S. Mem. at 47), and the OIN (OIN Mem. at 39-40) do not dispute the DOI's finding. Consequently, the Subject Lands do not meet the second criterion for "reservation" land.

B. The Administrative Record Does Not Support The DOI's Footnote That It Would Have Reached The Same Conclusion Had It Evaluated The Application Under 25 C.F.R. § 151.11.

The DOI remarked in a footnote in the ROD that it arbitrarily would "still acquire the Subject Lands in trust" if it had decided to apply the correct regulatory criteria. The DOI's

unsupported suggestion does not satisfy its obligation to meaningfully consider all mandatory factors under its land-into-trust regulations. Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032, 1038-39 (10th Cir. 1995) ("[W]e have consistently admonished the Secretary to analyze all relevant factors and have reversed rulings that either disregarded certain factors or treated one factor as determinative." (emphasis added)). Nor does the single footnote in the 73-page ROD cogently explain the DOI's reasoning for arriving at the same exact result under a different standard. Baldwin Mov. Decl. Exh. L (ROD at 33 n.5); Atchinson, 412 U.S. at 807 ("[T]he agency must set forth clearly the grounds on which it acted."); Tourus Records, Inc. v. D.E.A., 259 F.3d 731, 737-38 (D.C. Cir. 2001) (agency must provide satisfactory explanation in statement of reasoning, not only conclusion). The Administrative Record demonstrates that for most of the decision-making process, DOI personnel considered the section 151.11 criteria irrelevant. See, e.g., Baldwin Mov. Decl. Exh. ZZ (AR011366) ("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."); id. Exh. AAA (AR027068) (January 25, 2008 Letter from Maria Wiseman to 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 25 C.F.R. § 151.11 (off-reservation standard)."); Baldwin Mov. Decl. 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.").

The Administrative Record also demonstrates that the DOI did not give greater weight to the tax and jurisdiction concerns of the State, Counties and local municipalities as the DOI would

have to do under the correct regulatory criteria. Internal DOI correspondence predating official notice of the Application to affected governments demonstrated that the State, Counties and local municipalities' comments would not be seriously considered: "[The OIN] expect a bunch of negative comments but the fee-to-trust action is justified as a Supreme Court directed procedure." Baldwin Mov. Decl. Exh. K. The Supreme Court did not direct the DOI to take land into trust. It simply noted that the trust process provided an avenue by which the OIN could reestablish jurisdiction. Sherrill, 544 U.S. at 220-21. Before an EIS was released, the DOI instructed Malcolm Pirnie that "State jurisdictional issues should not be considered substantial reasons to deny the fee-to-trust transfer," Baldwin Declaration Exh. DD (ARS005038), "[t]he 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," id., and that "the tax issue is not necessarily a valid issue but fear was widely spread." Id. at ARS005040. Such treatment reflects disregard for, rather than deference to, the concerns of the State, Counties and local municipalities. Contrary to the assertion of the OIN that the "ROD confirms that DOI was duly 'sensitive'" to balancing the relevant interests of the affected governments (OIN Mem. at 49), the Administrative Record establishes just the opposite.

Apparently, at some point before issuing the ROD, the DOI realized that it had applied the wrong standard and added the footnote that it would arrive at the same exact result had it applied the off-reservation criteria. Such action cannot satisfy the agency's requirement to explain its decision, and would effectively grant power to the DOI to declare that there is no difference between the two regulatory schemes, so long as the DOI says so. The DOI applied the wrong standard, and its failure infected the entire decision-making process (including the environmental impact statements), thereby stripping the affected governments' comments of the

weight they were entitled under the correct regulatory standard. A remand would not be a "formality" as the OIN contends, because if the Court remanded the Determination to the DOI with instructions to apply the correct regulatory standard, the same DOI officials would not be passing judgment on the Application.[48] The DOI admitted that "a different administration may look at things differently" (Baldwin Declaration Exh. VV (ARS000905) (Internal DOI e-mail)), and that is especially true where the DOI would have to apply the regulatory standard more deferential to the affected governments' concerns.

For the reasons detailed above, the Defendants are not entitled to summary judgment on Plaintiffs' Sixth Cause of Action because the DOI applied the incorrect regulatory criteria.

VI. THE DOI ARBITRARILY CONCLUDED THE OIN NEEDED TRUST LAND AND INAPPROPRIATELY CONCLUDED HOW MUCH IT WOULD TAKE INTO TRUST

One of the mandatory considerations for the DOI under sections 151.10 and 151.11 is the applicant tribe's need for additional land.[49] The Federal Defendants contend that the DOI satisfied section 151.10(b)'s requirement because no particularized, acre-by-acre justification is required. (U.S. Mem. at 48). It is not the DOI's lack of an acre-by-acre justification that renders the Determination defective, it is the DOI's reliance on vague justifications that are contradicted by the Administrative Record and the lack of any reasoning, consideration, or evidence

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[48] The OIN also argues that the Subject Lands are "near" the 32-acre parcel that was the subject of the Boylan case and which the OIN argues constitutes reservation land. (OIN Mem. 41). Even if the Boylan land is considered reservation land, the fact that the Subject Land parcels are "near" the reservation does not mean that the section 151.10 criteria apply. Section 151.10 applies to land "located within or contiguous to an Indian reservation." 25 C.F.R. § 151.10. The IBIA has held that "contiguous" means adjoining or abutting and not "near". Baldwin Mov. Decl. Exh. XX (Jefferson County v. Northwest Regional Dir., 47 IBIA 187, 205-206 (IBIA Sept. 2, 2008)). The OIN did not include the 32-acre parcel in the Application. Baldwin Mov. Decl. Exh. L (ROD at 14).

[49] In the first instance, the DOI concluded that "no demonstration of 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 Mov. Decl. Exh. L (ROD at 34). Such a construction is contrary to the plain meaning of Part 151 and, in any event, is not supported by the Administrative Record because the Subject Lands are not within or adjacent to any OIN reservation. See supra Section V.A. The Federal Defendants appear to abandon this view on their motion for summary judgment.

supporting the 13,003.89 acres of land subject to the Determination.[50] The DOI failed to examine the relevant data, ignored its own findings, and did not articulate a satisfactory explanation for the Determination. See Forest Watch v. U.S. Forest Serv., 410 F.3d 115, 118-19 (2d Cir. 2005) (determination did not adequately connect result to appropriate standard).

A. The DOI Relied On Contradictory Findings Of Need That Are Not Supported By The Administrative Record

As the OIN points out in its motion for summary judgment, a cited "need" purportedly justifying the Determination is for the OIN to diversify its economy so it does not rely solely on Turning Stone's gaming revenue. (OIN Mem. at 44 (citing ROD at 36)). The DOI has concluded, however, that "[t]he Nation has constructed a diversified business structure in convenience stores, a newspaper publishing enterprise, gasoline stations, and a major destination resort known as the Turning Stone Resort & Casino." Baldwin Mov. Decl. Exh. A (FEIS at 1-8) (emphasis added). Indeed, the DOI recognized that out of the approximately $400 million annual income of the OIN, $100 million comes from the OIN's SavOn gas stations. Id. at Exh. VV (ARS000904) (Internal DOI e-mail). The DOI recognized that the OIN has a diverse economy and that trust status is not necessary to keep the OIN's economy diverse. Id.at Exh. L (ROD at 38); see also infra at 93. Moreover, it is arbitrary for the DOI to conclude that the OIN would not change its current land uses (Baldwin Mov. Decl. Exh. L (ROD at 39)), but then take land into trust because the OIN needs to diversify its economy.

The DOI also concluded that "the basic features of trust status will promote the Nation's ability to continue its existing uses of the Subject Lands," but the DOI has concluded that Turning Stone is operating lawfully without trust status (Baldwin Mov. Decl. Exh. L (ROD at 36)), and that the OIN's other enterprises can be operated without being taken into trust.

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[50] Indeed, had the DOI applied the correct standard for off-reservation acquisitions, it would have had to give greater scrutiny to the OIN's purported need.

Baldwin Mov. Decl. Exh. SS (ARS004558) (Handwritten note by James Cason) ("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.").

Similarly, the DOI summarily concluded that the Determination would "promote the health, welfare and social needs of its members and their families." Baldwin Mov. Decl. Exh. L (ROD at 36). There is no finding by the DOI that OIN members need more health, welfare or social services than the tribe already provides or how trust status will promote those ends. The DOI did, however, find that the OIN "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." Id. at Exh. A (FEIS at 4-382); see also id. at FEIS at 3-245; id. at FEIS 3-247 (listing "Milestones for Nation Government Program and Services 1989-2004").[51] If the DOI can satisfy its section 151.10(b) analysis by simply intoning general benefits of trust status without tethering those generalities to the circumstances of the applicant tribe, it is hard to imagine any tribe not having a need for trust status, and section 151.10(b) would be rendered meaningless. See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29,

[51] The Federal Defendants contend that the DOI is not obligated to undertake an acre-by-acre justification for taking land into trust. Even if such an inquiry is not required, the DOI is still obligated to consider the need for a tribe to have the amount of land taken into trust. The cited needs – "cultural and social preservation and expression," "political self-determination" and "historic and cultural sites" Baldwin Mov. Decl. Exh. L (ROD at 8), can be accomplished by taking 1,510 acres of land. See Baldwin Mov. Decl. Exh. A (FEIS at 3-11, 3-17) (listing 178 acres used by the OIN for public and community services, 860 acres used for tribal housing and 472 acres used as "wild/forested/public parks/open space" that "includes" the OIN's hunting, fishing and festival sites). Although the DOI is not required by regulation to take into trust the minimum amount of land possible, it still must find the OIN needs all of the land to be taken into trust. If the articulated need can be satisfied with 1,510 acres, the DOI must still find a need for taking the remaining 11,493.89 acres into trust. The DOI cannot do so, especially in light of its conclusions that the OIN enterprises do not need trust status to continue operating. Baldwin Mov. Decl. Exh. SS (ARS004558) (Handwritten note by James Cason); see also id. at Exh. II (Supplemental Jarrell Report ¶ 72) ("[T]he property taxes the OIN would have to pay on property not placed in trust cannot reasonably be claimed to threaten the economic self-sufficiency of the OIN and its members, who are the joint beneficiaries of these valuable assets and businesses.").

43 (1983) (An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.").

B. The DOI Decided To Take A Significant Amount Of Land Into Trust Prior To Any Substantive Analysis Of Tribal Need

Even if there is some need for the DOI to take land into trust, there is no articulated need justifying taking over 13,000 acres into trust. The Administrative Record evidences that before formal notice had been provided to the Plaintiffs and local municipalities, the DOI had decided to take a large amount of land into trust for the OIN. Even though the applicable regulations call for notification to state and local governments "[u]pon receipt of a written request to have lands taken into trust," 25 C.F.R. § 151.10, by the time the DOI did provide formal notice to the State on September 20, 2005 (over five months after it received the Application), it had already informed the OIN to prioritize its lands because it was considering taking "only" 10,000 acres into trust. Baldwin Mov. Decl. Exh. K (Sept. 2, 2005 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."); id. at Exh. G (ARS001065) (Sept. 22, 2005 internal DOI e-mail) ("[T]he total acres in group 1 & 2 [are] just under the 10,000 acres that Mr Casson [sic] considered his limit of being comfortable with at this point in time.").

As late as March 2007, that 10,000-acre figure – one reached without substantive analysis or input from affected governments – was still the preferred alternative for the DOI. Baldwin Mov. Decl. Exh. XXX (Internal DOI e-mail). It was not until the next month that the acreage of the DOI's preferred alternative was enlarged to 13,000 to make the "Oneida somewhat happier." Id. at Exh. N (Internal DOI e-mail). For most of the decision-making process, the DOI made decisions and formulated alternative agency actions around a "direction" from Mr. Cason to take

10,000 acres into trust. Id. at Ex. WWW (Internal DOI e-mail). That "direction" was formulated before the State, Counties, and local municipalities were given official notice of the Application or requested to provide written comments, let alone before they actually provided detailed written comments on the Application or the tax levy information the BIA requested. The "direction" was also given before an EIS was drafted. It would be one thing to analyze a tribe's need for land and conclude that the purposes of the IRA will be served by a decision to bring land into trust. It is another (arbitrary and capricious) thing to base that agency action on a number of acres that is not connected to any articulated needs of the tribe (or impacts on the surrounding communities) and to reach that conclusion before a record, which is supposed to form the basis for (and not simply window dressing for a previously made decision), is created. The Administrative Record contains no justification or explanation for setting a 10,000-acre target, and much of the decision-making process focused on that figure.

C. Instead Of Objectively Analyzing Need, The DOI Used The Determination To Rectify Perceived Wrongs To The OIN

The DOI in the ROD, and the Federal Defendants in their moving papers, argue that the Subject Lands were purportedly acquired by the State in violation of federal law, but this cannot constitute a "need" to take land back into trust. It is precisely this thinking – that after 200 years of control by the State and its subdivisions, the OIN needs the land back under its sovereign control – that has been rejected by the Supreme Court and Second Circuit. Sherrill, 544 U.S. at 215-16 ("Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here."); Oneida Indian Nation of New York v. County of Oneida, 617 F.3d 114, 135-36 (2d Cir. 2010) (barring claims that are "disruptive of significant and justified societal expectations"), cert. denied 2011 U.S. LEXIS 7494, 2011 U.S. LEXIS 7567 (Oct. 17, 2011) (dismissing the Oneida land claim).

Internal DOI correspondence indicates the complete disregard by the DOI of the policy and concerns underlying those decisions. Baldwin Mov. Decl. Exh. VV (ARS000904) ("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.").

In a fax from the DOI to Malcolm Pirnie containing points to "keep in mind and express in the DEIS," Kurt Chandler wrote that "[t]he 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." Baldwin Mov. Decl. Exh. DD (ARS005039). Similarly, the Federal Defendants contend that "antagonistic actions by the State and Counties provide ample justification for the need to have land taken into trust for the Oneidas" because the State and Counties have litigated against the tribe. (U.S. Mem. at 49). But the Federal Defendants fail to consider (either in the ROD or in their motion) that the OIN have refused to observe State and local regulation and tax law, even after Sherrill confirmed that the OIN had no sovereignty over the land and that the land is taxable. Under the Federal Defendants' view, while the OIN's disregard for applicable law is inconsequential, the Plaintiffs' efforts to enforce their jurisdiction are somehow nefarious.[52]

Accordingly, because the Federal Defendants and the OIN have not demonstrated that the DOI rationally and reasonably considered the OIN's need for land to be taken into trust, their motions for summary judgment must be denied.

VII. THE DOI'S CONSIDERATION OF THE IMPACTS OF REMOVING TRUST LAND FROM THE TAX ROLLS UNDER 25 C.F.R. § 151.10(e) IS ARBITRARY AND CAPRICIOUS

[52] Shockingly, there is little to no analysis in the Administrative Record or the ROD as to how the OIN would actually be impacted by being subject to State and local regulation – in other words, there is no analysis of the "need" to take the land into trust.

An agency decision must not be upheld where its justification is illogical. See Rochester-Genesee, 531 F. Supp. 2d at 520 (agency's definition of term logically contradicted content of its own regulation). If the decision is not rationally supported by the record it must be vacated. Crane v. Sec'y of the Army, 92 F. Supp. 2d 155, 167 (W.D.N.Y. 2000) (determination arbitrary and capricious where small minority of documents and witnesses supported agency action).

As they do with a number of analyses, the Federal Defendants contend that the DOI undertook a tax analysis that it was not required to undertake, and even if this Court finds fault with it, the Court should nevertheless affirm the Determination. (See U.S. Mem. at 53). In other words, the Federal Defendants argue that if the analysis is sound, the Court should affirm the Determination, and if the analysis is faulty, the Court should still affirm. This is not the appropriate standard for administrative review under the APA. An agency determination must be evaluated on the grounds given by the agency. Office of Commc'n of United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977).

The tax analyses undertaken by the DOI do not simply contain "some erroneous findings" (U.S. Mem. at 51), but rather rely on fundamentally flawed and contradictory premises that the OIN will continue to make non-binding commitments to local municipalities and that the OIN enterprises will shut down if land is not taken into trust. See infra Section VIII.A. The DOI concluded that the OIN will continue to pay local governments for services provided, Baldwin Mov. Decl. Exh. L (ROD at 31, 47), even though the OIN has withheld or unilaterally changed those payments in the past. In addition, the DOI and its chief decision-makers did not believe that OIN enterprises would shut down if they were not taken into trust. See Pl. Mov. Mem. at 76-79. Nevertheless, the DOI conjured creative arithmetic to conclude that the Determination would result in a net benefit to the local community because of certain "benefits" from the OIN

that "offset" the tax loss, specifically OIN voluntary payments to local governments, OIN employee property tax payments, OIN employee state income taxes, OIN spending and OIN payments to the State Police and State Racing and Wagering Board. (U.S. Mem. at 54). There is no rational justification to account for these payments as benefits of the Determination, except to materially skew the impact analysis. Accordingly, the DOI's section 151.10(e) analysis is arbitrary and capricious.

A. The DOI's Conclusion That The OIN Would Continue To Make Non-Binding Commitments To Local Municipalities Is Not Supported By The Administrative Record

The loss of property taxes suffered by the State, Counties and local municipalities imposes the costs of services provided to the OIN upon a smaller group of non-Indian taxpayers.[53] Although the DOI decided not to quantify that impact (see Baldwin Mov. Decl. Exh. YYY (ARS001980) (DOI Briefing Paper on Jarrell Report)), it assumes that the additional costs will be addressed by, *inter alia*, voluntary payments to local municipalities by the OIN. Baldwin Mov. Decl. Exh. L (ROD at 47). This conclusion is not supported by – and is actually contrary to – the Administrative Record.

First, the OIN views these payments as completely voluntary. The basis for the DOI's assumption that such payments can be relied on to offset tax losses is a self-serving 2008 letter from OIN Representative Ray Halbritter to the DOI, characterizing the payments as "grants," "gifts," and "donations." Baldwin Mov. Decl. Exh. A (FEIS App. J) (Jan. 7 2008 letter from OIN Representative Ray Halbritter to James Cason, Associate Deputy Secretary of the Interior).

Second, the Administrative Record demonstrates that the OIN has stopped or unilaterally modified certain voluntary payments at its own will and has used others to exert political

[53] The Federal Defendants and the OIN assume that there will be no effect to take land into trust, because the OIN is not paying taxes now. What they do not account for is that the Determination will make that refusal to pay taxes by the OIN and the disproportionate allocation of cost to the non-Indian community permanent.

influence. For example, the ROD relies upon a voluntary services agreement between the OIN and the Verona Volunteer Fire Department as an example of the OIN's payments to local municipalities for services rendered to the tribe, Baldwin Mov. Decl. Exh. L (ROD at 58), but omits that the OIN unilaterally changed the formula under which it made such payments. See id. at Exh. ZZZ (AR003016-18). Indeed, the OIN has used other pledges and payments to pressure municipalities to follow OIN dictates. The Stockbridge Valley Central School district was denied a $150,000 pledge from the OIN because the school district refused to accede to the OIN's demand to fire a teacher who was critical of the OIN. See Baldwin Mov. Decl. Exhs. AAAA (AR004088-96, at ¶¶ 4, 12-22); BBBB (AR004098-101, at ¶ 6); QQQQ (AR001443).

Third, after the Supreme Court's decision in Sherrill, the OIN unilaterally ended its silver covenant payment program. Baldwin Mov. Decl. Exh. L (ROD at 47). The Administrative Record establishes that when the OIN does not get its way, it stops paying local municipalities and school districts, regardless of whether those municipalities and school districts rely on the payments or provide services to OIN members.

The DOI did not consider a scenario in which the OIN did not make or decreased these voluntary payments, nor did it consider the resulting effect on local communities. The ROD notes that the OIN made $38.5 million in payments to local governments since 1995 (Baldwin Mov. Decl. Exh. L (ROD at 47)), but fails to account for the fact that $10.1 million was used for capital improvements specifically to service OIN properties – not to pay municipalities for services rendered. Id. at Exh. FFF (AR013120) (Jarrell Report at ¶ 115). The Administrative Record contains evidence that the OIN's payments to local municipalities are not reliable and the record does not support the DOI's reliance on such payments as alleviating property tax loss.

B. The DOI Improperly Excluded Property Improvements On The Turning Stone Tax Lot Under IGRA In Calculating The Tax Loss Under The Determination

Both the Federal Defendants and the OIN contend that the DOI correctly determined the amount of taxes that would be lost (and the amount of taxes outstanding) because IGRA preempts any taxation of improvements to land that are purportedly "related" to the OIN's gaming operation.[54] Such a conclusion is incorrect as a matter of law, and the Federal Defendants and OIN are not entitled to summary judgment.

The Federal Defendants' and OIN's reading of IGRA to preclude property taxation on non-gaming improvements to land is an unprecedented and unprincipled expansion of IGRA. The ROD (and the OIN in its moving papers) principally rely upon Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994) for the proposition that the Town of Verona's tax assessment including improvements to the land (such as golf courses, restaurants, luxury hotels, and event centers) is invalid because those improvements would not have been built but for the Turning Stone casino's continued operation. Baldwin Mov. Decl. Exh. L (ROD at 52); (OIN Mem. at 58). In Cabazon, the Ninth Circuit recognized that "IGRA seeks to 'ensure that the Indian tribe is the primary beneficiary of the gaming operation.'" 37 F.3d at 433 (quoting 25 U.S.C. § 2701) (emphasis added). In doing so, the court held that a state-imposed licensing fee on on-reservation wagers was invalid under IGRA where "the State benefited from the tribal gaming operation to a considerably greater extent than the Bands." Id. at 433-34 (emphasis added).

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[54] The OIN and Federal Defendants attempt to frame the IGRA issue as one solely of determining the amount of taxes the OIN should be required to pay under 25 C.F.R. § 151.13. Not only is the determination of the amount of taxes assessed and assessable relevant to the amount of taxes owing and that the OIN has failed to pay, it is also germane to the impact of removing land from the tax rolls under 25 C.F.R. § 151.10(e) since there is a substantial disparity between the assessment for the Turning Stone casino tax lot used by the DOI ($22.55 million) and that used by the Town of Verona ($362.55 million). Baldwin Mov. Decl. Exh. L (ROD at 52-53).

First, IGRA does not expressly prohibit state taxation. 25 U.S.C. § 2710(d) ("[N]othing 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 . . ."); 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 merely because a statute does not "authorize" an act does not mean it prohibits that act); Cabazon, 37 F.3d at 433 ("[S]ection 2710(d)(4) is not on its face a prohibition of state taxation.").

Second, the cases cited by the DOI and the OIN are inapplicable because they employ a preemption analysis for state regulation of activities on a tribe's reservation where that tribe exercises sovereignty, not a tax assessing real property improvements on land over which the tribe exercises no sovereignty. See, e.g., Cabazon, 37 F.3d at 433 (employing analysis to determine "whether federal law preempts a state's authority to regulate activities on tribal lands"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (ROD at 51; OIN Mem. at 60) (considering preemption where a "State asserts authority over the conduct of non-Indians engaging in activity on the reservation"); Gaming Corp. of Am. v. Dorse & Whitney, 88 F.3d 536, 543-44 (8th Cir. 1996) (OIN Mem. at 60) (considering "whether IGRA completely preempts state laws regulating gaming on Indian lands" and noting IGRA's preemptive force in the "governance of gaming activities on Indian lands" (emphasis added)); Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 837 (1982) (OIN Mem. at 60) (discussing preemption of "exercise of state authority over commercial activity on an Indian reservation").[55]

[55] The OIN mischaracterize the import of Rincon Band v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010). Rincon involved accusations that the State of California was not negotiating a tribal gaming compact in good faith. The court recognized that a State's demand for direct taxation of a tribe or its lands is evidence of lack of good faith in the IGRA negotiation process and that IGRA limits negotiation topics to those that are related to gaming. Id. at 1028-29. The impetus for this provision is that lands upon which a tribe will conduct gaming operations are normally free from taxation. That is not the case here. Nor does Rincon stand for the complete prohibition of state taxation under IGRA. See Confederated Tribes of Siletz Indians v. Oregon, 143 F.3d 481, 486 n.7 (9th Cir. 1998)

Here, the Town of Verona does not rely on IGRA as the basis of its authority to assess taxes on the improvements made to the Turning Stone tax lot, but rather on Sherrill's holding that the OIN is not immune from real property taxes.[56] Nor is the tax assessment an attempt to regulate any activity (let alone gaming activity) conducted on property over which the OIN exercises sovereignty. Instead, it is an ad valorem tax on property over which the OIN does not have sovereignty and the improvements thereon, so the preemption analyses undertaken by the cited cases are inapposite.[57] See Confederated Tribes of Siletz Indians, 143 F.3d at 487 (declining to apply White Mountain preemption analysis where state law did "not seek to usurp tribal control over gaming nor [did it] threaten to undercut federal authority over Indian gaming"). Even if the Town of Verona's property tax assessment somehow could be construed as a tax on gaming, the OIN is still the primary beneficiary of the gaming activities at Turning Stone under Cabazon as the OIN earns approximately $330 million annually. Baldwin Mov. Decl. Exh. FFF (AR013094-95) (Jarrell Report at ¶¶ 48-50). Using the Town of Verona's full

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(holding IGRA does not preempt state law where the state law had "no effect on the determination 'of which gaming activities are allowed'"). The OIN's use of a fortiori reasoning as to Rincon is another way of saying that it has no applicable authority to support its position. (OIN Mem. at 59).

[56] The OIN's citation to N.Y. State Finance Law § 99-n is of no relevance. Section 99-n is a temporary statute enacted in response to the OIN's refusal to pay valid property taxes. Its legislative history is clear that "[n]othing contained in this act shall be construed as exempting the lands of the Oneida Indian Nation of New York from real property taxation or relieving the Oneida Indian Nation of New York of its obligation to pay such taxes, provided however that such tax payments, upon collection by the collecting officer, shall be placed in the Oneida Indian Nation real property tax depository fund established pursuant to section 99-n of the state finance law." Baldwin Opp. Decl., Exh. N (2005 N.Y. Sess. Laws ch. 521 (2005), at § 2). Once all outstanding taxes from the OIN are collected, or on June 30, 2012, the funds are distributed to the affected municipal corporations that "replicates the distribution of such taxes that would have occurred if the final resolution were in effect during such tax years." N.Y. State Fin. § 99-n. It is this law that accounts for the assessment of the OIN taxes being larger than the Town of Verona's budget.

[57] Even if a balancing of interests was appropriate in this situation, the State and its subdivisions have an important interest in assessing the property taxes based on significant improvements to the Turning Stone tax lot. The Town of Verona provides firefighting, rescue and emergency services to the property, including a number of multi-story structures that the Federal Defendants and OIN contend should not be taxed, but for which the Town is not adequately compensated by the OIN. See Baldwin Mov. Decl. Exh. ZZZ. Congress recognized that "[a] State's governmental interests with respect to Class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens." Baldwin Opp. Decl., Exh. O (S. Rep. No. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. at 3083).

valuation, the annual tax impact to the OIN for the full value of the Turning Stone tax lot is approximately $16.2 million, or less than 5% of the OIN's annual gaming revenue. Id. at AR013111-12 (Jarrell Report at ¶¶ 96-99).

The DOI's expansive reading of IGRA to preempt taxation of any otherwise taxable real property and non-gaming improvements including the OIN's luxury hotels, golf courses, a driving range, restaurants and retail stores is arbitrary and capricious. The Ninth Circuit held that

> "IGRA's core objective is to regulate how Indian casinos function so as to 'assure the gaming is conducted fairly and honestly by both the operator and the players,' 25 U.S.C. § 2702(2). Extending IGRA to preempt any commercial activity remotely related to Indian gaming – employment contracts, food service contracts, innkeeper codes – stretches the statute far beyond its stated purpose."

Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1193 (9th Cir. 2008). So too does extending IGRA's preemptive reach to encompass real property tax assessments for hotels, conference centers, restaurants, golf courses, and other non-gaming, entertainment improvements. Consequently, the DOI's analysis of the tax impact to the local jurisdictions – which does not include approximately $12 million in annual property taxes – is arbitrary and capricious.

C. The DOI Irrationally Treated OIN Employee Taxes And Payments Under the Gaming Compact As Offsets To The Loss Of Property Tax And Its Conclusions As To Tax Impacts Are Grossly Inaccurate

In concluding that the "Preferred Alternative (Alternative I) is projected to result in a net contribution to the New York State and local governments of approximately $16.94 million," Baldwin Mov. Decl. Exh. L (ROD at 48), the DOI included among the OIN's "contributions" to the local community, taxes paid by OIN employees, tax multipliers and payments to the State Police and State Racing and Wagering Board under the compact between the State and OIN for the operation of Turning Stone (the "Gaming Compact"). Id. at Exh. A (FEIS App. E Tables 18

& 26). Yet, there is no logical or rational basis for treating these "contributions" as offsetting measures to tax losses arising from the Determination because, as the DOI has determined, the OIN enterprises do not need trust status to continue operating. Id. at Exhs. L (ROD at 12, 39), SS (ARS004558) (Handwritten note by James Cason). Regardless of whether or not land is taken into trust, OIN enterprises will continue to operate, and in turn, will continue to employ people who will continue to pay taxes. It is thus irrational to conclude that these payments are "benefits" of the Determination that would offset the negative tax impact.

By treating these figures as benefits derived from the Determination, the DOI hides the undeniable truth that the Determination will result in a significant negative impact to the local communities.[58] Without payments under the Gaming Compact, the OIN make $1.18 million in payments pursuant to voluntary service, utility and infrastructure agreements. Baldwin Mov. Decl. Exh. A (FEIS App. E Tables 18 & 26). Using the DOI's calculations of impact based on estimates of fiscal cost for services rendered to the OIN, but without including Gaming Compact costs and payments, tax payments by OIN employees and the multiplier effect that would be made whether or not land is taken into trust, the Determination does not result in a positive impact of $16.94 million, it results in a negative impact of $1.36 million. Using the DOI's calculations of the impact resulting from property tax loss (as opposed to fiscal cost for services), but not the Gaming Compact costs and payments or the "benefits" described above, the resulting impact from the Determination is a negative impact of $1,638,800 excluding the Turning Stone tax lot (instead of the positive impact of $16,660,000 reported by the DOI), and a negative

[58] The OIN argues that the ROD "explains that DOI is considering 'the overall fiscal impacts of trust acquisition,'" and does not "equate tax payments by Nation employees or vendors with direct payments by the Nation." (OIN Mem. 47). The Federal Defendants argue the same. (U.S. Mem. at 56-57). This is a distinction without consequence. The taxes paid by OIN employees – whether considered OIN "payments" or not – cannot be fiscal impacts of the trust acquisition when those taxes would be paid without any trust acquisition.

impact of $13,839,100 using the Town of Verona's tax assessment of the Turning Stone lot (instead of a positive impact of $4,459,600 concluded by the DOI). Id.

The Federal Defendants argue that so long as the DOI considered the potential impacts it is not precluded from taking land into trust, even where the impacts are negative. (U.S. Mem. at 56). Even if negative tax impacts do not preclude the DOI from taking land into trust, its decision cannot be affirmed when its conclusions as to that impact are based on irrational and faulty calculations. Friends of the Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 824 (8th Cir. 2006) (methodology of calculation arbitrary and capricious if unreliable or inadequately explained). If, as the Federal Defendants argue, the Determination was not biased, and the DOI gave the appropriate weight to the State's, Counties' and local municipalities' concerns regarding tax impacts, then it is beyond reasonable belief that the DOI would reach the same exact decision (down to the fraction of an acre) when its calculations of those impacts were off by $18.3 million per year. The DOI must consider the tax impacts of the Determination, but it cannot discharge that obligation by making unsupported conclusions.

Because the Federal Defendants and OIN have not provided undisputed facts demonstrating that the DOI's consideration of the tax impacts resulting from the Determination was not arbitrary and capricious, and because they cannot overcome the undisputed facts proffered by Plaintiffs demonstrating that the DOI failed to rationally discharge its duties in this regard, the Federal Defendants and OIN are not entitled to summary judgment.

VIII. THE DOI FAILED TO PROPERLY CONSIDER THE JURISDICTIONAL IMPACTS OF TAKING LAND INTO TRUST UNDER 25 C.F.R. § 151.10(f)

A. The DOI Must Rationally Connect Its Conclusions As To Jurisdictional Conflicts With The Evidence In The Administrative Record

The Court must not grant summary judgment in favor of the Defendants on the Plaintiffs' Ninth Cause of Action because DOI did not rationally consider the jurisdictional effects of the

Determination under 25 C.F.R. 151.10(f). The Federal Defendants and OIN argue that all the DOI must do is "consider" the effect of the proposed action on state and local land use, environmental, health and welfare, and other regulation, equating any discussion in the ROD with adequate consideration. (OIN Mem. at 47) (stating "DOI plainly considered these issues" and citing to the ROD sections discussing them without further explanation); (U.S. Mem. at 57-59). But the conclusions offered by the ROD and FEIS must show DOI "examine[d] the relevant data and articulate[d] 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). This applies to the ROD and EIS alike: "[w]hen 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." Sierra Club v. U.S. Army Corps. of Eng'rs., 614 F. Supp. 1475, 1516 (S.D.N.Y. 1985). That the ROD and EIS discuss jurisdictional impacts in passing does not automatically mean that discussion is sufficient to discharge the DOI's substantive obligations under 25 C.F.R. § 151.10(f) and the APA.

The Supreme Court observed that the DOI's land-into-trust regulations dictate application of the Secretary's power under Section 465 in a manner "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Sherrill, 544 U.S. at 220-21. The OIN, in its moving brief, inappropriately conflates this description of Section 465's implementing regulations with the DOI's process. That (allegedly) "[t]he Supreme Court thus endorsed DOI's regulations as a vehicle for balancing the relevant interests," (OIN Mem. at 49), does not suggest that the DOI correctly applied its regulations to the OIN's Application or that its consideration of potential jurisdictional conflicts

is not arbitrary and capricious.[59] The DOI's conclusions must rationally follow from the evidence before it. Conclusory statements are insufficient to establish rational consideration of a given factor. 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").

B. The DOI Used Flawed Reasoning In Its Conclusions Regarding Jurisdictional Conflicts

Plaintiffs' briefing in support of summary judgment of Plaintiffs on the Ninth Cause of Action explores the logical flaws that render DOI's analysis of 25 C.F.R. § 151.10(f) jurisdictional factors inadequate. (Pl. Mov. Mem. at 99-115). The irrational arguments advanced by the Federal Defendants and the OIN on summary judgment match those set out in Plaintiffs' brief in support of its Motion for Summary Judgment, and are more fully refuted there, but they are also reviewed below.

One principal deficiency in the DOI's treatment of potential jurisdictional conflicts is its undue reliance on the OIN's "history of reaching service and intergovernmental agreements with local governments." (U.S. Mem. at 59 (citing ROD at 57-59)). As explored in Plaintiffs' moving brief for summary judgment at 90-93, 103-04, the DOI's assumption that the OIN will continue to abide by agreements once the State and municipalities are deprived of the means to enforce them is not logical. This problem is not academic: For example, the Federal Defendants promote the OIN's voluntary service agreement with the Town of Verona Fire Department, (U.S. Mem. at 61), but omit to mention that the OIN unilaterally changed the payment formula in its favor. Baldwin Mov. Decl. Exh. ZZZ (AR003016-18) (Oct. 2, 2005 letter from

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[59] On the one hand, the OIN argues that the DOI was not obliged to consider the concerns of the Supreme Court about checkerboarding jurisdiction (OIN Mem. at 47-50), but on the other hand, the OIN points to Sherrill as authority for applying to have land taken into trust. Baldwin Mov. Decl. Exh. C (AR003474) (Application).

Secretary/Treasurer Verona Fire District to Deputy Supervisor, Town of Verona); Pl. Mov. Mem. at 91.

Similarly, the application of federal law to trust land does not alleviate the DOI's obligations to consider jurisdictional conflicts before deciding to take land into trust, nor does that application eliminate jurisdictional conflict with state law and regulation. Yet these are fundamental assumptions carried forward from the ROD. (See Pl. Mov. Mem. at 102 n.67). The Sherrill court warned against a "checkerboard of alternating jurisdictions . . . [which] would 'seriously burde[n] the administration of state and local governments.'" 544 U.S. at 219-220 (emphasis added). This is a rational consideration of "jurisdictional problems" under section 151.10(f). Reference to federal law is not a rational replacement for analysis of issues specific to state and local jurisdiction, especially given that DOI knew state law regulates conduct and federal law does not. This can be seen, for example, in the specifics of clean air policy. Baldwin Mov. Decl. Exh. A (FEIS at 3-77 to 3-79) (New York State regulates air pollution in hydrogen sulfide, beryllium, fluorides, total suspended particulates, and air toxins, none of which are regulated by the EPA); id. Exh. SSS (AR000336**,** AR000378-89) (O'Brien and Gere report (Group 1 parcels Appx. A, Fig. 5-6)) (OIN's Atunyote golf course encroaches on state, but not federal, wetlands, directly implicating a jurisdictional problem). A federal-state divergence is also seen in overall approach to environmental regulation. Id. at Exh. SSS (AR000334) (New York environmental law requires NYSDEC approval of projects where federal law merely requires notification; wetlands protected by buffer areas under New York law which do not apply under federal law).

The DOI also relies on the OIN's record of managing the land and its existing ordinances. Baldwin Mov. Decl. Exh. L (ROD at 59-60). But the OIN's record is not as the DOI presents it,

and DOI was made aware of that fact. For example, "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. Baldwin Mov. Decl. Exh. SSS (AR000334). Furthermore, the OIN has ignored state land use regulations in the past, especially in the construction and operation of Turning Stone. E.g. Id. at Exh. SSS (AR000358-359) (describing placement of OIN gaming expansion near Vernon-Verona-Sherrill Central School District Campus). The Federal Defendants emphasize that the ROD recognized Turning Stone's past noncompliance but concluded it was necessary for the OIN's economic benefit. (U.S. Mem. at 60-61). But the point is that the manner in which Turning Stone was built displays the OIN's disregard for state and local jurisdiction and for the surrounding communities. And the same economic justification – that conforming to state and local land use, zoning, or building requirements will somehow undermine the economic value of future OIN projects – will undoubtedly be used to justify future departures. Indeed, the OIN's non-conforming uses will only intensify if the Determination stands; and the Determination will make permanent the attendant negative effects of the OIN's non-conforming land use on the local non-Indian community by removing State jurisdiction.

The ROD improperly presumes that the baseline for the DOI's consideration is the current state of affairs, under which the OIN operates Turning Stone (and generally manages its land) without regard for State jurisdiction.[60] Sherrill held that the free market purchases of property by the OIN did not revive the tribe's sovereignty over the land. 544 U.S. at 216-17. Consequently, many OIN structures were built unlawfully and are operating in violation of State

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60 Just as DOI uses the present situation as a baseline so as to ignore OIN's past unlawful conduct, it wrongly assumes the present situation will not change so as to ignore potential future ramifications of OIN projects. That assumption is wrong because there has been significant land use change on OIN land and because OIN had a number of new land uses underway at the time of the ROD. (See Pl. Mov. Mem. at 109).

and local regulation, regardless of the OIN's opinion as to whether it had to abide by State law. Those actions impact the surrounding communities; and by ignoring the OIN land uses that are currently in violation of applicable law, the Determination cements those impacts. The DOI arbitrarily and capriciously failed to recognize that the OIN has broken – and continues to break – applicable law, and so too it has failed to properly consider existing jurisdictional problems to the Determination.

The Federal Defendants also argue that the Determination takes into trust a relatively contiguous set of parcels, and that the Plaintiffs' ability to govern non-trust land is therefore not disrupted by the Determination. (See U.S. Mem. at 58). This idea belies the Federal Defendants' premise, discussed above, that jurisdictional issues are irrelevant because of voluntary agreements, applicable federal law, or past successful OIN land management. It is also contrary to the record evidence. The map of the Subject Lands dispels the notion that the parcels are contiguous; there are at least fourteen separate groups of parcels which do not border each other. Baldwin Mov. Decl. Exh. A (FEIS at 2-44). In virtually the same breath in which the Federal Defendants praise the contiguous nature of the lands, they acknowledge the checkerboarding problem does exist and is inevitable. (See U.S. Mem. at 58). The Federal Defendants ask the Court to presume that checkerboarding is an unavoidable, usual byproduct of taking land into trust, but cite no authority to substantiate that contention. The reality is the Determination encompasses an amount of land in a populated area that is highly unusual in land into trust decisions. Checkerboarding jurisdiction is a compelling reason to limit the amount of land to be taken into trust, and was a primary concern of not only Congress, but also the Supreme Court when it issued the Sherrill decision. 544 U.S. at 220-221. The Federal Defendants' unsupported assertion, that since checkerboarding is always present, it should be ignored, flies in

the face of Sherrill, the IRA and the ILCA which was enacted to address the "'checkerboard' pattern of Indian and non-Indian land ownership within many reservations, and in a complex pattern of 'fractionated' land ownership in units that could not be operated economically." Baldwin Opp. Decl., Exh. P (H.R. Rep. No. 97-908 at 13, reprinted in 1982 U.S.C.C.A.N 4415, 4422).

The Federal Defendants also conclude that since regulatory jurisdiction has been disputed in the past by the OIN, this problem is somehow relieved. (U.S. Mem. at 58 n.21 (citing ROD at 69)). Sherrill decided that New York exercises regulatory jurisdiction over the OIN's lands, resolving any dispute to which the Defendants refer. 544 U.S. at 216-219. The Supreme Court decided that the OIN lost its sovereignty over two hundred years ago. Id. at 218-19 ("There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control."). Absent the Determination, then, there is no uncertainty or checkerboarding notwithstanding the OIN's resistance to that reality; it is only the Determination which threatens jurisdictional integrity going forward.

In response to Plaintiffs' raising these logical gaps, the OIN complains that taking any land into trust at all would be contrary to the Supreme Court's Sherrill decision because taking land into trust always risks jurisdictional conflict. (OIN Mem. at 50). First, Plaintiffs do not claim that taking any land into trust is contrary to Sherrill, but taking large amounts of land which disrupt the regulatory scheme without any meaningful considerations of the concerns of affected governments, school districts and communities is contrary to the express reasoning of Sherrill (and the DOI's own regulations). Second, the Court need not evaluate whether the level of jurisdictional conflict is acceptable on the merits. The Court must instead determine whether DOI acted arbitrarily and capriciously by lacking a rational basis for its decisions. Instead of

confronting the applicable jurisdictional gaps, the DOI uses every available rhetorical feint to avoid the evidence: the applicability of federal law which is not as strict as state law, existing uses and agreements which do not satisfy state law or are not enforceable, and positions on the checkerboard issue which contradict each other and the Record. Relying on those items is not a rational substitute for bona fide consideration of jurisdictional problems imposed on the State, Counties and local municipalities, and thus is arbitrary and capricious.

IX. THE DOI DID NOT CONSIDER THE ABILITY OF THE BIA TO DISCHARGE ITS ADDITIONAL RESPONSIBILITIES RESULTING FROM THE DETERMINATION UNDER 25 C.F.R. § 151.10(g)

The DOI is required to consider "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 OIN ironically argues that Plaintiffs' allegations regarding the DOI's failure to consider the ability of the BIA to discharge its additional responsibilities are "conclusory and unsupported by anything in the administrative record." (OIN Mem. at 50). That is precisely the problem with the DOI's treatment of section 151.10(g) – it is conclusory and not supported by the Administrative Record. In fact, in moving for summary judgment, neither the Federal Defendants nor the OIN cite any real consideration of the BIA's additional responsibilities in the Administrative Record, nor can they. The only discussions of this factor in the Administrative Record are the bald conclusions in the ROD. Such "analysis" does not meet the requirements for competent review under the APA. See, e.g., Defenders of Wildlife, 958 F. Supp. at 683.[61]

[61] In fact, it appears that for most of the decision making process, the DOI believed it was not bound by section 151.10(g). In draft comment responses to be published in the FEIS, the DOI stated that "25 C.F.R. § 151.10(g) pertains to situations where the BIA acquires land for a tribe in fee 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." Baldwin Mov. Decl. Exh. OOOO (AR054780). Judge Hurd's decisions finding the OIN land was restricted against alienation were vacated by the Second Circuit in Oneida Indian Nation of New York v. Madison County, 2011 U.S. App. LEXIS 21210, at *41-42, *96 (Oct. 20, 2011); see also Baldwin Mov. Decl.

As discussed in the Plaintiffs' Motion for Summary Judgment, the ROD neither lists nor discusses what additional responsibilities would arise from the Determination before concluding that the BIA will be able to discharge them. (Pl. Mov. Mem. at 111-113). Once again, in its discussion of additional responsibilities, the DOI disingenuously concludes that "[t]he Nation will continue its existing uses of the Subject Lands, which uses the Nation conducted prior to applying for acquisition of the lands in trust" Baldwin Mov. Decl. Exh. L (ROD at 69), notwithstanding that earlier in the ROD the DOI concluded that the Determination was necessary for the OIN to diversify its economy. Id. (ROD at 36). The Federal Defendants similarly argue in their moving papers that there will be no difficulty for the BIA to discharge its additional responsibilities, stating "[t]rust status here is not necessary to facilitate a new commercial enterprise or other type of development . . . because the Nation is not seeking to alter any existing uses of the lands to be acquired into trust" (U.S. Mem. at 63-64). But that is the very same reason the DOI cites for justifying the Determination.[62]

The Federal Defendants and OIN have not produced or cited any evidence that the DOI appropriately considered whether the BIA can discharge its additional duties arising from the Determination, and thus their motions for summary judgment should be denied.

Exh. MM (AR005715) (June 10, 2005 letter from James Cason to Ray Halbritter) ("[W]e do not agree with [the] assertion that the Court's ruling in Sherrill recognizes the continuation of restriction on alienation protections over recently re-acquired lands."). At some point before the FEIS was released, the DOI changed that response to state that a determination under section 151.10(g) "will be reflected in the Record of Decision." Baldwin Mov. Decl. Exh. A (FEIS App. M at 3). The DOI's conclusions were reflected in the ROD, but neither the Federal Defendants nor the OIN offer evidence of the DOI's actual consideration of section 151.10(g) from the Administrative Record to substantiate those conclusions.

[62] Much as the Federal Defendants try to avoid it, in Miami Tribe of Oklahoma v. Muskogee Area Director, 28 IBIA 52 (IBIA 1995) (Baldwin Mov. Decl. Exh. MMMM), the IBIA recognized that the distance of the land from the regional BIA office and whether the land is outside the current jurisdictional boundaries of the applicant tribe are relevant considerations under section 151.10(g). Miami Tribe, 28 IBIA at 54 (finding "[t]he distance alone makes it virtually impossible for Agency personnel to regularly visit the property" where land was 500 miles from the regional BIA office). Here, the Eastern Regional Office of the BIA is located in Nashville, Tennessee, over 800 miles from the Subject Lands, and the Subject Lands are outside the jurisdictional boundaries of the OIN.

X. THE DOI FAILED TO PROPERLY CONSIDER EXISTING EASEMENTS AND RIGHTS OF WAY

A. Plaintiffs Have Standing To Bring Suit On This Issue

The Federal Defendants and the OIN argue that Plaintiffs have no standing to bring claims against the Determination as it pertains to the City of Oneida's and National Grid's easements and rights of way. Neither cites any dispositive case law on the issue.[63] The State brings this cause of action in its capacity as a quasi-sovereign. It is well settled that a state "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). Where a State is protecting its quasi-sovereign interests, it is "entitled to special solicitude in our standing analysis." Massachusetts v. EPA, 549 U.S. 497, 1454-55 (2007) (citing Missouri v. Illinois, 180 U.S. 208, 240-41 (1901) (finding federal jurisdiction appropriate not only "in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State," but also when the "substantial impairment of the health and prosperity of the towns and cities of the state" are at stake)).

Here the State challenges the DOI's bald and unsupported conclusions that the Determination would not impair rights of way or easements, Baldwin Mov. Decl. Exh. L (ROD at 65-66), not to simply protect the City of Oneida's property rights, but to protect water and

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[63] Tellingly, the Federal Defendants' argument that Plaintiffs have not shown any "redressable injury" is directly contrary to the argument advanced by the Secretary in Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011), cert. granted by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, No. 10A1224, 11-246, 2011 WL 3794384 (Dec 12, 2011). In Patchak, the Secretary argued that "[t]he proper entity to 'police' Interior's decision to acquire land in trust for a tribe is the State in which the land is located, for it is the State that is akin to the regulated entity, because it stands to lose some of its regulatory authority as a result of Interior's trust acquisition." Baldwin Opp. Decl., Exh. Q (Answering Brief for Defendants-Appellees, 2010 WL 4569092, at *36-37, Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011).

sewage utility components integral to the health of prosperity of its towns and cities.[64] The State has a particularized interest in protecting the viability of one of its subdivision's rights-of-way that provides for a water main that draws water from a location in Oneida County, crosses into Madison County, and traverses the City of Oneida and surrounding municipalities. Baldwin Mov. Decl. Exh. HHHH (AR044979-82) (City of Oneida Scoping Comments). Similarly, the City of Oneida's easements on the Subject Lands accommodate sewer lines that service not only the City of Oneida, but the Town of Verona as well. Id. at AR044982. The viability of these utilities – and the health of the residents of these municipalities – have been jeopardized by the threats of the OIN and the OIN's refusal to abide by State law enacted to protect these utilities, and in turn, the public. See 16 N.Y.C.R.R. Part 753. By taking the parcels containing these easements and rights-of-way into trust, the DOI is removing them from State jurisdiction, and removing the State's ability to protect its residents who rely on water and sewage utilities. In protecting these interests, the State is not subject to the same standing requirements as a private individual. See Massachusetts, 549 U.S. at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in Lujan, a private individual.").[65]

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[64] Although National Grid and the OIN may have reached a settlement as to disputes involving National Grid's utility easements, the OIN's previous disregard for National Grid's rights-of-way and easements and State law intended to protect utility facilities is pertinent to the DOI's failure to rationally connect its conclusions in the ROD to the evidence in the Administrative Record. See, e.g., Baldwin Mov. Decl. Exh. KKKK (AR066298-304). In any event, no such agreements have been concluded with regard to rights-of-way and easements not owned by National Grid.

[65] The cases cited by the Federal Defendants and the OIN are inapposite. Michigan v. EPA, 581 F.3d 524 (7th Cir. 2009) (U.S. Mem. at 62) is distinguishable on the grounds that there, the state plaintiff was attempting to pursue its "economic interests" against the United States (and not quasi sovereign interests). Id. at 529. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) (U.S. Mem. at 62), is irrelevant as it concerned individual tax payers' challenge to state tax benefits granted to a private corporation. Similarly, Ctr. For Bio. Div. v. Abraham, 218 F. Supp. 2d 1143 (N.D. Cal. 2002) (OIN Mem. at 52), involved a private plaintiff not pursuing quasi sovereign rights, with harm not caused by the defendants' conduct, and could not be redressed by the relief sought. Contra Massachusetts, 549 U.S. at 518. And, San Juan Citizens' Alliance v. Salazar, No. 00-cv-00379-REB-CBS, 2009 WL 824410, at *5 (D. Colo. Mar. 30, 2000) (OIN Mem. at 52), is also distinguishable as it does not involve a state plaintiff and relies on the principals of Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), that the Supreme Court found inapplicable to State plaintiffs. See Massachusetts, 549 U.S. at 518. High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (10th Cir. 2006) (OIN Mem at 52), does not speak to the State's standing to pursue the Eleventh Cause of Action as that court specifically held that absent a challenge to jurisdiction, a grant of a mineral

B. The DOI Failed To Consider The OIN's Disregard For Rights Of Way And Easements

The DOI ignored complaints from the City of Oneida regarding the OIN's reckless behavior concerning the City of Oneida's rights-of-way and easements on OIN land by concluding that the OIN "intends" for all rights-of-way to remain in place after the Determination. Baldwin Mov. Decl. Exh. L (ROD at 66). As discussed thoroughly in Plaintiffs' moving papers (Pl. Mov. Mem. at 109-11), the City of Oneida raised specific concerns at various points in the decision-making process regarding its ability to access a water main line located on a 50-foot right-of-way on OIN-owned land, specifically, that the OIN had failed to notify the City of Oneida of actions the OIN took that restricted access to the water main for maintenance, that the OIN "threatened to excavate and cut off a water main located in the highway right-of-way on West Road" and that the OIN "excavated and planned placement of fencing on the water main right-of-way." Baldwin Mov. Decl. Exh. HHHH (AR044980); id. at Exh. IIII (AR005700-01); id. at Exh. JJJJ (AR005539). Notwithstanding these concerns, the DOI failed to analyze the OIN's past conduct or the fact that the OIN would no longer be subject to 16 N.Y.C.R.R. Part 753 requiring notice of proposed excavation near underground utility facilities.[66] By failing to

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patent under the General Mining Law of 1872 is outside the scope of the APA. Id. at 1186, 1190. Nor did any of the Plaintiffs sue to protect sovereign rights. Inter-Tribal Council of Nevada, Inc. v. Hodel, 856 F.2d 1344 (9th Cir. 1988) (OIN Mem. at 52) is inapplicable as the plaintiff in that suit was a non-profit corporation that did not have any interest – property or sovereign – in land that was conveyed to the federal government in fee simple.

[66] The OIN argue that the "DOI fully considered the issues" relating to easements and right-of-way impairment by simply citing to National Grid's and Dominion Resources' comments in the Administrative Record. (OIN Mem. 52). The OIN does not cite to any document evidencing the DOI's consideration of those comments. The OIN's citation to a March 4, 2008 letter from the City of Oneida to the DOI inquiring as to the legal status of easements and rights of way after land is taken into trust (OIN Mem. at 52 (citing ROD, App. B at 118) does not substantiate the DOI's purported consideration of the letters submitted by the City of Oneida concerning the OIN's efforts to frustrate the city's exercise of property rights, notwithstanding the city's status as a valid easement holder. See Baldwin Mov. Decl. Exhs. HHHH (AR044980), IIII (AR005700-01), JJJJ (AR005539). Moreover, notwithstanding the OIN's claim that it enjoys sovereign immunity regardless of any trust transfer (OIN Mem. at 53), the OIN came extraordinarily close to conceding that it does not enjoy sovereign immunity when it declined to have the Supreme Court decide that the tribe was immune from suit. In fact, the Supreme Court had granted certiorari on, inter alia, "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes," Madison County v. Oneida Indian Nation of New York, 131 S. Ct. 704 (2011), before the OIN thereafter "affirmatively disclaimed any

consider the OIN's disregard for the City of Oneida's rights-of-way and easements and, in turn, the ability of the residents of the City of Oneida and Town of Verona to utilize the utilities on those properties, the DOI did not consider an important aspect of its action and is not entitled to summary judgment on the Eleventh Cause of Action.

XI. PLAINTIFFS' NEPA CLAIMS SHOULD NOT BE DISMISSED.

A. An EIS Was Required For This Land-Into-Trust Transfer

The Federal Defendants and OIN urge the Court to ignore the deficiencies in the EIS – and dismiss Plaintiffs' NEPA claims as a matter of law – because, in their view, an EIS was not required for this land-into-trust transfer. (U.S. Mem. at 70; OIN Mem. at 62-63). At this stage of the land-into-trust proceedings, where over six years have passed since the DOI decided to prepare an EIS (see 70 Fed. Reg. 246, 76325 (December 23, 2005)), it is improper for the DOI to assert a "categorical exclusion" as a basis for defeating Plaintiffs' NEPA challenges. Once an agency decides to prepare an EIS, an agency cannot abdicate its responsibility to perform that task properly by using irrational assumptions. The DOI and the OIN, however, are attempting to avoid even the deferential judicial scrutiny accorded to EIS review by claiming that the entire process was unnecessary from the outset. As discussed below, regardless of whether this trust application might have fallen within a "categorical exclusion," it would be an incredible waste of time,[67] effort,[68] and money[69] if no environmental review were required here. Indeed, the DOI's

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reliance on the doctrine of tribal sovereign immunity from suit." Oneida Indian Nation of New York v. Madison County, 2011 U.S. App. LEXIS 21210, at *6-7 (2d. Cir. Oct. 20, 2011). Nothing precludes Plaintiffs from challenging the OIN's sovereign immunity from suit, or the OIN from waiving it, again.

[67] The environmental review process took over two years. The DOI published its intent to prepare an EIS in December 2005, the DEIS was issued for public review on November 24, 2006, and the FEIS was issued in February 2008.

[68] In support of its argument that NEPA requirements were met, the OIN points to the length of the FEIS (over 6,000 pages), "the extensive process DOI used to develop the FEIS," and "the participation of the State and Counties as 'cooperating agencies' in developing the scope of the EIS." (OIN Mem. at 66). The OIN further notes that the process included public meetings, an opportunity to comment on the DEIS, and two public hearings. Id. The Federal Defendants' and OIN's claims that a categorical exclusion applies would render all of this irrelevant.

assertion that an environmental review was never required, and therefore the FEIS is meaningless, simply highlights the fact that DOI's purported review of the land-into-trust application was predisposed from the start. The DOI had pre-determined the results of its so-called review, and crafted a self-serving 6,000 page FEIS that it now claims is irrelevant. DOI's back-pedaling notwithstanding, the decision to prepare an EIS indicates that the DOI believed that the land-into-trust application was not "categorically excluded" from NEPA, and indeed, was a major federal action that would have an adverse impact on the environment. See 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. § 1502.4.

The OIN argues that when "an agency voluntarily elects to prepare an EIS regarding an action that is categorically excluded, it has gone beyond what NEPA requires." (OIN Mem. at 62). Thus, it concludes, "[b]ecause the trust decision would comply with NEPA even if no EIS been prepared at all, alleged NEPA-related deficiencies in the EIS" must fail (id. at 63). In support of its argument that no EIS was required, the Federal Defendants and the OIN cite the section of the ROD stating that the OIN "has proposed no change in land use as part of its fee-to-trust request," and that such requests are "typically subject to 'categorical exclusion' under BIA policies and procedures for implementing NEPA such that no EIS is required." Baldwin Mov. Decl. Exh. L (ROD § 1.5, at 9 (citing 516 DM 10.5(I) (May 27, 2004))). The ROD further states that "[a]lthough not required, the BIA, in consultation with the Nation, elected to prepare an EIS to evaluate the Proposed Action and reasonable alternatives in order to ensure that the Nation's fee-to-trust request received the most thorough environmental review available under NEPA."

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[69] A review of the FOIA documents reveals that for at least the months of July-September 2005, Malcolm Pirnie and Louis Berger billed a combined average of $60,000 to $70,000 per month. Baldwin Opp. Decl. Exh. G (FOIA-143672). They anticipated that this level of work would be maintained through scoping. That alone would amount to at least $ 420,000 from October 2005 until April 2006, when the Scoping Report was finalized, for just these two entities. Adding in at least the lump sum payment to C&S Engineers in the amount of $172,330, it becomes almost three quarters of a million dollars for only a portion of time the FEIS was being prepared. Baldwin Opp. Decl. Exh. R (FOIA-021338). Based on these bills alone, it is reasonable to estimate that the cost of preparing the EIS was in the millions of dollars.

Id. Exh. L (ROD at 9) (emphasis added); Baldwin Opp. Decl., Exh. S (FEIS at 6-2) ("the BIA elected to review the trust transfer proposal of 17,370 acres of land owned by the Nation under the more rigorous NEPA EIS requirements (1502 et. seq.) as well as their own requirements (30 BIAM, NEPA Handbook Section 6.0), rather than prepare an Environmental Assessment or issue a Categorical Exclusion").

The DOI's decision to perform an EIS here should end the now-academic inquiry of whether one was technically required in the first place. The DOI choose to prepare an EIS, and that EIS is subject to judicial review. See Natural Res. Def. Council, Inc. v. F.A.A., 564 F.3d 549, 556 (2d Cir. 2009). If the DOI believed that this trust application should have been subject to the less rigorous environmental assessment or to a categorical exclusion it could have "elected" to perform that review (and handled any challenges associated with that decision).[70] In any event, the ROD that embodies the Determination relies on the EIS for its "consideration" of nearly all of the mandatory factors under 25 C.F.R. § 151.10. (Pl. Mov. Mem. at 79-80). Regardless of whether the Defendants now argue that the DOI was not required to prepare an EIS under NEPA, the fact is that the DOI did prepare an EIS and the scenarios and purported analysis contained in that EIS provide the foundations for the ROD's conclusions. The fatal defect in the EIS (and the ROD's reliance on it) is not its length or the absence of public comment, but rather, its reliance upon a set of unprincipled and irrational scenarios in which the EIS assumed that the OIN would suffer a loss of its enterprises and property if its land were not

[70] In the cases cited by the OIN (OIN Mem. at 62, n.17) the BIA complied with NEPA by conducting an EA and issuing a finding of no significant impact ("FONSI"). See Ringsred v. City of Duluth, 828 F.2d 1305, 1307 (8th Cir. 1987) (BIA conducted an EA which reviewed the proposed trust acquisition and development of a gaming facility and issued a FONSI; court rejected plaintiff's argument that the EA should have analyzed the environmental impacts of, and possible alternatives to, a parking garage that was going to be constructed next to casino); Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23, 28 (D.C. Cir. 2008) (BIA conducted an EA and issued a FONSI for tribe's plan to build a casino); TOMAC v. Norton, 433 F.3d 852, 860-64 (D.C. Cir. 2006) (same); City of Roseville v. Norton, 219 F. Supp. 2d 130, 165-170 (D.D.C. 2002), aff'd, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (same). Here, however, the OIN and the Federal Defendants are arguing that the Application was categorically excluded from NEPA's requirements, i.e., that neither an EA nor an EIS was required.

taken into trust. The Court should examine the logic underlying these scenarios. Accordingly, even if the DOI was not technically required under NEPA to have prepared an EIS, the irrational and unreasonable assumptions contained in the EIS must still be closely reviewed by the Court.

Furthermore, even if the DOI had correctly determined that this trust transfer fell within a categorical exclusion, the inquiry still would not be over. According to the DOI's own regulations, it must determine whether an "extraordinary circumstance" exists warranting preparation of an EIS. The categorical exclusion provision cited in the ROD (Baldwin Opp. Decl. Exh T (516 DM 10.5) (emphasis added))[71] provides: "In addition to the actions listed in the Department's categorical exclusions in Appendix 1 of 516 DM 2, many of which the BIA also performs, the following BIA actions are hereby designated as categorical exclusions unless the action qualifies as an exception under Appendix 2 of 516 DM 2." The "exception" noted in Appendix 2 of 516 DM 2 constitutes a list of "extraordinary circumstances." Id. at Exh. U (516 DM 2). Citing to the general Council for Environmental Quality ("CEQ") regulations implementing NEPA (and not the more specific DOI Departmental Manual), the OIN asserts that no "extraordinary circumstances" exist here because Plaintiffs have not alleged any in the Complaint. (OIN Mem. at 62 n.17). The ROD, however, is silent on this exception. Accordingly, if the DOI wished to assert the categorical exclusion for this trust transfer, it was required, pursuant to its own regulations, to assess whether the OIN trust application "qualifies as an exception" (Baldwin Opp. Decl. Exh T (516 DM 10.5)) – i.e., whether an "extraordinary circumstance" exists warranting an EIS.[72] Neither the EIS nor the ROD addresses this issue; as

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[71] The specific exclusion cited was for "[a]pprovals or grants of conveyances and other transfers of interests in land where no change in land use is planned." Baldwin Opp. Decl. at Exh. T (516 DM 10.5(I)).

[72] Several extraordinary circumstances could have applied here. See Baldwin Opp. Decl. at Exh. U (516 DM 2 (Appendix 2)) (June 21, 2005) (although these regulations have since been updated, this version was in effect at the time of the EIS); id. at 2.1 ("Have significant impacts on public health or safety"); id. at 2.3 ("Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources"); id. at 2.4 ("Have highly uncertain and potentially significant environmental effects or involve unique or

such, the DOI's election to perform an EIS – and not a lesser form of environmental review or no review at all – ends the inquiry.

B. The EIS Is Deficient As A Matter Of Law

The Defendants misconstrue Plaintiffs' objections to the EIS and their challenge to the use of the taxation/jurisdiction scenarios in Plaintiffs' Thirteenth Cause of Action. The Federal Defendants and OIN argue that, because Plaintiffs' objections to the scenarios relate to "economic harms" and impact taxation, they are purportedly "outside the scope of NEPA" and "irrelevant to NEPA liability." (OIN Mem. at 64; accord U.S. Mem. at 72 ("unless Plaintiffs tie an objection to [socioeconomic and jurisdiction analysis] to an environmental effect, they are not stating a NEPA claim")).[73] The OIN further claims that because its "property tax liability" and the "allocation of regulatory jurisdiction" are unrelated to impacts on the physical environment, no NEPA claim lies (OIN Mem. at 64).

While it is true that the taxation/jurisdiction scenarios in the EIS relate to economic and regulatory concerns, Plaintiffs' objections to those scenarios are within the scope of NEPA because they directly relate to the DOI's evaluation of reasonable alternatives which is the "heart" of an EIS. See 40 C.F.R. §1502.14. The DOI was required to "[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. According to the ROD, the DOI "identified nine alternatives

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unknown environmental risks"); id. at 2.5 ("Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects."); id. at 2.6 ("Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects."); id. at 2.9 ("Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.").

[73] It is ironic that the Federal Defendants seek to avoid judicial review of economic harms when the principal basis for the FEIS's recommended action was to avoid economic harm to the OIN.

representing the reasonable range of alternatives for analysis in the [FEIS], including a No Action Alternative." Baldwin Mov. Decl. Exh. L (ROD at 13).

In analyzing the alternatives, however, the DOI used three unreasonable and fundamentally flawed scenarios based on irrational assumptions. (See Pl. Mov. Mem. at 70-73) (discussing flaws in "Casino Closes and All Enterprises Close (CC-AEC)" scenario); id. at 73-76 (discussing flaws in "Property Taxes Not Paid and Dispute Continues (PTNP-DC)" scenario; id. at 76-79 (discussing flaws in "Property Taxes Not Paid and Foreclosure (PTNP-F)" scenario). Because the DOI's analysis of the alternatives to taking over 13,000 acres of land into trust is founded on flawed assumptions, the DOI was unable to evaluate fairly and rationally the comparative merits of each alternative as required by NEPA. An agency's failure to base its analysis of alternatives on rational assumptions may result in invalidation of the EIS, see Ctr. for Biological Diversity v. DOI, 623 F.3d 633, 648 (9th Cir. 2010), and flawed economic data cannot be used, see, e.g., Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996) (noting that the use of "misleading economic assumptions" defeats NEPA's purposes and that it is necessary to "engage in a 'narrowly focused' review of the economic assumptions underlying a project to determine whether the economic assumptions 'were so distorted as to impair fair consideration' of the project's adverse environmental effects").

As such, the case law on which the OIN relies – which merely recognizes that economic injuries alone are outside the zone of interests protected by NEPA – is inapposite. See OIN Mem. at 64 (citing Memorandum-Decision and Order, Cent. New York Fair Bus. Ass'n v. Salazar, No. 08-CV-660, 18-19 (N.D.N.Y. Mar. 1, 2010); Town of Stratford v. FAA, 285 F.3d 84, 88-89 (D.C. Cir. 2002); Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005)). Nor does County of Seneca v. Cheney, 12 F.3d 8 (2d Cir. 1993) apply here. Seneca

involved a proposed reduction in force at the Seneca Army Depot and a challenge to the government's decision not to prepare either an EIS or EA. The Second Circuit held that the challengers to the depot closure could not demonstrate a NEPA violation because they "made no showing of threatened environmental damage as opposed to economic effects." Id. at 12. Although the challengers to the closure cited "a litany of environmental problems associated with the [depot's] presence . . . these problems were created by past actions, ironically by the very presence of [the depot] that [the challengers] seek[] to continue," and the Court observed that NEPA "relates solely to future agency actions." Id. Seneca differs from the case at bar because the "economic effects" challenged by the Plaintiffs in this case relate to the DOI's analysis of reasonable alternatives.

C. The EIS Failed To Adequately Consider The Direct Effects And Indirect Effects Of The Land-Into-Trust Transfer

Regardless of whether the OIN's past non-compliance with environmental laws, and its reasonably foreseeable future development, are characterized as a "direct effect" or an "indirect effect," CEQ regulations nevertheless require their consideration. See 40 C.F.R. 1508.8. Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8(b). "Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." Id.

Here, the EIS failed to adequately account for the OIN's repeated past violations of environmental law.[74] As discussed at length in Plaintiffs' Memorandum of Law, the OIN has

[74] This highlights yet another difference with the Seneca case. Unlike the challenged action in that case, here, the granting of the OIN's land-into-trust application enables the continuation of the very environmental harms that the OIN has caused in the past.

consistently ignored State wetland, ground and surface water, wildlife, air quality, and solid and hazardous waste management laws and regulations. This conduct has adversely affected the environment and was known to the DOI at the time the ROD was issued; despite this, the trust application was still granted. (See Pl. Mov. Mem. at 75-76) (discussing the OIN's (1) construction and operation of a co-generation plant; (2) burying of demolition debris in violation of appropriate waste management standards; (3) refusal to comply with state regulations governing underground petroleum bulk storage facilities at its SaveOn gas stations; (4) construction of Turning Stone without first obtaining necessary permits and approvals or complying with applicable State and local laws; (5) damage to surrounding wetlands; (6) damage to air quality; (7) construction of numerous golf courses without required permits or legally mandated environmental review; and (8) violation of 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).[75] Accordingly, the DOI's conclusion that the transfer of land into trust would not result in any environmental changes ignores the OIN's past conduct. In light of this past conduct, future non-compliance with environmental laws is far from speculative.

D. The DOI Failed To Adequately Consider The Cumulative Impacts Of The Land Transfer

The Federal Defendants' and OIN's motions for summary judgment should be denied on Plaintiffs' NEPA cumulative impacts cause of action. The ROD states that the OIN "is

[75] The OIN unsuccessfully attempts to explain away many of the aforementioned past environmental law violations. (OIN Mem. at 67). For example, although the FEIS notes the issues raised by the State and local government commenters, the DOI essentially parroted whatever OIN told it to say without examining whether, for example, destruction of wetlands could have been avoided completely, or to a significant extent when it built its golf courses. Baldwin Mov. Decl. Exh. A (FEIS at 3-64 to 3-65). Similarly, the DOI praises the OIN for conducting a self-serving "compliance" audit of its underground petroleum tanks, the results of which, as reported by the OIN, unsurprisingly found that the OIN believes itself to be in compliance with regulations. Baldwin Opp. Decl. Exh. S (FEIS at 4-358).

proposing no physical resource-impacting projects or changes in land use as part of the Proposed Action," but it also recognizes that the "State and local governments commented that the [OIN's] pre-application development of its lands was undertaken out of compliance with State and local laws and zoning, and has had substantial adverse environmental impacts on the lands and surrounding properties." Baldwin Mov. Decl. Exh. L (ROD at 27). Although the FEIS concluded that there have not been significant adverse effects on environmental resources resulting from the OIN's past non-compliance with state and local environmental law, see FEIS §§ 3.9.5, 4.9.5, Plaintiffs assert that a genuine question of fact exists concerning whether its comments and concerns were given appropriate consideration in the FEIS and the ROD.

A cumulative impacts analysis addresses the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." Id. In order to be meaningful, a cumulative impacts analysis "must identify, (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate." Senville v. Peters, 327 F. Supp. 2d 335, 348 (D. Vt. 2004) (citing Grand Canyon Trust v. F.A.A., 290 F.3d 339, 345 (D.C. Cir. 2002)). It must be "apparent on the record as a whole that the Agencies 'made a reasonable, good faith, objective presentation

of those impacts sufficient to foster public participation and informed decision making.'" St. Paul Branch of the NAACP v. United States DOT, 764 F. Supp. 2d 1092, 1105 (D. Minn. 2011).

Here, as previously discussed, there have been significant adverse effects on the environment on both OIN and non-OIN lands as a result of the OIN's noncompliance with State laws governing the protection of wetlands, groundwater, surface waters and wildlife, air emissions, solid and hazardous waste regulation, and petroleum bulk storage and spill response. (See Pl. Mov. Mem. at 75-76). The DOI failed to sufficiently account for – and assess the impact of – these significant past acts. (See id.). In light of these repeated past violations of State and local environmental law, Plaintiffs have, at minimum, raised an issue of fact concerning whether the DOI adequately considered the "incremental impact" of the land transfer when added to past OIN actions. Contrary to the DOI's assertion that these activities have not had a significant adverse effect, the OIN's illegal actions have caused and will continue to cause serious harm to the environment. When the impacts of these past acts are combined with the impacts of the proposed action and reasonably foreseeable future actions, the cumulative effects are significant. Because the DOI failed to adequately assess the impact of these past acts, and anticipate the consequences of allowing the effects to accumulate, summary judgment to the Federal Defendants and the OIN on this claim should be denied.

Moreover, the DOI's consideration of the foreseeable future actions by the OIN – which must also be considered on a cumulative basis with the transfer of title – was inadequate. Although a future action must be more than tentative or speculative to be "a reasonably foreseeable future action," Stewart Park & Reserve Coal. v. Slater, 225 F. Supp. 2d 219, 234 (N.D.N.Y 2002), the DOI improperly accepted at face value the OIN's representations that there will be no change in the use of the land after transfer. In the context of federal land transactions,

several courts have noted that "NEPA requires assessment of the environmental consequences of prospective [transferees'] likely uses of the land." Landmark West! v. U.S. Postal Serv., 840 F. Supp. 994, 1010 (S.D.N.Y. 1993), aff'd, 41 F.3d 1500 (2d Cir. 1994); see also Lockhart v. Kenops, 927 F.2d 1028, 1033 (8th Cir. 1991) (holding that, in creating an EIS for a proposed land exchange between the federal government and a private party, the agency should have considered the effects of private party's future development plans); Conservation Law Foundation of New England v. Gen. Serv. Admin., 707 F.2d 626, 634 (1st Cir. 1983) (noting that, before selling federal land to private parties, the agency was required to evaluate a range of probable uses of the land and their environmental effects).

Here, based on the OIN's stated intention to develop some, if not all, of the land taken into trust, the DOI should have addressed the effects of this likely future development in its cumulative impacts analysis. Baldwin Mov. Decl. Exh. L (ROD at 40) (not analyzing certain OIN "potential projects" after determining that they were "speculative"). Although the OIN argues that Plaintiffs' argument concerning future OIN development "comes down to speculation that the Nation will engage in future development that has environmental effects," (OIN Mem. at 69), it was unreasonable for the DOI to take the OIN's assurances at face value. In light of the OIN's past pattern of development and frequent public comments regarding future development plans, it is reasonably foreseeable that the OIN will develop lands taken into trust (and likely do so in the same irresponsible manner). The DOI was thus obligated to fully ascertain the OIN's intentions and incorporate them into the cumulative impacts analysis.

E. The DOI Failed To Comply With The NEPA Regulation Governing Public Involvement In The Environmental Review Process

The Federal Defendants misconstrue Plaintiffs' claim; Plaintiffs are not attempting to "convert" the DOI's failures to comply with FOIA "into a NEPA violation as well." (U.S. Mem.

78-79). The DOI's failure to timely disclose the documents underlying the EIS is a distinct and independent violation of NEPA's implementing regulations. In straightforward and unambiguous language, NEPA regulations require an agency to "[m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of [FOIA], without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action." 40 C.F.R. §1506.6(f) (emphasis added). Put another way, NEPA regulations require an agency to make an EIS and all documents upon which it relies available to the public. Failure to do so constitutes a NEPA violation. See, e.g., Envtl. Protection Info. Ctr. v. Blackwell, 389 F. Supp. 2d 1174, 1205 (N.D. Cal. 2004). In Blackwell, the U.S. Forest Service violated NEPA regulations by failing to make a report on which it relied in preparing an EA of a timber sale available to the public until "well after the EA was posted . . . and only two days before the [Forest Service's] Decision Notice and FONSI for the . . . timber sale was issued." Id. In light of this timeframe, "the possibility for public review of a document on which the [Forest Service] stated that it relied as part of its decision regarding the sale was virtually nonexistent." Id. The court explained that this delayed disclosure constituted "a NEPA violation inasmuch as there was no adequate opportunity for public review of the [report] on which the [Forest Service] relied." Id.

Here, as previously discussed, Plaintiffs were materially prejudiced by DOI's failure to timely respond to their FOIA requests. See supra Section IV.B (discussing how the Counties were effectively precluded from participating in the EIS scoping process); Section IV.B.2 (discussing how the DOI's FOIA production delays precluded Plaintiffs from commenting on materials underlying the land-into-trust application). Plaintiffs were entitled to receive all of the

requested documents under FOIA – and specifically documents underlying the DEIS and FEIS – contemporaneously with the public comment period, not years later. Among other things, the DOI failed to timely produce the factual data underlying the DEIS and FEIS, including spreadsheets prepared by Louis Berger, the contractor retained to do an economic analysis of the OIN's business operations. (See Dkt. No. 140-3, ¶¶ 102-103). Those spreadsheets and other belatedly-produced documents provided the necessary factual foundation for the DEIS, FEIS and ROD conclusions concerning the revenue and expenses of OIN's business enterprises. (See Dkt. No. 141-3, ¶¶ 70-71). The belated disclosure significantly hindered Plaintiffs' ability to comment meaningfully on the EIS contrary to the purpose of 40 C.F.R. §1506.6(f). Accordingly, the Federal Defendants' motion for summary judgment should be denied with respect to this claim.

CONCLUSION

Wherefore, for all of the foregoing reasons, Plaintiffs respectfully request that the Court deny the Federal Defendants' and OIN's motions for summary judgment.

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