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

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SUMMARY OF ARGUMENT

The Defendants have not made any showing sufficient to defeat Plaintiffs' motion for summary judgment. In opposition to the Plaintiffs' motion for summary judgment, the Federal Defendants and OIN advance arguments that, if accepted, would eviscerate any meaningful judicial review of administrative proceedings. Defendants contort administrative law in an effort to make the DOI's land into trust decision unassailable, arguing in substance that such decisions can be evaluated only on the basis of whether the agency stated a decision and not whether that decision was made with statutory authority or bears some rational relationship to the evidence in the Administrative Record.

The DOI Failed To Actually Consider Its Authority To Take Land Into Trust For The OIN, Which Is Ineligible Under The IRA

The Defendants admit that the DOI failed to actually consider the issue of the recognition of, and federal jurisdiction over, the OIN[1] in 1934, yet they ask the Court to affirm the Determination on the sole basis of a facially incomplete group of documents while excluding from consideration the wealth of information contained in the DOI's own files that refutes the DOI's pre-conceived and erroneous view on the issue. Remarkably, the Defendants contend that the Court can decide the issue only if it decides it in their favor; otherwise, the Determination must be remanded to the DOI for it to take up the issue, even though the Federal Defendants make clear the DOI will refuse to change its decision. (U.S. Opp. Mem. at 19). Not surprisingly, Defendants proffer no support for this "heads we win, tails you lose" construct.

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[1] Except where otherwise defined herein, capitalized terms have the same meanings as defined in Plaintiffs' Memorandum of Law In Support of Summary Judgment (Dkt. No. 237-1) and Plaintiffs' Memorandum of Law In Opposition To Defendants' Motions For Summary Judgment (Dkt. No. 259). The Reply Declaration of Aaron M. Baldwin dated March 15, 2012 is referred to herein as the Baldwin Reply Decl. The Federal Defendants' and OIN's oppositions to the Plaintiffs' motion for summary judgment are referred to as U.S. Opp. Mem. and OIN Opp. Mem., respectively. The Federal Defendants' Response to Plaintiffs' Statement of Material Facts is referred to as U.S. Response SMF.

Plaintiffs' position is straightforward: if the Court decides this issue, it must do so with the benefit of a complete record – the record the DOI should have developed – and not merely what the Federal Defendants and OIN contend should be considered by way of judicial notice. The Court is empowered to do so where, as here, the extra-record material is required in order for the Court to determine the adequacy of the government agency's decision, and this is especially so where, as here, the central documents are all in the agency's own files and were readily available to the agency when it issued its decision. If the Court decides that it cannot consider the full record, it should remand the issue of the OIN's status in 1934 with instructions requiring the DOI (1) to consider its own relevant files on this issue (i.e., files which the Plaintiffs submit with this motion) and whatever additional materials the parties wish to present; and (2) to otherwise establish a record so that the Court may properly evaluate those materials if the Determination is challenged again.

In an attempt to avoid an objective determination on the issue, the Federal Defendants belatedly advance the argument that Plaintiffs have waived the issue by not presenting the DOI with a fully developed record as to the OIN's status in 1934 during the decision-making process. The DOI has an affirmative obligation to determine whether it has statutory authority to make a decision, and that obligation is memorialized in its land-into-trust regulations. 25 C.F.R. § 151.10(a). During the comment period, the State put the DOI on notice of its obligation to determine its authority and address the recognition of, and federal jurisdiction over, the OIN in 1934 by raising the issue in a thirty-four page memorandum objecting to the Application. At the same time the DOI was deciding the Application, the Secretary was actively involved in the Carcieri v. Salazar litigation, arguing for a construction of the IRA that did not require the DOI to consider the recognition of, and federal jurisdiction over, applicant tribes as of 1934. Months

before the DOI issued the ROD, the Supreme Court granted certiorari on the issue of whether the IRA granted the Secretary authority to take land into trust for tribes that were not recognized and under federal jurisdiction in 1934. The DOI was well aware of the limitation on authority presented by the State in its comments and affirmatively chose not to consider it. There can be no waiver here, and even if there could be, the Federal Defendants have forfeited such an affirmative defense by failing to raise it during the four years this litigation has been pending.

The Defendants Ask The Court To Ignore The Administrative Record

In the face of Plaintiffs' presentation of substantial evidence from the Administrative Record demonstrating that the DOI: (1) failed to properly undertake and make required considerations and findings; (2) failed to apply the correct regulatory standards; (3) ignored its own policies and regulations, without explanation; (4) drew conclusions and relied upon assumptions that are contradicted by the Administrative Record; and (5) relied upon irrational methodology,[2] the Defendants contend that the Determination must be affirmed in any event because the DOI drafted a ROD containing conclusions as to factors under the land-into-trust regulations. The Defendants' position boils down to the notion that if the DOI collected documents for an Administrative Record and issued a ROD containing conclusions, then the Court's inquiry ends and the Determination must be affirmed. The OIN goes so far as to suggest that the Court need only look at the ROD's table of contents to find grounds to affirm the Determination. (OIN Opp. Mem. at 29). Such a notion would render administrative review under the APA a sham.

[2] Contrary to statements by the Federal Defendants, Plaintiffs have not "abandoned" their bias claim. A claim is not waived simply because a plaintiff does not move for summary judgment on it. Conservation Nw. v. Rey, 674 F. Supp. 2d 1232, 1256 (W.D. Wash. 2009); Pl. Opp. Mem. at 42-64.

The self-serving arguments advanced by Defendants are not the law. It is axiomatic that an agency's conclusions must be supported by the administrative record upon which they are purportedly based. If the materials in the Administrative Record are "irrelevant" as the Defendants contend (U.S. Opp. Mem. at 40; OIN Opp. Mem. at 33 n.21), then it raises the question why the Federal Defendants took nearly a year since the commencement of this action to assemble and file the Administrative Record with the Court, and supplemented it four times. (Dkt. Nos. 99-100, 170, 171, 193, 199-200).

The Defendants' reluctance to engage with the Administrative Record is not surprising, since the record confirms that the DOI predetermined the outcome of the Application, disregarded its own policies in deciding that Application, employed the wrong administrative standard, and repeatedly ignored or misapplied the criteria in its own regulations. In nearly every instance, when it did address the considerations mandated by its regulations, the DOI drew conclusions that were contradicted by the Administrative Record. Strikingly, in their oppositions to Plaintiffs' motion neither the Federal Defendants nor the OIN actually dispute the facts proffered by Plaintiffs. Moreover, the Defendants generally fail to cite evidence from the Administrative Record to support the ROD and the DOI's actions, and merely point to the challenged and unsubstantiated conclusions in the ROD itself.

As Plaintiffs have demonstrated that the DOI failed to act reasonably in issuing the Determination and the conclusions in the ROD are contradicted by the Administrative Record, Plaintiffs' motion should be granted and the Determination should be vacated.

I. THE OIN IS NOT ELIGIBLE TO HAVE LAND TAKEN INTO TRUST UNDER THE IRA

A. The Federal Defendants' Newly Minted Waiver Defense Is Not A Proper Basis To Avoid Review Of The Carcieri Issue

Having failed to raise any waiver defense in the two answers it filed in this case or in any other way in the four years this action has been pending, the Federal Defendants' assertion of waiver in its opposition papers is ironic, at best. It is also meritless, since in the context here, the defense of waiver has no role to play. The Federal Defendants have themselves claimed the land into trust process is not an adversarial proceeding where waiver could be an issue (U.S. Mov. Mem. at 43), a fact highlighted by the DOI regulations which required the DOI to determine whether the OIN is qualified to have land taken into trust on its behalf, regardless of whether the issue was raised by a state or municipal government submitting comments. 25 C.F.R. § 151.10(a). But even if the Plaintiffs were required to raise the DOI's authority to take land into trust for the OIN, they clearly did so, expressly flagging for the DOI the issue of whether the OIN was in fact a recognized tribe under federal jurisdiction in 1934. The related assertions that the Plaintiffs somehow withheld relevant documents is equally specious; the information submitted in support of Plaintiffs' position in this action are documents in the DOI's own files, which DOI was reasonably obligated to consider as part of its mandatory obligation to determine whether the Secretary had authority to take land into trust for the OIN.

1. The Federal Defendants Failed To Plead The Affirmative Defense Of Waiver

Waiver, or as it is sometimes characterized in the context of administrative proceedings, failure to exhaust an issue, is an affirmative defense that must be affirmatively stated in response to a complaint. See Fed. R. Civ. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . waiver") (emphasis added); Jones v.

Bock, 549 U.S. 199, 212 (2007) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. . . . [W]e have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."). Far from raising waiver (or exhaustion) in a timely and proper fashion as required by the rules, the Federal Defendants did not so much as mention the issue until their opposition to Plaintiff's motion for summary judgment, a fact that is especially striking in light of the procedural history of this case.

Plaintiffs filed this action nearly four years ago, on June 19, 2008, and asserted in their Third Cause of Action that among other things, the "OIN was not a 'recognized tribe now under federal jurisdiction' as of the date of the IRA's enactment in 1934," that the Secretary did not have the statutory authority to take land into trust for the OIN, and that the DOI did not meaningfully consider that absence of authority under the land-into-trust regulations. (Dkt. No. 1, ¶ 114-16). The Plaintiffs filed an Amended Complaint on July 15, 2008, asserting the same cause of action and relevant allegations concerning the OIN's eligibility and the DOI's statutory authority. (Dkt. No. 19, ¶¶ 119-21). On September 30, 2008, the Federal Defendants moved to dismiss certain causes of action but not Plaintiffs' Third Cause of Action. (Dkt. No. 36).

On February 6, 2009, after the Court decided the Defendants' motion to dismiss, the Federal Defendants answered Plaintiff's Amended Complaint, and did not raise any defense based on waiver or exhaustion. (Dkt. No. 90). (Nor did the OIN.) Plaintiffs' amended and supplemented their complaint on February 12, 2009, asserting the same relevant allegations under the Third Cause of Action. (Dkt. No. 94 at ¶¶ 153-155). On October 14, 2009, the Federal Defendants filed an answer to the Second Amended and Supplemental Complaint, once again failing to raise any defense based on waiver or exhaustion. (Dkt. No. 137).

On November 17, 2008, Plaintiffs moved for summary judgment on part of the Third Cause of Action, reserving the right to move on the Carcieri issue later. (Dkt. No. 57-2 at 6 n.4). The Federal Defendants did not comment on the Carcieri issue, let alone suggest that the issue had been waived, and in deciding that motion, this Court noted that "Plaintiffs expressly preserved this issue and properly 'reserve[d] their right to move at a later time for summary judgment on this and other grounds.'" (Dkt. No. 132 at 23-24 n.13). And when Plaintiffs moved the Court for leave to take discovery on the Carcieri issue, the Federal Defendants opposed the motion but again failed to raise waiver or exhaustion as a defense. (Dkt. Nos. 169, 178).

The waiver defense is transparently an afterthought, conjured up only now, when the Federal Defendants are faced with the stark reality that the OIN did not meet the IRA requirement for having land taken into trust. Having failed to assert the affirmative defense of waiver in a timely fashion, the Federal Defendants should be precluded from raising it now. Of course, had the DOI actually analyzed the issue during the administrative process and made an objective determination, as it was bound to do, it would have had to deny the OIN's Application to take land into trust.

2. The Concept Of Waiver Has No Application Here

The Supreme Court has held that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." Sims v. Apfel, 530 U.S. 103, 109 (2000); id. at 110 ("Where . . . an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker."); see also Coal. For Gov't Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 465-66 (6th Cir. 2004) (agency proceedings were not adversarial because it lacked cross-examination, counter-arguments, or any type of discussion that could be defined as "adversarial" and, as such, did not impose issue exhaustion requirement

on plaintiff). According to the Defendants, the land-into-trust process is not an adversarial process which supports the application of the issue exhaustion doctrine. The Federal Defendants have expressly argued that "[t]he land-to-trust decision process is not a formal adjudication" and that it is "an informal agency decision-making process." (U.S. Mov. Mem. at 43). It is the DOI's responsibility, not the affected governments', to assemble a record to support the DOI's decision.

This conclusion is especially appropriate here. There is no requirement that governmental entities that may be affected by having land taken into trust have any affirmative obligation to point out to the DOI that it needs to have statutory authority in order to take land into trust and to establish a record to that effect.[3] To the contrary, under the DOI's own regulations, the DOI had an affirmative obligation to determine whether the OIN met the criteria for having land taken into trust. According to the ROD, "Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations contained in such authority." Baldwin Mov. Decl. Exh. L (ROD at 33); 25 C.F.R. § 151.10(a).

The Supreme Court has confirmed that 25 U.S.C. § 479 "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." Carcieri v. Salazar, 555 U.S. 379, 382 (2009). Under longstanding Supreme Court doctrine, when the Supreme Court construes a statute, it "is explaining its understanding of what the statute has meant continuously since the

[3] Indeed, the Part 151 regulations provide for comments from state and local governments "as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments," 25 C.F.R. § 151.10, not as to the threshold legal question of the Secretary's authority to act on a tribe's application, including whether the tribe was recognized and under federal jurisdiction in 1934. The regulations do not obligate affected governments to raise issues as to the status of a tribe in 1934 at all, let alone in a particular manner. Conversely, the regulations do obligate the DOI to make such an inquiry and determine that it has the requisite statutory authority. 25 C.F.R. § 151.10(a). The OIN's intimation that Plaintiffs should have backed up their contention with a fully developed record of DOI records is without merit. (OIN Opp. Mem. at 5). Under the DOI's regulations, it is not the Plaintiffs' obligation to raise the statutory authority issue for the DOI.

date when it became law." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 & n.12 (1994). As a result, the DOI was under an obligation to determine if the OIN was a recognized tribe that was under federal jurisdiction when the IRA was enacted. It would turn logic on its head if, as the Federal Defendants contend, a mandatory determination that is supposedly within an agency's "expert judgment" (U.S. Opp. Mem. at 14) could be waived if not raised and supported by a factual record compiled from the DOI's own archives by public commentors during the decision-making process. It is the DOI's "responsibility to administer and implement the IRA," a responsibility that it failed to fulfill, and it is the DOI's obligation – not Plaintiffs' – to "develop the record during the administrative process." (U.S. Opp. Mem. at 11).

3. Plaintiffs Did Raise The Issue Before The DOI

Even if it were the Plaintiffs' duty to raise the issue of statutory authorization, the Federal Defendants admit that the Plaintiffs did raise the Carcieri issue in the State's comments in opposition to the Application. (U.S. Response SMF ¶¶ 21-22). Specifically, the Plaintiffs raised the issue and cited to a report by John R.T. Reeves, a lawyer and later Chief Counsel, Office of Indian Affairs, dated December 26, 1914 (a document that is attached as Exhibit C to the Tennant Decl.)[4] stating that the Oneida "as a tribe . . . are known no more in that State." Baldwin Mov. Decl. Exh. O (AR00286 n.2). In other words, Plaintiffs provided the DOI with notice of its own obligation, and cited to a DOI-authored document substantiating their claim as

[4] In claiming that this document and other DOI records are not even relevant to determining the Secretary's land acquisition authority under the IRA, the Federal Defendants further demonstrate the futility of the State and Counties submitting evidentiary materials during the administrative process to develop their stated Carcieri claim. If the Secretary is dismissing the historical materials as irrelevant – even after the Supreme Court's decision in Carcieri requiring consideration of that historical material – the State and Counties would not have gained anything by presenting those materials to the Secretary during the comment period. The Secretary would have rejected the historical records as altogether irrelevant given DOI's pre-Carcieri view that the IRA contained no temporal limitation, obviating the need for any historical records. It is hard to imagine a clearer case of futility. Accordingly, the Federal Defendants' argument that the Plaintiffs failed to exhaust their administrative remedies has a distinctly hollow ring and should be rejected.

to the Oneidas' status in 1934, effectively providing notice to the DOI of their claim during the decision-making process. Yet the DOI failed to properly address it. There is no authority that imposes some particular form for raising issues in a land-into-trust proceeding. See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1065-66 (9th Cir. 2010) (noting exhaustion requirement should be interpreted liberally, is satisfied where plaintiffs provide notice to allow decision maker to understand and rule on the issue raised, and taking note that issue raised was "integral part" of administrative process).

None of the cases cited by the Federal Defendants support the proposition that because the Plaintiffs did not search the DOI's own files to establish a full record and do the DOI's own job, the issue of the DOI's statutory authority to issue the Determination was waived (assuming for purposes of argument that such an issue can even be waived). In most of those cases the plaintiffs either made no mention of the issue in question, see Dep't of Transp. v. Public Citizen, 541 U.S. 752, 764 (2004) (party failed to raise issue at all) (cited at U.S. Opp. Mem. at 15); N.M. Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 835 (10th Cir. 1986) (same) (cited at U.S. Opp. Mem. at 15); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 35 (1952) (same) (cited at U.S. Opp. Mem. at 15), or raised an issue in such a manner that the agency was deprived of reasonable notice of the issue. See Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1308 (D.C. Cir. 1991) (cited at U.S. Opp. Mem. at 16) (party not only failed to present argument during rulemaking, but presented comments assuming opposite position); Tex Tin Corp. v. EPA, 935 F.2d 1321, 1323 (D.C. Cir. 1991) (cited at U.S. Opp. Mem. at 14) (finding that where party objected to data from specific test date during the administrative proceeding but then raised

objection to different date in judicial challenge, conduct was "likely to exclude the date not objected from the agency's focus").[5]

In National Association of Manufacturers v. Department of the Interior, 134 F.3d 1095 (D.C. Cir. 1998) (cited at U.S. Opp. Mem. at 15), the court found that the DOI did not have a fair opportunity to respond to a commentor's argument concerning "complex technical and policy matters" that were "buried in hundreds of pages of technical comments" that the commentor submitted. Id. at 1111. Such facts are absent here where the State presented its challenge to the statutory authority of the DOI to take land into trust for the OIN on the third page of a thirty-four page memo arguing that the Application should not be granted. Baldwin Mov. Decl. Exh. O. Moreover, the "buried" comments in National Association concerned the DOI's technical analysis in that case, not the DOI's statutory authority to act (as to which the Secretary has an independent duty to assemble the pertinent records to support its authority). Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), involved the failure to raise a specific factual contention regarding the content of an EIS during NEPA's public comment period. There, a party challenged an EIS on the ground that it failed to consider the necessary alternatives. During the public commenting phase, the party requested the agency "to embark upon an exploration of uncharted territory," and when the agency requested further clarification, the party refused. Id. at 554. Courts have thereafter found that "the language in Vermont Yankee does not 'establish a broad rule . . . [it] has been applied in those instances in

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[5] SEC ex rel. Glotzer v. Stewart., 374 F.3d 184 (2d Cir. 2004) (cited at U.S. Opp. Mem. at 14), does not address a failure to raise an issue at the administrative proceeding stage. There, a party failed to "navigate administrative channels before bringing an action in federal court to enforce a subpoena" calling for the testimony of two SEC lawyers. Id. at 188. The SEC's regulations called for an aggrieved party to file a petition for review of the decision not to testify as "a prerequisite to the seeking of judicial review." Id. at 188-89. The noncompliance meant the SEC's denial was not a "final" action, could not be reviewed under the APA, and did not constitute a waiver of sovereign immunity. Id. at 192. The case is inapposite here where the Determination is a "final determination" of the DOI. Baldwin Mov. Decl. Exh. OOO (Notice of Final Agency Determination to Take Land into Trust under 25 U.S.C. § 465 and 25 CFR part 151).

which an interested party suggests that certain factors be included in the agency analysis but later refuses the agency's request for assistance in exploring that party's contentions.'" Nw. Envtl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1534-35 (9th Cir. 1997) (quoting Kunaknana v. Clark, 742 F.2d 1145, 1148 (9th Cir. 1984)).

In any event, an agency has a duty to comply with statutory procedures and constraints "regardless of whether participants complain of violations." Id. at 1535; see also Wilderness Soc'y v. Salazar, 603 F. Supp. 2d 52, 70 (D.D.C. 2009) ("Because defendants are required to meet their legal obligations under EO 11,990 regardless of whether the executive order was raised at the public participation level and because plaintiffs and others raised specific factual issues concerning wetlands, plaintiffs' challenge is not barred for failure to raise the specific requirements of EO 11,990 during the administrative proceedings").

The underlying policy of the cases cited by the Federal Defendants is that there must be fair notice of an issue to the agency. The Federal Defendants do not claim – as they could not – that they were unaware of the Carcieri issue. The Secretary of Interior (named as defendant in this case) was a defendant in Carcieri v. Salazar and the Federal Defendants were well aware that months before the ROD was issued the Supreme Court had granted certiorari in that case on the issue of "[w]hether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." Baldwin Reply Decl. Exh. A (Petition for Writ of Certiorari, Carcieri v. Kempthorne, No. 07-526, 2007 WL 3085107 (Oct. 18, 2007) (Feb. 18, 2007)); Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (granting certiorari); Baldwin Reply Decl. Exh. B (AR010175) (Upstate Citizens for Equality comment notifying DOI that the Supreme Court granted certiorari in Carcieri). The Carcieri plaintiffs had filed a petition for rehearing *en banc* with the First Circuit a mere two months before the State submitted its

comments on this Application. Baldwin Reply Decl. Exh. C (Carcieri v. Kempthorne Docket). Consequently, the DOI had fair notice that Plaintiffs challenged the DOI's authority to take land into trust vis-à-vis the OIN's status in 1934.

Nor can the Federal Defendants seriously complain that the Plaintiffs somehow withheld evidence relevant to the required determination by the DOI, when the source of such information is in the DOI's own files. That argument underscores the DOI's cavalier attitude towards applying its own regulations, and its refusal to make an objective and informed decision on issues central to a land into trust application.

B. The Court Cannot Decide The Issue Of Recognition And Federal Jurisdiction On The Basis Of The Administrative Record, And If It Decides The Issue, It Must Look To The Complete Historical Record

1. The Federal Defendants Ask The Court To Decide This Issue Only If It Decides In Their Favor

The Federal Defendants have admitted that the DOI did not expressly consider the issue of whether the OIN was a recognized tribe under federal jurisdiction on June 18, 1934. (U.S. Response SMF ¶ 29, 31). At the same time, the Federal Defendants have asked the Court to (1) take "judicial notice" of "legal opinions and treaties" and "resolve this question" itself (Dkt. No. 169 at 34, 36; OIN Opp. Mem. at 7-8 n.5) or (2) in the alternative, "order a remand to allow the agency to apply the law announced in Carcieri." (Dkt. No. 169 at 36). In other words, the Federal Defendants offer the absurd "heads I win, tails you lose" argument that the Court may decide the recognition and federal jurisdiction questions if the Court finds in favor of the DOI based on those materials the Federal Defendants offer, but if the Court is not so inclined, it should send the issue back to the DOI. The Federal Defendants also contend that the Court cannot consider the full factual record as to the recognition of and federal jurisdiction over the OIN in 1934 (U.S. Opp. Mem. at 16-17), asking the Court to set a dangerous precedent: decide

an issue of statutory authority that an agency failed to decide, on the basis of an administrative record that omits the agency's own files on the issue, in addition to selected materials that the agency offers for judicial notice, but preclude other parties from submitting factual information (in the agency's own files) that is central to that issue.[6]

The standard rule is that when an agency has failed to consider a necessary issue, the agency decision should be remanded. See Ward v. Brown, 22 F.3d 516, 522-23 (2d Cir. 1994). Here, however, the DOI has indicated that it lacks an open mind and will decide the issue in the OIN's favor and has actually asked the Court to decide the issue (in its favor, of course). In these circumstances, Plaintiffs submit that if the Court decides the issue, it must do so based on the complete record (not just the highly selective and limited materials to which the Federal Defendants wish to confine the Court).

If the Court concludes that it cannot reach the issue based on the complete record developed on these motions, then the Court must remand to the agency; and when it does so, it should instruct the DOI to assemble a record (including the materials submitted by Plaintiffs) in deciding the issue, so that the materials may be considered by the Court after the DOI simply confirms the Determination on remand.

2. Plaintiffs Properly Submitted The Complete Historical Record To Address the Carcieri Issue That The DOI Failed to Consider

The Defendants' complaints about Plaintiffs' submission of historical documents outside the Administrative Record are misplaced. Had the Secretary properly construed the IRA to

[6] It is disingenuous, to say the least, for the Federal Defendants to argue that Plaintiffs withheld evidence from the DOI when (1) it was the DOI's obligation to assemble a record upon which to find it had statutory authority to issue the Determination and (2) the evidence is DOI-authored documents from the DOI's own files. (See U.S. Opp. Mem. at 16). The reason these materials are not included in the Administrative Record is because the DOI failed to discharge its obligations. The OIN's argument that the "DOI would have considered the materials" (OIN Opp. Mem. at 5 n.3) is directly contrary to what the Federal Defendants now argue. (U.S. Opp. Mem. at 17-19).

require a showing that the Oneidas in New York were a recognized tribe under federal jurisdiction in 1934, the Secretary would have been obligated to develop that record using historical documents generated by DOI and the Office of Indian Affairs – indeed, the very same documents that Plaintiffs have submitted on summary judgment to establish the glaring factual holes in the ROD.[7]

The Defendants further complain that Plaintiffs have submitted an expert declaration and report in connection with these historical records. The criticisms focus on the timing, contending the Beckham Declaration and report on summary judgment amount to "sand-bagging." At most, the Federal Defendants and OIN make out a case for being allowed to present an opposing expert affidavit.

As an initial matter, it is entirely appropriate for the State and Counties to rely on extra-record material to demonstrate that the DOI failed to consider "all relevant factors or adequately explain[] its decision." United States v. Azko Coatings of Am., Inc., 949 F.2d 1409, 1428 (6th Cir. 1991); see also Pl. Mov. Mem. at 10 n.9. Documenting what is missing from the Administrative Record in this case principally involves assembling pertinent historical records generated by the DOI and Office of Indian Affairs between 1900 and 1950 – all within the possession, custody and control of the Federal Defendants. Plaintiffs sought discovery but were

[7] The OIN's complaints about "extra-record" evidence are particularly unpersuasive when the Administrative Record is examined for historical records relating to the OIN's status in 1934. In the Oneida land claim litigation, historian Lawrence C. Kelly submitted a 355-page report which was made part of the land-into-trust administrative proceeding and attached to the FEIS . The report, entitled "A History of the United States-New York-Oneida Relations, 1784-1950," offers a comprehensive historical account of those relations, and references a significant number of the historical records that are referenced and submitted under the Tennant Declaration (citing, among other documents, Exhibits C, F, G, H, I, J, K, L, P, Q, R, S, PP, BBB, and DDD). Likewise, the OIN's expert in the land claim case, Michael Leroy Oberg, submitted a 192-page rebuttal report that also references some of the same historical records. The OIN submitted the Oberg report in connection with the land into trust proceeding; it, too, became part of the FEIS. Accordingly, the Administrative Record contains a number of the challenged historical records, almost all of which come from the DOI. The only reason that the record was not fully developed as to the Oneidas' status in New York in 1934 was because the DOI did not believe those facts were relevant to determining the Secretary's authority to act on the OIN's land-into-trust application.

rebuffed by the Defendants, who asserted discovery was unavailable in this case because it was governed by the APA. (Dkt. No. 40 at 5). When Plaintiffs moved to compel discovery related to the Carcieri issue, Magistrate Judge Peebles concluded the relief requested amounted to a ruling on the merits (that is, a finding that the Administrative Record is inadequate) and denied the requested discovery. (Dkt. No. 183 at 44-45).

As a result, Plaintiffs undertook their own investigation into the historical records, and enlisted the help of Prof. Stephen Dow Beckham, a noted historian at Lewis and Clark College, to guide the search for pertinent historical records within the National Archives. As that process continued, and the voluminous records were retrieved through archival searches, the issue became how best to present the historical materials to the Court.

The State and Counties asked Prof. Beckham to (1) marshal and explain the historical records to facilitate the Court's job in determining whether the Administrative Record is adequate to address the Carcieri temporal requirement as it pertains to OIN (and if the Secretary considered that issue at all) and (2) lay out the pertinent facts for purposes of summary judgment motion practice. Prof. Beckham's declaration and report address the status of the Oneidas in New York in 1934 and their relationship (or lack thereof) to the modern tribal applicant OIN. The vast majority of the records submitted or referenced by Prof. Beckham come from the Department of the Interior – and should have been addressed by the Secretary on its own accord under a correct reading of the IRA.[8]

[8] The pertinent records from the DOI are attached as exhibits to the Declaration of David H. Tennant in Support of Plaintiffs' Motion for Summary Judgment [Third Cause of Action] dated November 15, 2011 (Dkt. Nos. 247-250) ("Tennant Declaration"). The OIN (but not the Federal Defendants) asserts that the Tennant Declaration is an improper "attorney affidavit" under NDNY Local Rule 7.1(a)(3). (OIN Opp. Mem. at 7; cf. U.S. Opp. Mem. at 16). The Tennant Declaration (1) sets out the pertinent procedural history regarding the Secretary's failure to consider the Carcieri temporal requirement and the resulting gap in the Administrative Record; (2) authenticates the historical records (obtained by counsel from the National Archives) to fill in the gap in the Administrative Record; and (3) explains the significance of the documents including extracting key

The expert disclosure rules that Federal Defendants and OIN contend have been flouted are contained in Rule 26 and govern the identification of experts to be used at trial in the course of normal litigation where discovery is permitted in all forms. None of the cited cases involve a party's good faith efforts to fill in a patently deficient administrative record in the context of an APA case where no discovery is permitted, much less in the particular circumstances presented here where the agency decision-maker is refusing to consider its own historical records. Moreover, the cited cases involve typical discovery schedules with untimely disclosure of expert opinions in advance of trial. No party here believes a trial is necessary to determine the factual issues posed by the Carcieri decision.

If the OIN (and Federal Defendants) think the expert declaration and report submitted by Plaintiffs are inaccurate, they were free to rebut them as they saw fit, including submitting expert materials prepared by their own expert historian(s). There was ample time in the briefing schedule on these motions for Defendants to do so.

If the Federal Defendants and OIN were surprised to see the Beckham Declaration and report on summary judgment, and believe they have been prejudiced, the appropriate response would have been to ask for more time to submit a rebuttal expert report.[9] What is not

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language from the records. The Federal Defendants understand that the Tennant Declaration submits the DOI's own archival records which are of a "factual and historical nature" (U.S. Opp. Mem at 16) and is not objectionable on that basis. This type of "sponsoring" declaration is common and indeed necessary to present evidence under Rule 56 motion practice. Local Rule 7.1(a)(3) appears to be narrowly tailored to keep statements from counsel, not based on personal knowledge, from gainsaying evidence supporting a Rule 56.1 Statement of Material Facts. This is in keeping with general concerns about unreliable "attorney affidavits" that are not premised on personal knowledge. See generally 11 James Wm. Moore et al, Moore's Federal Practice § 56.94(7)(a) (3d ed. 2011) (and cases cited therein) But even if Local Rule 7.1(a)(3) could be applied to restrict a sponsoring declaration like the Tennant Declaration, at most it would render non-evidentiary the narrative portions of the declaration and not the attached exhibits. The attached historical records are precisely the evidence that the Secretary was required to consider under Carcieri, are missing from the Administrative Rrecord, and must be considered by this Court in analyzing the Carcieri temporal requirement.

[9] The Federal Defendants reserve their right to depose Prof. Beckham, prepare a rebuttal report, and make a Daubert motion if appropriate. (U.S. Opp. Mem. at 17 n.6).

appropriate is for the Federal Defendants and OIN to attack not just the timing of the expert report but to argue that the underlying historical records are improper "extra record" material. Given DOI's intentional avoidance of the Carcieri issue, the obvious hole it left in the Administrative Record, and its position that it will refuse to consider its historical records on remand, Plaintiffs were required to go outside that record to demonstrate the incompleteness of that record and the infirmity of the Determination and ROD. Even if the expert disclosure rules could be read to make the Beckham Declaration and report improper, Plaintiffs still would be permitted to present the underlying historical documents to establish the inadequacy of the Administrative Record. The Beckham Declaration and report facilitate that undertaking and should be considered.

C. The Court Should Employ De Novo Review To Determine If The Secretary Acted In Excess Of His Statutory Authority Under The IRA

1. The Court Should Not Defer To The Secretary's Interpretation Of His Own Authority Under The IRA

The Federal Defendants seek to shield from meaningful review the legal question regarding the Secretary's authority under the IRA to take land into trust on behalf of the OIN. They argue that this court should defer to the Secretary's construction of the IRA unless it is "plainly erroneous or inconsistent with the regulation." (U.S. Opp. Mem. at 7). The determination of the Secretary's authority to take land into trust, including the meaning of the phrase "now under Federal jurisdiction," is purely a question of law that goes to the narrow issue of the Secretary's legal capacity to act under the IRA. Resolution of that question does not call upon the Secretary to construe federal Indian policy or otherwise draw upon any claimed institutional expertise.

The Supreme Court in Carcieri authoritatively rejected the Secretary's reading of the IRA in which the Secretary read "now" to mean "now or hereafter" and thereby completely

eliminated the temporal limitation that was unambiguously stated in the statute. The Secretary continues to misread the IRA to eliminate any meaningful temporal restriction on the Secretary's authority, construing "now" to effectively mean "any time before 1934" (see infra at 34-38), while strongly supporting efforts in Congress to overturn Carcieri. See infra at 24. The fact that the Secretary is advocating so strenuously to change the law suggests the Secretary's current administrative practice of working around Carcieri is contrary to law.

The Federal Defendants assert that the phrase "now under federal jurisdiction" is ambiguous, citing to a DOI memorandum prepared by Felix Cohen. (U.S. Opp. Mem at 22 n.9). Neither the majority nor concurring opinions in Carcieri considered the phrase ambiguous. The temporal restriction is not at all ambiguous in the context of the colloquy between Commissioner Collier and Senator Wheeler, and clearly refers to Indians who were then wards of the federal government because they were actually receiving services from the Office of Indian Affairs. In no event can any claim of ambiguity help the Oneidas in New York in 1934, which by DOI's official contemporaneous pronouncement, "were known no more as a tribe in that State." Tennant Decl. Exh. C at 11 (Reeves Report). The Oneidas were scattered throughout central and western New York with no tribal organization of their own, living among non-Indian communities or residing on reservations of other Indians. According to the DOI, the Oneidas in New York were non-tribal Indians who did not receive any services from the Office of Indian Affairs in 1934. The Oneidas in New York in 1934 therefore were not "a recognized tribe now under Federal jurisdiction" under any plausible interpretation of that phrase. Accordingly, there is no basis to defer to the Secretary's current defective reading of the IRA. Indeed, that reading is irrational in that it eviscerates the express unambiguous temporal restriction to 1934; renders "irrelevant" all historical evidence relating to the critical year of 1934; and substitutes in its place

evidence of historical contacts with the federal government long before 1934 that, in effect, would render eligible any tribe that ever was contacted by the federal government before 1934. See infra, at 35-38.

With the Secretary patently committed to reversing Carcieri and resisting its application in the interim, the Secretary is not an unbiased, dispassionate administrative decision-maker and deserves no presumption of regularity or expertise. Indeed, the Secretary's consistent misreading of "now under Federal Jurisdiction" shows the Secretary has no knowledge or expertise when it comes to construing the IRA. Where, as here, the federal agency demonstrates open resistance and hostility to Supreme Court precedent, deference is particularly inappropriate.

2. The Determination Of Whether The Secretary Acted In Excess Of His Authority Is A Threshold Legal Issue That Requires Independent Review

The threshold legal question of whether the Secretary acted within the statutory authority granted by the IRA, or acted in excess of that authority, "necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority." Western Union Tel. Co. v. FCC, 541 F.2d 346, 354 (3d Cir. 1976) (applying Section 706(2) of the APA). Where that independent review reveals the agency acted outside of its statutory authority, the challenged acts are deemed ultra vires and the decision must be set aside. See Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 101 (2d Cir. 1970); Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993). Accordingly, the Court should independently review the Secretary's conclusory determination that he acted within his statutory authority. Specifically, this Court should compare for itself the "claimed excessive action" (i.e., taking land into trust for the OIN) with the "pertinent statutory authority" (the IRA as interpreted by the Supreme Court in Carcieri). Western Union, 541 F.2d at 354. But even without independent review, the DOI's records make clear that the Secretary exceeded his statutory authority in finding the OIN eligible

to have land taken into trust under the IRA, and his decision to do so must be set aside as arbitrary, capricious, and contrary to law.

D. The Defendants Ignore The Damaging Historical Facts Concerning The Oneidas In New York in 1934 And Offer Legal Fictions In Their Place

1. The DOI's Contemporaneous Records Show The Oneidas In New York In 1934 Were Neither Organized As A Tribe Nor Under The Jurisdiction Of The Federal Indian Affairs Office, And Thus Were Not A "Recognized Tribe Under Federal Jurisdiction" As Of June 1, 1934

The DOI records express a number of inconvenient and incontrovertible truths that under any reasonable interpretation of the Supreme Court's decision in Carcieri are fatal to the Secretary's authority to take land into trust for the benefit of the OIN. The DOI's records document the following historical facts about the Oneidas in New York in 1934:

- the Oneidas who lived scattered in New York in 1934 were not tribally organized;
- the Oneidas in New York were not recognized as a tribe by the federal Office of Indian Affairs in 1934;
- the federal Office of Indian Affairs did not provide services to, or otherwise exercise jurisdiction over, Indians and reservations in New York in 1934; and
- the DOI and Office of Indian Affairs repeatedly disclaimed jurisdiction over the Oneidas in New York before, during, and after the Boylan case.

See Pl. Mov. Mem. at 26-41; Tennant Decl. ¶¶ 14-57, Exhs. C to MM; and Baldwin Mov. Decl. Exh. WW (Declaration and Report of Stephen Dow Beckham dated November 14, 2011 ("Beckham Report")).

On this last point, the historical record is clear that DOI's official articulation of federal Indian policy excluded New York Indians (and Oneidas in New York) from federal jurisdiction given their "peculiar" status as wards under the care of the State. (Pl. Mov. Mem. at 38-41). Even Indian Commissioner John Collier, an ardent supporter of Indian rights, called federal jurisdiction in New York "shadowy" and "uncertain" and specifically stated that the Office of

Indian Affairs could not in fact begin to exercise jurisdiction over the Indians and reservations in New York unless one of two things happened: (1) the New York tribes voted to adopt the IRA or (2) Congress enacted legislation authorizing and funding the Office of Indian Affairs to extend its jurisdiction into New York. Tennant Decl. ¶ 80, Exh. EE; Pl. Mov. Mem. at 40-41. Neither of those things happened, leaving the Indians in New York, including the handful of non-tribal Oneidas, under the primary and active jurisdiction of New York State.[10]

The 1930 Congressional hearing cited by OIN contains statements from the Chairman of House Committee on Indian Affairs, and a member of that Committee, that reflect the special status of New York Indians as wards of the state and not the federal government. Specifically, the Chairman observed that the Indians in New York had "never been directly under the guardianship of the Federal Government" and that perhaps the "Indian problem" could be solved if the Federal Government "starts" to assume such guardianship. Baldwin Reply Decl. Exh. D at

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[10] The Federal Defendants dismiss as "absurd" the notion that a "tribe[] could choose whose jurisdiction they fall within, whether it be the United States, a State, or a foreign government." (U.S. Opp. Mem. at 28 n.13, 29). The choice between keeping the status quo (with the State exercising active, primary jurisdiction) and adopting the IRA with attendant federal supervision was very real, as the universe of senior DOI officials and pro-tribal commentators understood at the time. (Pl. Mov. Mem. at 37-41). There was, of course, no option to adopt the jurisdictional mantle of a foreign government. See Cherokee Nation v. Georgia, 30 U.S. 1, 17-18 (1831) (Indian tribes are "completely under the sovereignty and dominion of the United States . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them would be considered by all an invasion of our territory, and an act of hostility.") Ironically, the 1930 congressional hearing testimony submitted by OIN (Dkt No. 260-5, Exh. 3) documents the active state jurisdiction over New York Indians and the passive federal jurisdiction at that time. Baldwin Reply Decl. Exh. D at US024082-86 (excerpt of Indians of New York, Hearings before the Committee on Indian Affairs, House of Representatives, 71st Cong., 2d Sess. on H.R. 9720 (USGPO Washington 1930). The Congressional hearing related to a proposed bill to clarify New York's jurisdiction over certain Indian matters. "Chief" Rockwell understood that by taking a position on the proposed federal legislation, the Indians in New York would be choosing between federal and state jurisdiction, which he found appropriate: "We also think it is fair for us to have a choice as to whom our protector should be." Id. at US024083. This was precisely the jurisdictional choice that New York Indians faced when voting to adopt or reject the IRA. See Pl. Mov. Mem. at 37-41; Tennant Decl. ¶¶ 69-70, 77, 78, 80, 82, 83, 84, 86, Exhs. U, NN, VV, WW, YY, ZZ, AAA-CCC, EEE-III, KKK. The Defendants ignore this New York Indian-specific history in arguing that "[t]he Oneida vote against IRA reorganization in 1936 did not eliminate 'any possibility of coming under federal jurisdiction' (Pls. Mem. 34), any more than it removed federal jurisdiction over other federally-recognized tribes." (OIN Opp. Mem. at 7-8 n.5; see U.S. Opp. Mem. at 28-29). It had precisely that effect for New York Indians, as the New York Indians themselves understood.

US024081.[11] Another member of the committee noted that "it would have been much better for the Indians of New York if they had been as other Indians of the United States, under the guardianship of the Federal government." Id. at US024081 to US024082.[12]

Accordingly, the handful of non-tribal Oneidas who lived in New York in 1934, and received no services from and had no relationship with the federal Office of Indian, were not "wards of the [federal] Government at the present [June 1934] time" (Tennant Decl. Exh. A (May 17, 1934 Hearing before Committee of Indian Affairs at 263)) as the drafters and adopters of IRA intended by the temporal requirement that the Secretary's authority to take land into trust be limited to "recognized tribes now under federal jurisdiction."

The Defendants contend that the DOI is free to ignore all relevant historical evidence in 1934 in favor of abstract considerations of "federal jurisdiction" that flow (according to Defendants) from the 1794 Treaty of Canandaigua, the fact that the Department of Justice ("DOJ") unilaterally sued on behalf of several Oneida families in Boylan – a suit which DOI did not join but repudiated – and the decision of the Secretary in 1936 to allow non-tribal Oneidas in New York the chance to organize under the IRA. In making this argument, the Federal Defendants declare "irrelevant" all of the historical facts regarding the circumstances of the Oneidas in New York in 1934 and the unresolved efforts of the federal Office of Indian Affairs to extend its jurisdiction in New York State in 1934 (U.S. Opp. Mem. at 17-19) – facts that show the Oneidas in New York were not organized as a tribe, were not recognized as a tribe by the federal government, and were not receiving any services from the federal Office of Indian

[11] The 1930 hearing transcript submitted by OIN (Dkt No. 260-5, Exhibit 3) omits these damaging statements.

[12] The Defendants' reliance on Rockwell's occasional correspondence with federal officials (see OIN. Opp. Mem. at 7-8 n.5 (final bullet point)) likewise proves the absence of federal jurisdiction. The federal officials contacted by Rockwell disclaimed jurisdiction over the Oneidas in New York. See Tennant Decl. ¶¶ 69-77, Exh. WW; Baldwin Mov. Decl. Exh. WW (Beckham Report at 29-30).

Affairs in 1934, and thus were neither a recognized tribe in 1934 nor under federal jurisdiction in 1934. The DOI ignores this history.

2. The Contemporaneous Factual Findings And Pronouncements Of Indian Policy By The Secretary, Commissioner Of Indian Affairs, And Senior Officials In The DOI Are Not Rationally Dismissed As "Informal Opinions Of Government Officials"

The historical DOI records bear all the indicia of formal communications of official fact-findings and Indian policy, including – without contradiction – a formal report (the Reeves Report) on the status of New York Indians commissioned by the Commissioner of Indian Affairs and delivered to Congress by the Secretary in connection with pending legislation respecting New York Indians. Tennant Decl. ¶¶ 15, 17, Exh C; Pl. Mov. Mem. at 26. The Reeves Report and other DOI pronouncements are at least as "official" as Secretary Salazar's letter to the Senate Committee on Indian Affairs expressing his "strong support" for proposed legislation to overturn the Supreme Court's decision in Carcieri, or Assistant Secretary Larry Echo Hawk's testimony before the Senate Committee on Indian Affairs to support legislation seeking to overturn Carcieri. Baldwin Reply Decl. Exh. E at 13; id. at Exh. F. The Federal Defendants doubtlessly do not view these current pronouncements of department policy as "informal opinions of government officials."

This Court should not give credence to the Defendants' efforts to undermine the meaning and significance of Chapter 22 ("New York Indians") in the 1941 edition of Felix Cohen's Handbook of Federal Indian Law (U.S. Opp. Mem. at 32 n.19; OIN Opp. Mem at 13 n.10). The original Cohen treatise was published as an "official publication of the Interior Department" (see United States v. The Native Village of Unalakleet, 411 F.2d 1255, 1259 (Ct. Cl. 1969)) and is

considered "the Bible" of Federal Indian Law.[13] The Supreme Court has consistently recognized the expertise of Felix Cohen and the authoritative nature of his seminal Handbook. See United States, ex rel. The Hualapai Indians of Arizona v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 349 n.5 (1941); Squire v. Capoeman, 351 U.S. 1, 8-9 (1956) (referring to Cohen as "an acknowledged expert in Indian law"); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 159 (1973) (describing the DOI's 1958 edition "a revision of the monumental work, Handbook of Federal Indian Law prepared by Felix S. Cohen and published in 1940") (Douglas, J., concurring and dissenting); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139 n.6 (1982) (referring to the 1941 version as the "classic treatise on Indian law"); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199-200 n.9 (1978); United States v. Wheeler, 435 U.S. 313, 322-23 (1978); Sherrill, 544 U.S. at 204.

The Court of Claims decision in United States v. The Native Village of Unalakleet, rejected a similar effort by the DOI to take a position conflicting with the content of the original Cohen treatise. The Court of Claims not only noted the official nature of the DOI publication but the thorough scholarship, research, and documentation that underlay it, including Cohen's "seven years of practical experience in handling on the various Indian reservations the most difficult controversies that have arisen during that period and in drafting a significant part of the legislation about which he writes." 411 F.2d at 1259-60.[14]

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[13] A member of the Solicitor's Office within the DOI, Scott Keep, Assistant Solicitor, Branch of Tribal Government & Alaska, can be seen on You Tube praising the Cohen treatise: "Felix Cohen's handbook is still really the Bible for Indian law. When we have new attorneys join the division, all I can say is, I tell them to go back and read the original Felix Cohen. It's amazing how enduring it really is." See http://www.youtube.com/watch?v=kL29SqQ3LUU; also available at: http://tm112.community.uaf.edu/unit-2/cohen-handbook.

[14] Academics likewise laud Cohen and his original Handbook. See, e.g., Jill E. Martin, Miner's Canary: Felix S. Cohen's Philosophy of Indian Rights, 23 Am. Indian L. Rev. 165, 166 (1998-1999) ("When the Handbook was revised in 1982, it was titled Felix S. Cohen's Handbook of Federal Indian Law, in recognition of Cohen's genius, vision, and hard work."); Robert A. Williams, The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. Cal. L. Rev. 1, 1 n.1 (1983) (Cohen's original Handbook "was the first work of its kind and soon became a 'litigation bible' for lawyers in the Indian field.").

Chapter 22 of the Cohen treatise, by any fair reading, represents an accurate factual account of the status of the New York Indians, including the Oneidas, based on the information then known to the DOI. It was and remains the authoritative contemporaneous pronouncement of DOI's understanding, from at least 1914 to 1941, that Oneidas in New York "were known no more as a tribe in that state." [15] Without any ability to challenge the factual accuracy of the DOI-published Cohen treatise, the Federal Defendants seek to bootstrap the author's modest disclaimer to the official publication to undo Cohen's express adoption and endorsement of the Reeves Report to Congress. But it is impossible to fit Cohen's embrace of the Reeves Report into the vague subject matter of the disclaimer: "every generalization, prediction, or inference that may be found in the volume." of the (non-tribal) status of the Oneidas living in New York, grounded in DOI's own records, and was meant to inform policy-makers, judges, attorneys, and legal scholars.[16]

This Court should accept the DOI's official contemporaneous findings of fact and policy determinations and reject Defendants' efforts to belittle those records, which in the case of DOI, reaches the height of hypocrisy.

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15 The Cohen-authored treatise was republished by DOI in 1958, and the reference to the Oneidas being known no more as a tribe in New York remained. United States DOI, Federal Indian Law, 967 (1958 ed.). The most recent edition of the Handbook of Federal Indian Law is not published by DOI, and the chapter on New York Indians and reference to the Oneidas have been deleted.

16 In view of the admittedly official nature of the original DOI-published treatise, Federal Defendants' make the extraordinary argument that the Handbook "while originally prepared by Department employees, was conceived as 'a simple manual' to assist practitioners…" and was "[f]ar from representing an official statement of the federal government." (U.S. Opp. Mem. at 32 n.19). The Federal Defendants' broad dismissal of the DOI's "Bible" is belied by the Cohen treatise's creation and dissemination as an "official publication of the Interior Department." The Native Village of Unalakleet, 411 F.2d at 1259.

3. Unable To Avoid The Damaging Facts In DOI's Own Records, The Federal Defendants Seek to Define "Now Under Federal Jurisdiction" Without Regard To The Actual Facts in 1934

As explained in Plaintiffs' moving papers, these historic records are directly responsive to the inquiry that Carcieri requires but the Secretary failed to undertake. The Supreme Court's decision in Carcieri expressly directs the Secretary to consider the status of the tribal applicant in 1934 – looking both to the applicant's existence as a tribal organization, and whether it was under federal jurisdiction, at that specific time. The Federal Defendants strain mightily to get away from that straight-forward reading of Carcieri and the damaging historical facts in 1934.[17] The justification for rejecting this evidence starts with the DOI's explanation of the Secretary's new two-part test[18] for what it means to be "under federal jurisdiction," recently announced in the decision on the land-into-trust application of the Cowlitz Indian Tribe. In setting out its rationale for Cowlitz, DOI argues – without support in the record and contrary to both the command of Carcieri and DOI's recent articulation of the legal standard in Village of Hobart v. Acting Reg'l Dir., BIA, IBIA Nos. 10-107, 10-091, 10-092 (Tennant Decl. Exh. B) – that "requiring a tribe to produce affirmative evidence of its jurisdictional status for 1934 is too burdensome." (U.S. Opp. Mem. at 23).[19] If that is ever true (which Plaintiffs doubt), it is

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17 The fact that the Secretary and Assistant Secretary-Indian Affairs find it necessary to lobby Congress to amend the IRA and enlarge the Secretary's authority to take land into trust following Carcieri is an acknowledgement that the law is not as the DOI would like it to be and as the DOI has sought to apply it in this case.

18 This test was articulated in the U.S. DOI, BIA, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz parcel in Clark County, Washington, for the Cowlitz Indian Tribe ("Cowlitz decision") at pages 94-95, available at: http://www.bia.gov/idc/groups/mywcsp/documents/text/idc012719.pdf (last visited March 14, 2012).

19 The DOI in Village of Hobart collected and analyzed the cotemporaneous historical evidence regarding the Oneida Tribe of Wisconsin ("OTW") and concluded the record established federal jurisdiction, including the fact that the certain tribal lands were held in trust by DOI in 1934 and the OTW voted to adopt the IRA in 1935. Those were the pertinent contemporaneous historical facts by which DOI judged the eligibility of OTW – not relying on abstract concepts of ancient Treaty rights (although OTW had the same or better claim than OIN to continuous treaty recognition under the 1794 Treaty) and without applying the recently-conceived Shawano rule

certainly not true in this case. The historical record regarding the jurisdictional status of the New York Indians in general, and the Oneidas in New York in particular, is well documented. The pertinent historical records are easily accessed through the National Archives. The asserted "burden" is thus non-existent with respect to determining the jurisdictional status of the Oneidas in New York in 1934, and any test that purports to eliminate consideration of the relevant contemporaneous historical evidence for that reason is intrinsically irrational – i.e., arbitrary, capricious and contrary to law.[20]

Instead of considering the actual historical record regarding the Oneidas in New York in 1934, the Federal Defendants and OIN look to three discrete historical events occurring in 1794, 1909 and 1936 to try to satisfy the Carcieri "under federal jurisdiction" standard. As to each of these events (none of which speak to June 1, 1934) the Defendants present a thin veneer of the facts, creating a materially incomplete and misleading picture, and the Defendants blur the critical distinctions between (1) the ancient Oneida Nation that once inhabited central New York (until the mid-19th century), (2) the scattered remnants of that tribe that lived non-tribally in New York in 1934, and (3) the modern tribal applicant OIN.[21] By presenting incomplete facts

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that being allowed a vote under the IRA has the same jurisdiction-conferring effect as a positive vote to adopt the IRA.

[20] The Cowlitz decision does not support jettisoning the contemporaneous historical record. Indeed, in that case, the DOI recognized that "probative evidence" might exist that shows "a tribe's jurisdictional status was terminated or lost prior to 1934." Cowlitz decision at 95. The DOI reasoned however that in the absence of such probative evidence, DOI would credit evidence that a tribe was previously under federal jurisdiction. Here, the contemporaneous historical record proves that federal jurisdiction over the historic Oneida tribe in New York ended upon its break up and removal to Wisconsin and Canada by the middle 1800s, and that the federal Office of Indian Affairs played no role whatsoever in the lives of the few Oneidas in New York in 1934, who lived non-tribally and were scattered across Central and Western New York. Whatever the historic Oneida tribe in New York had in the way of federal recognition and jurisdiction in the 1700s and 1800s was lost by the early 1900s, when the Oneidas in New York "as a tribe these Indians [were] known no more" in this State. Tennant Decl. Exh. C at 11 (Reeves Report).

[21] The Federal Defendants' intentional blurring of the names can only be viewed as a kind of shell game, trying to mislead the reader, when it is necessary to draw these distinctions in applying the decision in Carcieri. It is singularly unhelpful for the Federal Defendants to refer to four Oneidas evicted in 1909 and their 32-acre parcel

and then blurring the distinctions between the Oneidas in New York in the 1700s and 1800s, 1930s and 2008, the Federal Defendants and OIN seek to gloss over the damaging facts in 1934 and fabricate instead something that did not in fact exist in 1934 – an organized Oneida tribe in New York that was under the jurisdiction of the federal Office of Indian Affairs. And certainly the modern OIN did not exist in 1934.

a. 1794 Treaty And Distribution Of Treaty Cloth

As explained in Plaintiffs' moving papers, the continued payment of treaty cloth to certain Oneidas living in New York did not confer federal jurisdiction over them. That was the considered judgment of the DOI in 1982. Pl. Mov. Mem. at 42-43; Tennant Decl. Exh. UU (1982 DOI memorandum at 6, 13 (transcribed)).[22] Legally, factually and logically no weight can be attached to continued cloth distribution because those distributions recognized only a present right to be paid for an historic treaty obligation without any determination that current (or earlier) recipients are members of any tribe. Moreover, the DOI's reliance on the 1794 Treaty is misplaced inasmuch as the signatory to that treaty and the party protected under it – the ancient Oneida Tribe – split up into multiple factions and substantially removed to Wisconsin and Canada by the mid-1800s, with only a small number of Oneidas remaining in New York. Given

as "the Nation and its Reservation" (U.S. Opp. Mem. at 8, 33-34); 32-acres as "Nation land" (id. at 21) or to claim that the "the parties do not dispute that the Secretary called a vote of the Oneida Indian Nation of New York" (id. at 27). Referring to the scattered, disorganized, non-tribal Oneidas in New York in 1934 by the appellation adopted by the modern tribal applicant OIN – which organized in the 1940s or later – is especially misleading. Not only does it attempt to ascribe tribal status to non-tribal Oneidas in 1934, it also blurs the distinction between the families who were evicted from the 32-acre parcel in 1909 and the members of the modern tribal applicant. While the Federal Defendants presumed the modern tribal applicant OIN includes descendants of the Boylan families (U.S. Mov. Mem. at 22-24), that is not supported by the available records. See Baldwin Mov. Decl. Exh. WW (Beckham Report at 49-64, 69-70). It is evident the Federal Defendants have never undertaken the kind of genealogical inquiry that could answer that question. Tellingly, the OIN has not offered any evidence to make the connection that Professor Beckman demonstrates is missing.

[22] DOI does not even try to suggest the 1982 DOI memorandum was in error on this point. Indeed, the explanation offered by the author of that report – that the right to receive payment for an historic obligation does not say anything about the current tribal status of the recipients – is unassailable.

those undisputed facts, and the record that the scattered Oneidas in New York were not organized as a tribe in 1934 and were complete strangers to the Office of Indian Affairs in 1934, the 1794 Treaty is 140 years out of date for purposes of satisfying the Carcieri "*now* under federal jurisdiction" test. And given these undisputed facts, any presumption that the Oneidas in New York remained under federal jurisdiction after 1794 is amply rebutted by at least five decades of DOI records (1890-1940).

b. Boylan Litigation

The Federal Defendants and OIN place heavy weight on the Boylan litigation and resulting decisions by the district court and Second Circuit. This is an understandable strategy given the content of the contemporaneous DOI records (all declaring the remnant of Oneidas in New York non-tribal) and the contradictory statements found in the Boylan decisions, all of which were rendered without regard to the controlling Montoya common law test for tribal recognition (Montoya v. United States, 180 U.S. 261, 266 (1901)) or the official federal Indian policy as articulated by DOI and Office of Indian Affairs. (Pl. Mov. Mem. at 44-45).[23] But even if the Boylan decisions are taken at face value despite the many important respects in which they depart from Indian law and policy, the fact remains that the judicial observations regarding the Oneida families who were evicted from the 32-acre parcel are twenty-five years out of date with respect to the IRA. As explained in Plaintiffs' moving memorandum of law, the judicial decisions concern events that occurred in the latter part of the 19th century and early years of the

[23] The district court's conclusory finding that the evicted family members were a "band" is factually unsupported as well as legally mistaken. As the DOI observed in 1982, the few Oneidas residing on the 32 acres did not have a tribal organization and instead had an ad hoc relationship based on their shared occupancy of the land. Tennant Decl. Exh UU at 6-7 (transcribed). That informal relationship does not make them a band or tribe under the controlling Montoya test ("a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory," 180 U.S. at 266), and certainly does not bring that ad hoc group under federal jurisdiction.

20th century, culminating with the eviction of four family members in 1909. (Pl. Mov. Mem. at 29-30). The trial record accordingly describes ownership and occupancy of the 32 acres a quarter-century or more before the IRA was enacted in 1934. When the Indian Affairs Office learned in 1935 that a small remnant of the state-created reservation might exist, that Office dispatched an agent to investigate. Those actions conclusively demonstrate the absence of federal supervision or jurisdiction over those lands at that time. When the agent visited the site, he found William Rockwell and his family occupying the parcel, which Rockwell owned individually in fee simple. Baldwin Mov. Decl. Exh. WW (Beckham Report at 21, 25, 43-44, 66, 68-69). Whatever might have been tribal property in 1909 (as described in Boylan) was no longer the case in 1934. A quarter-century after the eviction, the ownership and occupancy of the land had changed.[24] And, of course, in those intervening 25 years, the Office of Indian Affairs did not take any steps to establish jurisdiction over the Oneidas in New York or this 32-acre parcel, or over any other group of New York Indians or their lands. What had been the federal government's "hands-off" policy respecting New York and its Indians before Boylan remained so after Boylan (until the 1940s). As a matter of undisputed fact, the Office of Indian Affairs did not exercise jurisdiction over the Indians and reservations in New York in 1934 and no other branch of the federal government did either. The DOJ intervened one time for the evicted families, and ended that intervention by 1921, not to be heard from again.

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[24] The Congressional hearing testimony of "Chief" Rockwell in 1930 (OIN Opp. Mem. at 7-8 n.5) fails to create an issue of fact regarding the lack of tribal organization among the Oneidas in New York in 1934 – even as it demonstrates the absence of federal jurisdiction over all New York Indians. See, supra, note 10. Nothing in Rockwell's testimony (or his occasional correspondence with federal officials) supports a finding (contrary to the Reeves Report) that the Oneidas in New York were tribally organized, with a tribal body exercising authority over its members, and with a government-to-government relationship with Office of Indian Affairs. Indeed, a short five years later the Office of Indian Affairs dispatched an agent to investigate the possibility that a tiny remnant of the ancient Oneida reservation might still exist.. The agent found only William Rockwell and his family living on the 32 acres which he owned in fee – with no tribal organization evident, and certainly nothing recognizable as a tribe to the investigating agent. This episode conclusively documents the fact that the Office of Indian Affairs had little knowledge of and provided no services to the Oneidas in New York in 1934.

The Federal Defendants argue that this "one-off" intervention by the DOJ creates federal recognition and jurisdiction in perpetuity that can be terminated only by Congress or the Executive Branch, but cannot cite any cases on point to support this unique position. (U.S. Opp. Mem. at 33-34). In any event, the legally and factually unsupported findings in Boylan regarding the evicted families and the jointly occupied 32-acre parcel were quickly overtaken by events that saw one person obtain title in fee ending shared occupancy and use before 1934. With the subjects of the Boylan case scattered, and the land no longer owned, occupied or used for tribal purposes, there was no continuing group in 1934 upon which to hang the label of Boylan "band" or "tribe." Tennant Decl. Exh. UU (1982 DOI memorandum at 12 (transcribed)). And there is no evidence tying the Boylan families (circa 1920) to the modern tribal applicant (OIN). Baldwin Mov. Decl. Exh. WW (Beckham Report 49-64, 69-70). Accordingly, Boylan does not support any findings useful to the OIN in satisfying the Carcieri temporal limitation.

The Federal Defendants ignore their own historical documents that demonstrate the change in ownership and occupancy of the 32-acre parcel by 1934-1935, and instead cleave to a simplistic argument that the Boylan district court findings were affirmed by the Second Circuit in that case and favorably commented on by the Second Circuit in Oneida Indian Nation v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003), *rev'd* 544 U.S. 197 (2005). But neither the Second Circuit in Sherrill nor any other court has previously been required to look at the actual historical record in 1934 to determine the status of the Oneidas in New York under the IRA. If this Court decides the issue, it is obligated to give a fresh look to the historical record to determine if the Oneidas in New York were organized and recognized as a tribe and were under the jurisdiction of the Office of Indian Affairs in 1934. This is true notwithstanding the existence of judicial opinions that comment on other aspects of the historical record for other purposes, as explained in Plaintiffs'

moving memorandum of law at 43-46.[25] In any event, to the extent the DOI is now saying the Boylan courts had power to establish federal Indian law and policy, this Court must have the power, and indeed has the duty, under Carcieri to review the OIN's eligibility under the IRA based on an appropriately developed record – and not limited to the totally inadequate record from the administrative process here as to the status of the Oneidas in New York in 1934.

Finally, the Federal Defendants misunderstand and mischaracterize Plaintiffs' evidentiary showing (and related argument) concerning the open split between the DOI and DOJ as to the Boylan litigation, specifically DOI's disagreement with DOJ's unilateral decision to intervene on behalf of the families evicted from the 32-acre parcel. (See Pl. Mov. Mem. at 29-32). This is not a matter of speculating that the client agency (DOI) was questioning the DOJ's decision to litigate. (U.S. Opp. Mem. at 12-13). The relevant DOI records establish as a matter of historical fact that DOI disagreed with the DOJ's decision to intervene and believed, before, during and after the Boylan case was litigated, that the intervention was unwarranted as a matter of federal Indian law and policy and was premised on incorrect factual assumptions and an untenable legal theory. Tennant Decl. Exh. D, U, and V. There is nothing speculative about the disagreement.[26]

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[25] The dismissive treatment of the DOI historical records – including the Reeves Report that the Secretary submitted to Congress – is pure hypocrisy when articulated by the Federal Defendants (see Section I.D.1-2, supra, at 21-27). It is understandable but misguided advocacy when advanced by the OIN. It is inaccurate dictum in the Second Circuit majority opinion in Sherrill. Repeating a factually inaccurate statement does not make it true. The Reeves Report represents the official view of the DOI which was communicated to Congress in 1915 and reaffirmed in 1941 and 1958 by the DOI's Handbook of Federal Indian Law. That is a fact. The report was commissioned by the Commissioner of Indian Affairs, presented to the Secretary of the Interior, who submitted it to Congress in connection with legislation regarding New York Indians. For anyone to say (as did the Second Circuit majority in Sherrill, 337 F.3d at 166) the Reeves Report (and other official DOI documents) "merely reflect the opinions of a handful of government officials and commentators" is not true. The Sherrill majority opinion's dictum is properly disregarded by a court that seeks historical facts regarding the status of the Oneidas in New York in 1934, which must include looking to contemporaneous official fact-findings and pronouncements of policy such as the Reeves Report. Indeed, that is precisely what the Supreme Court did in County of Oneida v. Oneida Indian Nation of New York (Oneida II) when examining the facts and circumstances of the Oneidas in New York. 470 U.S. 226, 260 n.9 (1985).

[26] The Federal Defendants weakly argue that the record does not show unilateral action by the DOJ (U.S. Opp. Mem. at 34 n.21), but curiously describe the exchange between the DOJ and DOI as follows: "[A]ll that is clear

c. IRA Vote

The Federal Defendants argue that "Plaintiffs cannot look behind the fact that in 1936 the Department called an Oneida vote on the IRA." (U.S. Opp. Mem. at 13). They contend that the IBIA decision in Shawano Cty., Wisconsin v. Acting Midwest Regional Dir., BIA, 53 IBIA 62 (IBIA 2011), properly and reasonably determined that the fact of a vote being called establishes "under federal jurisdiction" as a matter of law. (U.S. Opp. Mem. at 24, 26).

As Plaintiffs explained in their opposition brief (Pl. Opp. Mem. at 21), this Court does not owe any deference to the IBIA's administrative decision in Shawano, which in any event offers only dictum on the point in question because the tribe in Shawano in fact voted to adopt the IRA, which is a jurisdiction-conferring act. Moreover, the IBIA in Shawano did not make any findings about the status of New York Indians. The administrative proceeding in Shawano addressed a land-into-trust application by the Stockbridge-Munsee Community Band of Mohican Indians in Wisconsin ("Stockbridge-Munsee"). As noted above (and in Plaintiffs' moving brief, Pl. Mov. Mem. at 37-41) the normal jurisdictional balance was reversed in New York with the state exercising active jurisdiction and the federal government remaining passive. The Shawano decision is premised on the tribe residing in a state where the normal allocation of jurisdiction existed in Indian matters. The decision has no application to IRA votes by New York Indians in New York. Finally, the simplistic Shawano test for "under Federal jurisdiction" makes no sense when applied to the actual historical record in New York regarding the non-tribal Oneidas. For them, the IRA vote provided a way to re-organize as a tribe and begin receiving services from

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is that after litigation commenced, efforts to locate a [DOI] referral recommending litigation were frustrated." Id. The Federal Defendants do not identify how such efforts were frustrated or by whom. But even if that happened, that would prove DOI's repudiation of the lawsuit in another manner. However the DOJ's request for a DOI referral recommending litigation was frustrated, the contemporaneous exchange of documents between DOI and the DOJ relating to Boylan demonstrates DOI's express rejection of both the factual and legal premise upon which the DOJ was proceeding in that lawsuit.

the federal government. The Secretary permitted these scattered remnants of the Oneida tribe to hold a vote only because they arguably (but without any certainty) possessed a small remnant of the original reservation. The IRA vote was held on the very last day possible to see if these dispersed tribal remnants wanted to band together and organize under the IRA. They chose not to and remained without a tribal organization until the 1940s. Tennant Decl. Exh. TT (Waterman Aff. at ¶ 2).[27]

4. The DOI Arbitrarily and Capriciously Construes The Meaning Of "Now Under Federal Jurisdiction" To Allow Tribes To Meet The Carcieri Test

The DOI appears to admit that it is construing "now under federal jurisdiction" on a case-by-case basis to permit each tribal applicant to meet it, entirely divorcing the statutory analysis from the tribe's actual history in 1934, should that history present a barrier to IRA eligibility. (U.S. Opp. Mem. at 20-24). The DOI's transparently result-oriented approach is illustrated by what it did in Village of Hobart, where, notwithstanding the OTW's affirmative vote under the IRA and that tribe's historic claim to rights under the 1794 Treaty, the DOI addressed the actual facts regarding OTW's tribal status and reservation in 1934, focusing on the continued federal supervision of its tribal lands. See Tennant Decl. Exh. B (Village of Hobart, DOI Brief at 15-18). In doing so, the DOI did not treat OTW's vote under the IRA as dispositive under Carcieri (as stated by the IBIA in Shawano) even though the OTW was recognized as an organized, existing tribe in contemporaneous correspondence from the Office of Indian Affairs and even though the OTW voted in favor of the IRA. Id. at 18. The Federal Defendants have no explanation for why the DOI in Village of Hobart examined the actual facts relating to OTW's

[27] The OIN does not explain why the Waterman Affidavit is not dispositive on the question of the tribal status of the Oneidas living in New York in 1934. Instead, the OIN simply says the affidavit was offered in litigation by a "dissident" group, but does not identify any factual inaccuracy in that sworn affidavit. (OIN Opp. Mem. at 9 n.6).

tribal organization and relationship to the Office of Indian Affairs in 1934, but failed to undertake that same inquiry here with respect to the Oneidas in New York. No rational explanation can be offered for this disparate treatment under the IRA. The apparent rationale for treating these two groups of Oneidas differently is that the OTW could withstand that historical scrutiny whereas the Oneidas in New York cannot. Such result-oriented, arbitrary and capricious decision-making flouts the Carcieri temporal requirement that applies equally to all tribes. It is no wonder the Federal Defendants remain silent rather than try to explain this inconsistent treatment.

The Defendants' reliance on Shawano is misplaced both legally and factually. As noted above, Shawano involved the Stockbridge-Munsee and that tribe's application to have certain lands, located within the exterior boundaries of its former reservation in Wisconsin, taken into trust under the IRA. The IBIA opinion noted that the Stockbridge-Munsee existed as an organized tribe in 1934, even though it lacked a land base. 53 IBIA 63, 64. The opinion specifically observed that "the Federal government [Office of Indian Affairs] continued to have dealings with the tribe in four areas (including sending school-age tribal members to government-run schools for tribal children)" even after the reservation was lost through allotments. Id. at 74 (citing Wisconsin v. Stockbridge-Munsee Cmty., 366 F. Supp. 2d 698, 725-26 (E.D. Wis. 2004) aff'd 554 F.3d 657 (7th Cir. 2009)). The IBIA decision further noted that, "[n]otwithstanding the lack of a tribal land base and pursuant to 25 U.S.C. § 478, the Secretary held an election for members of the Tribe on December 15, 1934." Id. at 64. Grounded in the historical evidence of the Stockbridge-Munsee's tribal status in 1934 and continuing relationship with the Office of Indian Affairs in 1934, the IBIA decision concluded: "[I]n 1934, the Secretary necessarily recognized and determined that the Tribe did constitute a tribe under federal

jurisdiction when he called and conducted a special election at which the Tribe's adult Indians voted on the question of whether to accept or reject the application of the IRA." Id. at 71. The IBIA decision deemed this single fact "conclusive in determining whether the tribe was 'under Federal jurisdiction' in 1934."

By its terms, the decision in Shawano applies only to Indians who were organized as a tribe in 1934 that was then receiving services through the federal Office of Indian Affairs. Moreover, the IBIA's conclusion that holding a vote is sufficient to confer federal jurisdiction (without regard to the outcome of the vote) is dictum because the Stockbridge Munsee in fact voted to adopt the IRA.

The Federal Defendants' effort to read the Shawano decision expansively – so as to apply equally to the Oneidas in New York who voted to reject the IRA – is seriously misguided. In contrast to the tribal status of the Stockbridge-Munsee in Shawano, the Oneidas in New York were not organized as a tribe in 1934, and the scattered Oneidas residing in New York did not have any relationship with the federal Office of Indian Affairs in 1934. They were permitted to vote notwithstanding those impediments because a few Oneidas lived on a 32-acre parcel that arguably might have met the definition of a "reservation" under the IRA. Allowing the vote to proceed did not entail any recognition by the Secretary that the disorganized assembly of voting Oneidas – some coming from the Onondaga Reservation, some from the Tuscarora Reservations, and others from non-Indians communities – had an existing tribal structure. The DOI's "discovery" of a possible fragment of state-created reservation and ambivalent decision to hold the eleventh-hour vote only demonstrates the fact that the federal government had little knowledge of and no relationship with the Oneidas in New York in 1934. See Pl. Mov. Mem. at 32-34.

5. DOI Takes Refuge In Legal Fictions To Avoid The Damaging Historical Facts

The Federal Defendants place significant weight on the claim that the Oneidas' historic reservation has not been disestablished. (U.S. Opp. Mem. at 31 n.15). While not directly related to the IRA inquiry, the Federal Defendants contend that federal jurisdiction exists over the "Nation and its Reservation" until such time as the tribe is terminated and the reservation is disestablished. These related arguments rest on twin legal fictions that have no place in answering the factual question posed by Carcieri, namely, whether the federal Office of Indian Affairs was delivering services to the Indians in 1934 and thereby treating the Indians as wards of the federal government.[28]

The Secretary's articulation of "now under Federal jurisdiction" in Cowlitz does not support the substitution of a legal fiction for the actual facts in 1934. The Cowlitz two-part test looks first to whether tribal status was "terminated" or "lost." The distinction between "terminated" and "lost" is important, distinguishing between formal legal action and loss of tribal status without such formal action, as happened with the Oneidas in New York. Moreover, the DOI's decision in Shawano did not apply a "not terminated" tribal standard to the OTW. This case appears to be the first time DOI has employed a "not terminated" test to tribal status to try to salvage IRA eligibility, and is especially misguided because the allegedly "not terminated" tribe (the ancient Oneida Nation) had long since removed from the State, leaving behind individual Oneidas who lived on other reservations or were assimilated into the non-Indian communities in which they lived.

[28] The legal status of the Oneidas' "not disestablished reservation" is the subject of continuing litigation, with the issue presented to the Second Circuit by the Counties' petition seeking rehearing en banc. See Oneida Indian Nation of New York v. Madison County and Oneida County, No. 05-6408-cv(L). That petition was fully briefed in December 2011and is pending a decision by the Second Circuit.

It does not make sense to invoke a legal fiction of a "not terminated" tribe because that vague legal status is of no practical use in determining whether the tribe was in fact receiving services from Office of Indian Affairs in 1934. Whatever may be the validity of the analysis by the Second Circuit in Sherrill (2-1 panel opinion, reversed on other grounds),[29] which considered OIN's claim to immunity from real property taxes on recently purchased fee lands, that analysis is inapposite to the inquiry under the IRA. The latter inquiry can be answered only by looking to the actual relationship between the Office of Indian Affairs and the population of potentially eligible Indians in 1934. Only existing wards of the federal government were eligible to receive IRA benefits, and they could reliably be identified only by determining if the Office of Indian Affairs was providing services to them in 1934. There is no basis to conclude that the IRA's "now under Federal jurisdiction" temporal restriction was intended to encompass scattered remnants of non-tribal Indians who were unknown to the Office of Indian Affairs and not receiving services from that office in 1934, premised on a legal fiction that the historic tribes were not officially terminated (and in the case of the historic Oneida Nation, had removed from New York to Wisconsin and Canada).[30]

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[29] The Second Circuit majority opinion in Sherrill did not accurately describe or weigh the historical DOI records. The same Reeves Report that the panel dismissed was cited by Justice Stevens in Oneida II as correctly setting forth the Oneidas history in New York. 470 U.S. at 260 n.9.

[30] The IRA hearing colloquy between Senator Wheeler and Commissioner Collier, which resulted in the "now under Federal jurisdiction" language in the IRA, addressed practical concerns about the reach of the IRA and its pressure on the government's purse. The phrase "now under Federal Jurisdiction" necessarily focused on actual relationships between the Office of Indians Affairs and Indians then receiving services from that Office. It would be only through those actual contacts that the federal government would know which Indians in 1934 were within its jurisdiction. See Pl. Mov. Mem. at 20-21.

6. Defendants Have Not Shown – And Cannot Show – The Boylan Indians Have Any Relation To The Modern Tribal Applicant

The Federal Defendants only guess about a possible relationship between the inhabitants of the 32 acres and the modern tribal applicant. (U.S. Mov. Mem. at 17-18 n.4). The Administrative Record is silent as to any connection between the Boylan Indians and OIN, which necessitated the submission of extra-record material to demonstrate that gap. Thus, Prof. Beckham surveyed census records and other historical materials and concluded that the Rockwell family, which occupied the 32 acres in 1934, was the sole remaining group of the Boylan Indians, and that there was no relationship between that family and the Indians who later formed OIN.[31] Baldwin Mov. Decl. Exh. WW (Beckham Report at 10-22, 43-44, 59-64, 66-67, 69 (Conclusion ##13 and 27)); Pl. Mov. Mem. at 47. The OIN is unable to point to any evidence in the Administrative Record to the contrary. Indeed, the Secretary did not show that connection and did not develop that part of the record.

The OIN instead asserts that, as a matter of law, its eligibility under the IRA does not depend on any genealogical relationship between the Boylan Indians and the modern tribal applicant. According to the OIN, the IRA vote in 1936 is dispositive on the question, and the vote was not limited to the occupants of the 32 acres or descendants of those Indians. (OIN Opp. Mem. at 11 n.9, 14-15). But that just begs the question of whether that vote – to reject the IRA – has any federal-jurisdiction-conferring effect. For the reasons set forth above, it does not. See,

[31] The modern tribal applicant OIN was formed in the 1940s or 1950s. See id. Exh. UU (1982 DOI memorandum at 9-12 (transcribed)); Baldwin Mov. Decl. at Exh. WW (Beckham Report at 68). The Affidavit of Delia Waterman, an Oneida elder, submitted in earlier litigation (Exh. TT to Tennant Decl.) affirmatively documents the lack of any organized government structure to the tribe in 1930s and the creation of an Oneida tribal organization in 1948. The OIN has no factual response to this sworn historical account rooted in Waterman's personal knowledge, instead merely labeling Waterman "a dissident." (OIN Opp. Mem. at 9 n.6). Whatever her status within the Oneida tribe, the OIN was obligated to lay bare all facts in opposition – if any existed – rather than dismiss the elderly affiant as a dissident. The Federal Defendants do not even try to engage the Waterman Affidavit, tacitly acknowledging they have no factual rebuttal to it.

supra, at 34-35; Pl. Mov. Mem at 37-47. If the Court agrees with Plaintiffs that the vote to reject the IRA by non-tribal Oneidas in New York in 1936 did not confer federal jurisdiction on them as a tribe as of 1934, then the Secretary would need to establish a genealogical relationship between the Boylan Indians and the OIN as a necessary condition for the Boylan case to be relevant to whether the OIN was a recognized tribe under federal jurisdiction in 1934. (Pl. Mov. Mem. at 47-48).

The OIN also argues that because it is "the direct descendant of the Oneida Nation which inhabited New York 200 years ago" it must have had a continuous tribal existence for all that time, including as of 1934. (OIN Mem. Opp. at 15). But that assertion only proves the OIN seeks to employ a legal construct to satisfy the Carcieri temporal requirement rather than looking to the actual facts regarding the Oneidas' status in New York in 1934. As a matter of law and logic, the OIN's present status as a "direct descendant" of the historic Oneida Tribe does not mean that the Oneidas who lived in New York in 1934 were organized as a tribe, had a government-to-government relationship with the federal Office of Indian Affairs, and were therefore both recognized as a tribe and under the jurisdiction of that federal office – and thus were in fact wards of the federal government – in 1934. To the contrary, as a matter of historical fact, the ancient Oneida Tribe in New York fragmented into factions and substantially removed to Wisconsin and Canada in the mid-19th century. The few Oneidas who remained in New York were assimilated into the non-Indian culture or otherwise lived non-tribally on the reservations of other Indians. No Oneida tribal body existed in New York in 1934 with which the federal government then maintained relations. The fact that the non-tribal Oneidas in New York later formed a tribal organization and established a relationship with the federal government – and that tribal body became the acknowledged "descendant" of the ancient Oneida Tribe – proves nothing

under the Carcieri temporal test for tribal eligibility, which must be satisfied, if at all, by the actual facts regarding the Oneidas in New York in 1934. For the reasons set forth above, those facts conclusively prove the Oneidas in New York in 1934 were not tribally organized or recognized as a tribe by the federal government, and further prove these non-tribal Oneidas were strangers to the federal Office of Indian Affairs, receiving no services from it, and thus were not wards of the federal government at that time. Accordingly, the Secretary lacked the statutory authority under the IRA to take land into trust for the benefit of the OIN, because the Oneidas in New York were not a "recognized tribe . . . under Federal jurisdiction" in 1934, and the OIN did not then exist.

II. THE FLAWED TAXATION/JURISDICTION SCENARIOS INFECT THE ENTIRE NEPA ANALYSIS IN THE EIS AND ROD

The Federal Defendants characterize Plaintiffs' arguments concerning the taxation/jurisdiction scenarios as an "irrelevant quibble with a minor aspect of the FEIS" (U.S. Opp. Mem. at 9), asserting that the DOI's use of such scenarios represent a "narrow issue in the overall NEPA analysis" because they "played a role mainly in the [DOI's] full consideration of potential socioeconomic impacts deriving from its choice of an EIS alternative." (U.S. Opp. Mem. at 51). The OIN goes one step further, essentially arguing that the scenarios should escape judicial review because the trust acquisition was purportedly "categorically excluded from EIS review." (OIN Opp. Mem. at 27).[32]

As an initial matter, the fact that the irrational and unreasonable scenarios also infected the DOI's analysis of the socioeconomic impacts of the land-into-trust transfer does not lessen the defects for purposes of NEPA. The scenarios directly relate to the DOI's evaluation of

[32] For reasons previously discussed, NEPA's categorical exclusion does not apply here, and in any event, the DOI's decision to conduct an EIS triggers the concomitant requirement that it do so properly using rational assumptions. (See Pl. Opp. Mem., at 97-101).

reasonable alternatives which is required under NEPA and is the "heart" of an EIS. See 40 C.F.R. § 1502.14. For that reason, the DOI's use of the flawed scenarios amounts to more than an "irrelevant quibble," but rather, is a fundamental defect in the EIS and ROD's analysis of the reasonable alternatives to taking over 13,000 acres of land into trust for the OIN. By using these scenarios, the DOI failed to "[r]igorously explore and objectively evaluate all reasonable alternatives" so that the comparative merits of each alternative could be reviewed. See 40 C.F.R. § 1502.14(a); Pl. Opp. Mem. at 101-103.

The Federal Defendants also maintain that the scenarios were "largely irrelevant to questions of environmental impacts" because the OIN proposed no change in land use. (U.S. Opp. Mem. at 54). However, it was improper for the DOI to operate under this premise in light of the OIN's past development of its lands and its refusal to follow State and local environmental and land use laws. As noted in Plaintiffs' moving papers, the OIN has consistently ignored State wetland, ground and surface water, wildlife, air quality, and solid and hazardous waste management laws and regulations, as well as other State and local laws critical to the public welfare including storm sewer regulations, fire safety and building codes, and laws regulating the storage of gasoline. (See Pl. Mov. Mem. at 75-76).

According to the OIN, Plaintiffs "misunderstand the purpose" of the scenarios which purportedly were intended "to avoid basing the decision on assumptions about what would happen in future litigation" between Plaintiffs and the OIN or "how the parties would react to the various possible outcomes." (OIN Opp. Mem. at 28). Instead of avoiding assumptions about future litigation or the parties' reaction thereto, the DOI unnecessarily injected irrational and unrealistic assumptions into the environmental (and socioeconomic) analysis. (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)). Plaintiffs respond below to the Defendants' arguments on each challenged scenario.

A. Casino Closes and All Enterprises Close (CC-AEC)

The Federal Defendants misconstrue Plaintiffs' argument against this scenario, which assumes that Turning Stone Casino and all OIN enterprises will close. Contrary to the Federal Defendants' assertion, the problem with the CC-AEC scenario is not just the OIN's ability to "pay taxes assessed on the casino by the Town of Verona" (U.S. Opp. Mem. at 56), but also the actual likelihood of the casino closing in the first instance. As previously explained, the Turning Stone and the OIN's other enterprises are very profitable – as of mid-2006, Turning Stone had an estimated worth of between $2.15 billion and $2.31 billion and generated $330 million in revenue annually (which has increased since then). (See Pl. Mov. Mem. at 71). The OIN is not likely to simply abandon this multi-billion dollar venture.

The Federal Defendants have erected yet another "straw man" in asserting that the casino must close if it "operates illegally under IGRA" (U.S. Opp. Mem. at 56). The DOI has itself taken the position that the casino is operating lawfully under IGRA. See Baldwin Mov. Decl. Exh. L (ROD at 12) ("Turning Stone is now operating lawfully under IGRA."). It is facially unreasonable for the DOI to conclude one thing and then formulate a scenario to justify the Determination that relies on the contrary premise. Moreover, after criticizing Plaintiffs for not identifying how the casino could operate "within the confines of State and local laws," the Federal Defendants then recognize that the DOI could have "assumed that the [OIN] would negotiate a deal with the State to keep its casino functioning." (U.S. Opp. Mem. at 56).

Notwithstanding the State court ruling declaring that the Gaming Compact was invalid, the State has never moved to shut down the casino.[33] Further, in light of all of the assumptions the DOI made during the decision-making process, it should have assumed that the OIN would negotiate a new compact with the State rather than forego hundreds of millions of dollars in revenue and close the casino. As for the prospect that the casino would close because of the state court ruling, that result would not have required closure of the OIN's other enterprises (which were not implicated by the State court decision). (See Pl. Mov. Mem. at 70 n.45).

B. Property Taxes Not Paid and Dispute Continues (PTNP-DC)

The Federal Defendants argue that the "disputes continue" because Plaintiffs and the OIN disagree on the meaning of Sherrill and that Plaintiffs incorrectly contend that Sherrill resolved all jurisdictional disputes. (U.S. Opp. Mem. at 57). Sherrill was quite clear that the OIN lacks jurisdiction over the land in question. Sherrill, 544 U.S. at 218-19 ("There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation."); id. at 203 ("[T]he Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders."). The "disputes continue" because the OIN has adopted a self-help litigation strategy of refusing to follow the plain meaning of the Sherrill holding. Notably, the Federal Defendants fail to identify a jurisdictional dispute that Sherrill did not resolve, relying only upon Justice Stevens' lone dissent which claimed Sherrill involved "an Indian tribe's claim to tax immunity," and did not "implicate the tribe's immunity from other forms of state

[33] The fact that Plaintiffs have previously argued that the Turning Stone Casino is operating unlawfully is irrelevant here where the DOI has rejected that contention. Baldwin Mov. Decl. Exh. L (ROD at 12). The DOI cannot decide that the casino operation is lawful, but use the arguments it rejected to fabricate a scenario the very occurrence of which would be directly contrary to the DOI's own conclusions.

jurisdiction. . . .” Id. at 222. Lest there be any doubt about the scope of Sherrill, both the Second Circuit and this Court read that decision broadly to dismiss ancient Indian land claims based on the equitable doctrines of laches, acquiescence, and impossibility. See Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266, 274 (2d. Cir. 2005) (“Although we recognize that the Supreme Court did not identify a formal standard for assessing when [land claim] equitable defenses apply, the broadness of the Supreme Court’s statements indicates to us that Sherrill’s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to ‘disruptive’ Indian land claims more generally.”) (emphasis added) cert. denied, 547 U.S. 1128 (2006); see also Oneida Indian Nation of New York v. County of Oneida, 617 F.3d 114 (2d Cir. 2010), cert denied 132 S. Ct. 452 (2011) (dismissing Oneida land claim); Onondaga Nation v. State of New York, No. 5:05-cv-0314, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010) (Kahn, J.) (dismissing Onondaga land claim) (Baldwin Reply Decl. Exh. G); Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, 233 F.R.D. 278, 282 (N.D.N.Y. 2006) (holding that under Sherrill, “the doctrine of impossibility bars the [Seneca-Cayuga] from asserting immunity from state and local zoning laws and regulations, as well as state and local taxation laws and regulations”).

C. Property Taxes Not Paid and Foreclosure (PTNP-F)

This scenario contemplates the possibility that the OIN would accede to foreclosure of its property rather than pay real property taxes it has the means to pay. According to the Federal Defendants, this scenario was proper because the payment of taxes might be viewed by the OIN as a concession of its “sovereignty over its land” and the DOI was “not in a position to know how the [OIN] would act” if ordered to pay taxes (U.S. Opp. Mem. at 58-59). Of course, the DOI could not know for certain how the OIN would act; it should not, however, have assumed

the OIN would have acted irrationally under the circumstances. The DOI elevated the possibility that the OIN would (1) continue in its refusal to pay property taxes that are owed under Sherrill; (2) lose all of its fee properties; and (3) relinquish its multi-billion dollar casino and resort enterprise over the rational economic actor perspective that the OIN would pay taxes that are judicially determined to be payable. The DOI should have assumed that the OIN would act rationally rather than assume it would willfully refuse to pay property taxes and lose its land through tax foreclosure sales.

For the above mentioned reasons, the scenarios and analyses used in the FEIS and relied upon by the ROD are fundamentally flawed and Plaintiffs' motion for summary judgment on their NEPA claims should be granted.

III. THE DOI EVALUATED THE APPLICATION UNDER THE WRONG REGULATIONS

A. The "On-Reservation" Criteria Do Not Apply To The Application

In opposition to Plaintiffs' motion for summary judgment, the Federal Defendants and OIN make much of argument that the "Oneida Reservation" has not been disestablished. (U.S. Opp. Mem. at 37; OIN Opp. Mem. at 16). This "fact," if it be one,[34] does not help the Defendants' cause. Indeed, the fact that there has been no final judicial determination that the area acknowledged in the 1794 Treaty of Canandaigua as the "reservation" of the historic Oneida Indians has been disestablished means that the land the DOI proposes to take into trust is not within a reservation as that term is defined in the DOI's land-into-trust regulations. See 25 C.F.R. § 151.2(f).

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[34] As previously noted, on November 3, 2011, the Counties in Oneida Indian Nation of New York v. Madison County, 665 F.3d 408 (2d Cir. 2011), moved the Second Circuit for rehearing *en banc* on that issue, and it has been fully briefed and submitted. The question of whether the issue will be heard en banc by the Second Circuit is under review.

As this Court has recognized, the DOI's definition is distinct from other definitions pertaining to land owned by Indians. (Dkt. No. 132 at 17 n.9 (finding that for purposes of an IGRA challenge, the Court must look to the IGRA regulations for the definition of "Indian lands" and not to the land-into-trust regulations' definition of "reservation")). The DOI's land into trust regulation definition, which governs here, sets forth two alternative criteria for a land area to be considered a reservation:

> [T]hat area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2(f). No court has ruled the OIN land satisfies this "reservation" definition.

And, facially, neither criterion is present here. Accepting the Federal Defendants' and OIN's contentions that the land is not subject to final judicial determination that it has been disestablished or diminished, in order for the land to be a "reservation" the United States must recognize the OIN as having "governmental jurisdiction." Irrespective of the Defendants' post-decision litigation positions, the DOI did not find that the OIN has, much less exercises, governmental jurisdiction over the land, and in light of the Supreme Court's decision in Sherrill could not have done so.

An agency is only entitled to deference in construing its regulations where those regulations are ambiguous. See Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000). Where there is no ambiguity, the regulations should be afforded their plain meaning. See Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 152-53 (3d Cir. 2004) (agency's interpretation of its own regulations is not entitled to substantial deference by a reviewing court where an alternative reading is compelled by the regulation's plain meaning); Aspenwood Inv. Co. v. Martinez, 355 F.3d 1256, 1261 (10th Cir. 2004) (finding that where common-sense reading of

plain language conflicts with agency's interpretation, court "'cannot torture the language' to reach the result the agency wishes").

Under the plain terms of the DOI's definition, absent a disestablishment determination (lacking here) land can be a reservation only if the tribe is recognized as having governmental jurisdiction "over" the "area of land" in question. 25 C.F.R. § 151.2(f). Yet the Federal Defendants (in the ROD and in their opposition papers) are unwilling to apply that definition. Instead, the Federal Defendants argue that since the Second Circuit determined that the historic reservation was not disestablished, the OIN fee land is within a "reservation." See Baldwin Mov. Decl. Exh. L (ROD at 32); U.S. Opp. Mem. at 38. That is not what the regulation says. Rather, the regulation makes clear that in the circumstances here the land can be considered a reservation only if the tribe is recognized as having governmental authority over the land.[35] In Sherrill, the Supreme Court refused to recognize that the OIN had governmental jurisdiction over the land acknowledged in the Canandaigua Treaty. To be sure, the Court held that the OIN did not exercise governmental authority and had not done so for 200 years. See Sherrill, 544 U.S. at 216 ("For the past two centuries, New York and its county and municipal units have continuously governed the territory," while the OIN did not); id. at 215 n.9 ("New York's governance remained undisturbed" for 200 years.). That alone makes clear that the OIN does not have governmental authority under any common sense meaning of the term. See also Baldwin Reply Decl. Exh. H (Merriam-Webster excerpt) ("Government" is defined as the "act or process of

[35] In fact, in light of the Supreme Court's Sherrill ruling, the land cannot be considered to be a reservation under fundamental precepts of Indian law either. The sine qua non of a reservation is that the tribe who claims the reservation has tribal sovereignty over the area; that is, the reservation is the area over which the tribe exercises tribal sovereignty. In the words of the Federal Defendants, "reservation land, by its very nature, is land over which a tribe has governmental rights." (U.S. Opp. Mem. at 38). Since the OIN does not have tribal governmental rights over the area in which the OIN fee land is located, that land cannot be a reservation under any view.

governing" and "governing" is "to exercise continuous sovereign authority over"). But the Court did not just hold, as the Federal Defendants and the OIN now say, that the OIN could not exercise sovereignty that it possessed. It held that the Tribe had no sovereignty: "The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." Sherrill, 544 U.S. at 203. The DOI concedes this in the Administrative Record. Baldwin Mov. Decl. Exh. A (FEIS at 1-8) ("[T]he Nation lacks sovereignty over the lands as a matter of law.").

In short, the United States does not recognize the OIN as having governmental authority over the area of land in which the OIN fee lands are located. And there is no contrary finding anywhere in the ROD. The DOI did not find that the holdings in Sherrill meant that the OIN had governmental jurisdiction. (U.S. Opp. Mem. at 38). Nor did the DOI find that the OIN was the tribe "to which the reservation belongs," as the OIN contend. (OIN Opp. Mem. at 17).[36] Instead, the DOI merely found that Sherrill did not disestablish the "Oneida reservation." Baldwin Mov. Decl. Exh. L (ROD at 32). The DOI does not have authority to recognize a tribal sovereignty that the Supreme Court has definitively found to not exist.

The contention in the Federal Defendants' opposition that the United States "recognizes the Oneidas as having governmental jurisdiction over its Reservation lands" (U.S. Opp. Mem. at 38) is disingenuous and wrong. It rests on the proposition that since the Supreme Court in Sherrill did not affirmatively rule on the disestablishment of the former OIN reservation, and since a reservation is an area over which a tribe has sovereignty, then the OIN must have

[36] The OIN's argument that the DOI is entitled to deference on construing its regulations on this issue is misplaced. There is no evidence the DOI ever construed its regulations the same way that the Federal Defendants and OIN do in this action. "That counsel advances a particular statutory interpretation during the course of trial does not confer upon that interpretation any special legitimacy." City of Kansas City v. HUD, 923 F.2d 188, 192 (D.C. Cir. 1991).

sovereignty over the former reservation. But that circular reasoning ignores the holding of the Supreme Court in Sherrill. Notably the Supreme Court did not hold that the former reservation area was not disestablished; it did not reach the issue. Sherrill, 544 U.S. at 215 n.9 ("The Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation, as Sherrill argues."). The Court did hold affirmatively that the OIN does not have sovereignty. Plaintiffs submit that that holding requires the conclusion that the land is not a reservation under any definition, but certainly it means that the land area does not fit within the DOI's land-into-trust definition of reservation.

The Federal Defendants' remaining arguments are equally misplaced. The contention that the OIN exercises some authority over its members is irrelevant. The question under the DOI's definition is whether the OIN has governmental authority over the land. Under Sherrill, the answer to that is no. Sherrill's holding makes clear that State and local government have authority to tax the land owned by the OIN and their land use laws apply to the land, both of which are antithetical to any notion that the OIN has sovereignty over the land. (See also OIN Opp. Mem. at 43 ("As a matter of positive law, there is no question that the Supreme Court's holding [in Sherrill] means that state regulatory authority applied before as well as after the decision.")). That the OIN refused to abide by the State's governmental jurisdiction does not bestow such jurisdiction on the tribe.

The Federal Defendants' suggestion that Section 151.2(f) "focuses on governmental jurisdiction because the question of which tribe properly has governmental rights over reservation land is not always clear"[37] (U.S. Opp. Mem. at 38) is contrary to the unambiguous

[37] The OIN contends that governmental jurisdiction is some amorphous standard as to "the tribe to which the reservation belongs." (OIN Opp. Mem. at 17). Such a construction is not supported by the plain meaning of the language used in section 151.2(f), nor is there any evidence that the DOI operated under that construction or

language of the section and unsupported by any reference to prior commentary or interpretation by the DOI. And it makes no sense in the context of this proceeding, where more than one tribe claims rights in the "reservation." Baldwin Mov. Decl. Exh. L (ROD at 11, 32-33); Baldwin Opp. Decl. Exh. L (AR004424) (Letter from Oneida Tribe of Wisconsin); id. Exh. M (AR012151) (Affidavit of M. Sharon Blackwell, Deputy Commissioner of Indian Affairs at ¶ 3). In any event, since agency action must be evaluated on the grounds provided by the agency and not by litigation positions, and since the DOI did not use the construction offered by the Federal Defendants or find that the OIN had governmental jurisdiction, the Determination must be reversed for failure to apply the correct regulatory standard. See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973) ("[W]e must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process").

B. The Court Cannot Affirm The Determination Based Upon An Unsubstantiated Conclusion That Is Belied By The Administrative Record

The Defendants contend that even if the DOI evaluated the Application under the improper criteria, the Determination should be affirmed because the DOI concluded in a footnote in the ROD, that it would reach the same exact result had it applied the "off-reservation" criteria that are more deferential to the concerns of the affected governments.[38] The "off-reservation" criteria require the DOI to "give greater scrutiny to the tribe's justification of anticipated benefits

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made conclusions in that regard. In addition, the argument would not assist the OIN here. As the Administrative Record makes clear, the Oneida Tribe of Wisconsin, the Stockbridge-Munsee, and the Oneida of the Thames assert rights in the "Oneida Reservation." See Baldwin Mov. Decl. Exh. L (ROD at 11; 32-33); Baldwin Opp. Decl. Exh. L (AR004424) (Letter from Oneida Tribe of Wisconsin); id. Exh. M (AR012151) (Affidavit of M. Sharon Blackwell, Deputy Commissioner of Indian Affairs at ¶ 3).

[38] Plaintiffs do not "acknowledge" that "the ROD considered the application pursuant to the 'off-reservation' regulations . . ." (U.S. Opp. Mem. at 39). Plaintiffs "acknowledge" that the ROD failed to consider the application under the off-reservation criteria and attempted to paper over that deficiency at the last minute by including a footnote stating that the DOI would have reached the same conclusion even if it had applied the correct, off-reservation, criteria.

from the acquisition . . . [and] give greater weight to the concerns raised" concerning tax impacts and, jurisdictional problems, and potential land use conflicts. 25 C.F.R. § 151.11(b). The DOI concluded it would reach the same result in light of the "extraordinary comprehensiveness of the Final EIS and this ROD." Baldwin Mov. Decl. Exh. L (ROD at 33 n.5).[39] The Administrative Record demonstrates, however, that: 1) the DOI gave no weight to – and in fact disregarded – the affected governments' comments concerning tax impacts and jurisdictional problems; and 2) the DOI blindly accepted the OIN's justification of anticipated benefits from the Determination.

In their attempt to distract the Court from the evidence Plaintiffs have offered, the Federal Defendants contend that "it is the ROD that reflects the Department's final considered position" (U.S. Opp. Mem. at 41), and that, essentially, materials from the Administrative Record are irrelevant. Such a position is contrary to law. It is the Administrative Record that informs the Court as to what the DOI actually did, and it is a basic tenet of judicial review of administrative decisions that agency decisions must be evaluated as against the evidence in the administrative record. See, e.g., 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party. . . ."); Dubois v. Dep't of Agric., 102 F.3d 1273, 1285 (1st Cir. 1996) ("[T]he court must undertake a thorough, probing, in-depth review and a searching and careful inquiry into the record." (internal quotations omitted)); Sabin v. Butz, 515 F.2d 1061, 1068 (10th Cir. 1975) (reversing summary judgment in favor of agency where court found "no

[39] Such a conclusion is at odds with the OIN's argument that the affected governments' tax and jurisdictional concerns are "not relevant to the EIS, which properly was concerned with impact on the physical environment." (OIN Opp. Mem. at 18 n.11). The OIN is simply wrong. The ROD relies on the FEIS for economic and jurisdictional analyses. See Baldwin Mov. Decl. Exh. L (ROD at 40) (stating that "potential fiscal impacts were comprehensively evaluated in the Final EIS"); id. (ROD at 60) (stating that "potential future jurisdictional problems and land use conflicts were considered in Sections 4.2, 4.8.6, and 4.9.5 of the Final EIS"). If the OIN's argument is given any credibility, it establishes that the DOI's conclusion that it would come to the same Determination under section 151.11, which expressly relies on the FEIS, is arbitrary and capricious.

reference in any of the administrative record offered by the Government showing consideration" of relevant factors).

As explained below, the suggestion in the ROD that the DOI applied section 151.11 deference is not only unsupported, but also contradicted by the Administrative Record. The notion that the other conclusions in the ROD as to tax and jurisdictional impacts establish that the DOI properly considered those concerns of the affected governments ignores the reality that the DOI's conclusions in the ROD are merely window dressing for its uniform disregard of those concerns. The conclusions in the ROD are consistent with evidence in the Administrative Record demonstrating that the DOI did not give any weight to the affected governments' concerns as it is charged to do under section 151.11. Compare Baldwin Mov. Decl. Exh. DD (ARS005038) ("The objections received from local and state authorities over the loss of jurisdiction are considered to be a control issue . . . ."), with id. Exh. L (ROD at 67) ("The State and local governmental comments are, in part, arguments about which government should have jurisdiction over the Nation's lands . . . ."). While the ROD does recite snippets of the concerns raised by the affected governments, it summarily rejects them. Tellingly, the Federal Defendants have failed to identify one instance in the decision-making process where the DOI actually did give weight to the affected governments' concerns, scrutinize the OIN's justification for anticipated benefits, or undertake a distance analysis per section 151.11(b) to determine how much deference or scrutiny should be given. See Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 100, 103 (2d Cir. 2006) (finding that it is the agency's duty and not the court's "province to mine the record for data supporting the agency's blanket conclusions" and that "it is the agency's task to conduct a thorough examination of the record, to explain why it has rejected or ignored contradictory evidence").

1. The DOI Did Not Give Greater Weight To The Comments Of The Affected Governments

Much as the Federal Defendants and OIN try to downplay the significance of Plaintiffs' proffered evidence, the facts are undisputed. The DOI cited to the FEIS as purported justification for concluding the same Determination would be reached under the section 151.11 criteria. Baldwin Mov. Decl. Exh. L (ROD at 33 n.5). In communication from the DOI to Malcolm Pirnie, the contractor tasked with compiling the FEIS, DOI personnel stated that "[t]he concerns expressed over local jurisdiction and utilities or other services are not considered substantial reasons to deny the transfer," (Baldwin Mov. Decl. Exh. DD (ARS005037)), "State jurisdictional issues should not be considered substantial reasons to deny the fee-to-trust transfer" (id. at ARS005038), and "the tax issue is not necessarily a valid issue" (id. at ARS005040).[40] The ROD reflects those understandings. Baldwin Mov. Decl. Exh. L (ROD at 40, 66-67). Similarly, the Administrative Record demonstrates that DOI personnel did not believe that section 151.11 was applicable and therefore did not believe that any deference was due. Baldwin Mov. Decl. Exh. ZZ (AR011366) (Draft responses to individual confidential commenter); id. Exh. AAA (AR027074) (Letter from Division of Indian Affairs to Malcolm Pirnie) ("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."); see also Baldwin Mov. Decl. Exh. K (Internal DOI e-mail) ("[The

[40] The Federal Defendants' protest that this document is "preliminary and deliberative" (U.S. Opp. Mem. at 41), does not diminish the significance of the document. Magistrate Judge Peebles concluded, and this Court affirmed, that "because the DOI's decision-making process is at the heart of this action, I find that the deliberative process privilege imposes no restriction on plaintiffs' access to pre-decisional materials." (Dkt. No. 183 at 30). All information in the Administrative Record is "preliminary" in some sense because it precedes the final determination. That fact, however, does not make the documents in the Administrative Record irrelevant. If the only document that is relevant (because it is not "preliminary") is the ROD, then the Administrative Record would be legally irrelevant. The final arbitrary and capricious conclusions stated in the ROD are indicative of the same dismissive rationale expressed in Exhibit DD to the Baldwin Mov. Decl. See also infra Section V.

OIN] expect a bunch of negative comments but the fee-to-trust action is justified as a Supreme Court directed procedure.").[41] Contrary to the assertions of the Federal Defendants, it is relevant that the DOI believed the on-reservation criteria were applicable because those criteria are less deferential to the affected governments and more critical of the application, and because it contradicts the bald conclusion that the DOI would reach the same result under the off-reservation criteria.

2. The DOI Did Not Give Greater Scrutiny To The OIN's Justification Of Benefits From The Determination

Similarly, the Administrative Record reflects little to no scrutiny of the OIN's justification of the anticipated benefits from the Determination. The Application states that taking land into trust "is needed to preserve the Nation's sovereignty and its lands, which have been threatened with foreclosures and transfers to local governments, and is necessary to facilitate the Nation's self-determination, its economic development and its ability to provide housing, jobs, education and health care for its members." Baldwin Mov. Decl. Exh. C at 2. The ROD parrots back that the Determination is needed for "political self-determination, self-sufficiency, and economic growth . . . [that] provides for the location of tribal government and administrative buildings, housing for Nation members, health and educational facilities . . . ." Id.

[41] Moreover, the Federal Defendants do not point to any analysis or finding of the DOI that the land subject to the Determination is in "close proximity" (U.S. Opp. Mem. at 40) to the 32-acre parcel (not in trust) that might satisfy the "reservation" definition under 25 C.F.R. § 151.2(f). Therefore, their argument that the DOI would reach the same conclusion if it properly applied the off-reservation criteria is nothing more than a post-hoc litigation position. Similarly, the OIN's argument that there was no reason for the DOI to explain its decision under section 151.11 is without merit (and contrary to law). If section 151.11 applies and the plain meaning is accorded to the term "reservation" under Part 151, the land would not be "within reservation boundaries . . . so the distance from the trust land to the reservation is zero" as the OIN contends. (OIN Opp. Mem. at 18). If the off-reservation criteria apply then it necessarily means that the OIN does not exercise governmental jurisdiction over its land, with the possible exception of the 32-acre parcel. The OIN once again ignores the definition of reservation in section 151.2(f). At a minimum, the DOI would be required to figure out how much scrutiny of the OIN's purported benefits and how much weight to the affected governments' comments it would give in light of the distance between the parcels to be taken into trust and the 32-acre parcel, if the DOI decided such parcel satisfied the definition. The DOI did not do so.

Exh. L (ROD at 8). The DOI concluded this, even though it had also concluded that trust status was not needed for the OIN enterprises to continue operating (Baldwin Mov. Decl. Exh. L (ROD at 12; 39); id. at Exh. SS (ARS004558) (Handwritten note by James Cason)), and that the OIN already "was so successful in achieving its goals of enhancing self-determination and financial independence" (id. at Exh. A (FEIS at 3-246)). Thus the Administrative Record demonstrates that notwithstanding the DOI's findings to the contrary, the DOI adopted the OIN's justification with little scrutiny.

Since the DOI's footnoted conclusion that the Determination would be the same if it had applied section 151.11 is contradicted by the Administrative Record, and the Defendants have failed to cite to evidence to support it, the Determination cannot be affirmed.

IV. THE DOI ACTED CONTRARY TO ITS OWN POLICIES AND REGULATIONS

Much as they try to degrade the importance or efficacy of the DOI's policies, the Defendants cannot deny that by issuing the Determination the DOI failed to abide by its longstanding policies and the plain meaning of its regulations. The Defendants argue that the noncompliance with land-into-trust policy is irrelevant, that the standard practices ignored by the DOI were not meant to protect Plaintiffs and as such, noncompliance should be overlooked, and the unambiguous and compulsory land-into-trust regulations actually mean something other than what they state. Defendants' attempts to isolate and analyze each of the DOI's irregular actions in a vacuum ignores the inescapable conclusion that the DOI's decision-making process and handling of the Application was anything but regular and was arbitrary and capricious.

A. The DOI Is Not Entitled To A Presumption Of Regularity

Both the Federal Defendants (U.S. Opp. Mem. at 6) and the OIN (OIN Opp. Mem. at 2) argue that the DOI should be afforded a presumption of "regularity" on review of the

Determination. Such presumption can be rebutted with probative evidence of irregularity, and Plaintiffs have demonstrated on this motion that the DOI's conduct during the decision-making process was anything but regular. See Kelly v. United States, 826 F.2d 1049, 1053 (Fed. Cir. 1987) ("It is not enough for the [agency] to rely on the presumption of official procedural regularity when there is contrary credible evidence presented to overcome the presumption or where the administrative action is arbitrary or capricious."). Plaintiffs have established that the DOI repeatedly acted in an arbitrary and capricious manner:

- After a request from a former DOI and DOJ official turned OIN lobbyist to "creat[e] a special team within your organization to review and hopefully approve the lands described in the Tribe's application" (Baldwin Mov. Decl. Exh. E (AR083811)), the DOI removed decision-making authority from the Eastern Regional Office to the central office. Id. at Exh. G (ARS001065) (Internal DOI e-mail); id. Exhs. H and I (Internal DOI memorandums).

- Instead of sending formal notice of the Application to and requesting tax assessments from the State and local governments within thirty days of receipt of the Application, the DOI violated 25 C.F.R. §§ 151.10, 151.11(d) by waiting over five months to send such formal notice. Compare Baldwin Mov. Decl. Exh. C (Application dated April 4, 2005) with id. Exh. J (Sept. 20, 2005 notice to George Pataki).

- Before responses to the formal notice were received from the State and local governments or a complete EIS issued, the senior DOI official responsible for the Determination targeted an initial amount of 10,000 acres of land to take into trust for the OIN. Id. at Exhs. G (Sept. 22, 2005 internal DOI e-mail), K (Sept. 2, 2005 internal DOI e-mail).

- The DOI ignored the plain meaning of "reservation" as defined under 25 C.F.R. § 151.2(f) and applied "on-reservation" criteria to the Application when the "off-reservation" criteria – which are more deferential to the State's and local governments' concerns – should clearly apply.

- The DOI allowed the OIN to select a contractor for the EIS – Malcolm Pirnie, a contractor which was already under contract with the OIN for consulting work on the Application (Baldwin Opp. Decl. Exh. G (Oct. 3, 2005 e-mail from Anthony Russo, Malcolm Pirnie to Tom Mason, Zuckerman Spaeder)) – and draft the Memorandum of Agreement (Pl. Opp. Mem. at 57-60).

- Prior to Malcolm Pirnie's drafting of the DEIS, the DOI told the contractor that the State's jurisdictional and tax concerns were not "substantial" or "valid" and that the affected governments' concerns about jurisdiction were merely a "control issue." Baldwin Mov. Decl. Exh. DD (AR005037-38, AR005040).

- After beginning the title examination procedure in April 2005, the DOI requested the issuance of preliminary title opinions ("PTOs") (Baldwin Mov. Decl. Exh. KK (AR007022)), but abandoned that process approximately two years later (Id. at Exh. JJJ). Notwithstanding that it is standard DOI practice to require PTOs before a decision is made to bring land into trust (Baldwin Mov. Decl. Exhs. GGG, HHH, III, TT at 16), the DOI did not procure PTOs before issuing the ROD.

- Even though the land-into-trust regulations require "elimination" of liens and encumbrances on land, 25 C.F.R. § 151.13, the DOI instead accepted qualified letters of credit and pledges to obtain supplemental letters of credit from the OIN to address (but not eliminate) disputed tax liens on the property.

- The DOI determined to take over 13,000 acres of land into trust for the OIN and disregarded its longstanding policy, reissued after the Part 151 regulations were promulgated, to not take land into trust for tribes who are self-sufficient and can manage their own affairs. Baldwin Mov. Decl. Exh. CCC (Apr. 21, 1959 memorandum from Commissioner of Indian Affairs to area directors and supervisors).

Instead of proffering evidence and reasoned explanation from the Administrative Record to justify these departures, the Defendants seek to isolate each instance in a vacuum and advance arguments based on technicality. When examined in the aggregate, however, the inescapable

conclusion is that the DOI abandoned its standard practices, ignored its own regulations, and arbitrarily and capriciously decided to take an unprecedented amount of land into trust for the OIN.

B. The DOI's Policy Not To Take Land Into Trust For Tribes Who Are Self Sufficient Was Not Superseded, And The DOI Gave No Explanation For Ignoring It

In providing comments on the Application, the State notified the DOI that taking land into trust for the OIN would run afoul of the DOI's policy not to take land into trust for tribes who can manage their own affairs. Baldwin Mov. Decl. Exh. O (AR000287-88 n.3); id. Exh. P (AR001113-14 n.3). That policy is spelled out in a 1959 memorandum from the Commissioner of Indian Affairs to all Area Directors referenced in the State's comments, which states: "[W]e will not take additional land in trust for Indians who now have the ability to manage their own affairs." Baldwin Mov. Decl. Exh. CCC at 1. That policy was partly revised (not retracted as the OIN contend) the next year when another memorandum was issued stating "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 Federal Defendants incorrectly contend that these policies were effectively superseded when the land-into-trust regulations were promulgated in 1980. (U.S. Opp. Mem. at 42-43). The Federal Defendants fail to mention, however, that both memoranda were incorporated and reissued in the Bureau of Indian Affairs Manual ("BIAM") in February 1984, years after the "Termination era" ended (U.S. Opp. Mem. at 42 n.29) and four years after the

land-into-trust regulations were promulgated.[42] Baldwin Opp. Decl. Exh. C (1984 BIAM Reissue at 54 IAM 2.2.1F). The BIAM expressly states 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 or Indian tribes may be permitted to acquire land in a trust status." Id.[43]

Instead of satisfying its "duty to explain its departure from prior norms," Atchison, 412 U.S. at 807-08,[44] the DOI chose to ignore it without explanation. This policy is not a ministerial or informal procedural guideline, it is a published policy of the DOI regarding when it should exercise its discretion to take land into trust. Accordingly, it is arbitrary and capricious for the DOI to ignore it without a reasoned explanation or acknowledgement.[45] The OIN argues that Plaintiffs "offer no evidence," despite their citation to the Administrative Record where the State

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[42] The OIN's contention that the DOI's IGRA regulations at Part 292 somehow repealed the referenced policies so that the DOI did not have to consider them is similarly unpersuasive as Part 292 of the regulations was published in the Federal Register on the same day the ROD was issued, and was not scheduled to go into effect until a month later. Baldwin Reply Decl. Exh. I (73 Fed. Reg. 29354 (2008)).

[43] The OIN's citation to Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82 (2d Cir. 2000) (OIN Opp. Mem. at 20), is inapposite. That case found that the wealth of a tribe did not affect the application of "Indian canon of construction" to construction of the Connecticut Indian Land Claims Settlement Act. 228 F.3d at 92-93

[44] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 129 S. Ct. 1800 (2009) (cited at U.S. Opp. Mem. at 42), is not to the contrary. That case still acknowledged that "[a]n agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books." 129 S. Ct. at 1811.

[45] The other cases cited by the OIN (OIN Opp. Mem. at 19) in an attempt to argue that the DOI is free to ignore this policy are inapposite. The Supreme Court has held that "[w]hatever the ground for departure from prior norms . . . it must be clearly set forth so the reviewing court may understand the basis of the agency's action." Atchison, 412 U.S. at 808. The Court's later opinion in Schweiker v. Hanson, 450 U.S. 785 (1981) (cited at OIN Opp. Mem at 19) does not alter that premise, instead it stands for the proposition that failure to follow a ministerial instruction is not conduct that would justify estoppel of an agency. Id. at 790. Schweiker is not an APA case. Equally unpersuasive, Coliseum Square Ass'n, Inc. v. Jackson, 465 F.3d 215 (5th Cir. 2006), which relies upon Schweiker, notes that certain publications which are not promulgated pursuant to a statutory grant and are "internal house-keeping measures" do not constitute "an automatic violation" of the law, and are still subject to "the normal 'arbitrary and capricious standard.'" Id. at 229-30. Lyng v. Payne, 476 U.S. 926, 2937 (1986), which also relies on Schweiker, is similarly inapposite because the court there held that it need not "definitively resolve" the issue of what relief it could fashion for an agency's failure to follow its own policies where the agency did not violate its self-imposed obligations. Id. at 938.

first raised the policies, and implies that Plaintiffs need to proffer proof that the DOI has followed such policy. This is not the standard for administrative review – the DOI's decision must be adjudged against what it did in this Determination.

Since it is undisputed that the OIN generates between $300 and $400 million in income a year (Baldwin Mov. Decl. Exhs. FFF (AR013094) (Jarrell Report at ¶ 49), VV (ARS000904) (Internal DOI e-mail)), that the DOI concluded that the OIN enterprises (including the Turning Stone Casino) can operate without trust status (id. at Exhs. L (ROD at 12, 39), SS (ARS004558) (Handwritten note by James Cason)), and that the DOI noted the OIN would pay, at most, $16.2 million a year in property taxes (id. at Exh. L (ROD at 45 n.7)), the DOI's policy to not take land into trust for a "big operator" tribe that can manage its own affairs was directly implicated. It was arbitrary and capricious for the DOI to ignore that policy without providing an explanation to justify its deviation.

C. The DOI Failed To Procure Preliminary Title Opinions Per Its Normal Practice

Neither the Federal Defendants nor the OIN deny that it is DOI policy to obtain preliminary title opinions ("PTOs") before issuing a land-into-trust decision. (Pl. Mov. Mem. at 60). Nor do they dispute that the DOI began the process of procuring PTOs shortly after the Application was received (Baldwin Mov. Decl. Exh. KK (AR007022) (April 29, 2005 DOI Memorandum)), but abandoned that process without explanation when it became clear that it would be problematic for the DOI to "pass on the title with the tax liens filed against [the land]." Id. at Exh. JJJ (Jan. 19, 2007 internal DOI e-mail at 2); Pl. Mov. Mem. at 61.

Instead, the Defendants contend that Plaintiffs lack standing and that the Determination cannot be overturned because the DOI was not bound by its policy to obtain PTOs, in an effort to distract the Court's attention from the irrefutable fact that the DOI did not act in accordance with

its policies or standard procedures. The Federal Defendants' standing argument is misplaced. Prudential standing is often satisfied by a party that is either "regulated" by a statute as that party has the best incentive to police the agency's enforcement of a statute where such enforcement imposes a greater restriction than Congress intended, or a party whose interests the agency is supposed to protect. The DOI itself has stated that state and affected governments are the "proper entity to 'police' Interior's decision to acquire land in trust for a tribe . . ." Baldwin Opp. Decl. Exh. Q (Answering Brief for Defendants-Appellees, 2010 WL 4569092, at *36-37, Patchak v. Salazar, 632 F3d 702 (D.C. Cir. 2011)). Accordingly, Plaintiffs have prudential standing. See, e.g., Safe Extensions, Inc. v. FAA, 509 F.3d 593, 600-01 (D.C. Cir. 2007) (party regulated by statute had standing to challenge agency action where plaintiff was "effectively regulated"); Florida v. Weinberger, 492 F.2d 488, 493-94 (5th Cir. 1974) (state had standing to challenge Medicare regulations which would interfere with its statutory program). None of the cases cited by the Federal Defendants stands for the proposition that a party lacks standing to object to an agency's noncompliance with a particular regulation section or policy where that party has standing to challenge agency decisions made under the statute for which those regulations and policies were enacted. In other words, there is no dispute that the Plaintiffs have standing to challenge the Determination[46] and none of the authorities cited by the Federal Defendants preclude Plaintiffs from challenging the DOI's noncompliance with the regulations or policies under which the Determination was supposed to be made. In fact, those cases cited

[46] The DOI has, in fact, effectively admitted that states and municipalities are "akin to the regulated entity" under the IRA for purposes of prudential standing. Baldwin Opp. Decl. Exh. Q at *37.

by the Federal Defendants (U.S. Opp. Mem. at 43) make clear that the relevant inquiry is as to the complainants' standing vis-à-vis the statute, not the regulation or policy that was violated.[47]

Moreover, Plaintiffs are harmed by the failure of the DOI to comply with its standard practice of obtaining PTOs because it is the Counties' rights that encumber title of the land of which the United States seeks to hold.[48] The DOI's attempts to contort the plain meaning of the Part 151 regulations in the hopes that it can delay the title opinion process until after the Determination is a thinly veiled attempt to get around the fact that the DOI would not be able to get a clear title opinion on the land because, as explained below, letters of credit and promises of future and supplemental letters of credit do not extinguish tax liens, even if those liens are disputed. If nothing else, the DOI's failure to procure PTOs is illustrative of its irregular conduct during the decision-making process and justification for not affording the Federal Defendants a presumption of regularity in review of the Determination.

Also unpersuasive is the OIN's argument that the various documents cited by Plaintiffs (Pl. Mov. Mem. at 60), do not create rights in third parties or limit the DOI's discretion. (OIN

[47] In any event, the obtaining of PTOs is part of the DOI's title examination under section 151.13 (Pl. Mem. at 59-60), and it cannot be argued that Plaintiffs do not have prudential standing to challenge noncompliance with the regulations at Part 151 as those regulations expressly provide for Plaintiffs' comments during the decision-making process and obligate the DOI to wait 30 days before taking land into trust so that a decision can be challenged. See 25 C.F.R. §§ 151.10, 151.11(d) & 151.12(b).

[48] The Counties stand to suffer if the DOI does not comply with its procedures to eliminate liens that make title unmarketable because they are the beneficiaries of the tax liens. For this reason, the OIN's argument that Plaintiffs have "no stake in whether or not there are defects in title acquired by the United States" is without merit. (OIN Opp. Mem. at 23). The United States has taken the position that it is immune from suits involving trust land, and a failure by the DOI to properly account for the liens presents an actual injury to the Counties. The OIN argue that the DOI's decision to obtain title insurance obviates the need for PTOs, but that position makes no sense because, as the OIN admit, tax liens are not covered by the insurance. (OIN Opp. Mem. at 22). The DOJ's Title Standards specifically require PTOs – "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) – but also contemplate the issuance of title insurance. Id. The two are not mutually exclusive. The OIN's argument that PTOs are not needed because the "DOI and plaintiffs already knew those tax liens existed" (OIN Opp. Mem. at 22) does not explain why the DOI initially undertook the process of obtaining PTOs for almost two years. Compare Baldwin Mov. Decl. Exh. KK (AR07022) (April 29, 2005 Memorandum), with id. Exh. LL (AR004981) (Aug. 2, 2006 internal e-mail), id. at Exh. JJJ at 2.

Opp. Mem. at 23-24). Unlike the cases cited by the OIN, Plaintiffs also rely on the DOI's Title Standards which are incorporated by reference into the land-into-trust regulations at section 151.13. Such Standards are more than mere "interpretive rules." Gila River Indian Cmty. v. United States, 776 F. Supp. 2d 977, 992 (D. Ariz. 2011) (cited at OIN Opp. Mem. at 24).[49]

D. The DOI Failed To "Eliminate" All Tax Liens Per Its Mandatory Obligation Under 25 C.F.R. § 151.13

The Federal Defendants and OIN spend a considerable amount of space in their opposition briefs arguing that section 151.13 should not be afforded its plain meaning. Section 151.13 is unambiguous: prior to "final approval" the Secretary "shall require elimination" of any such "liens, encumbrances, or infirmities [that] make title to the land unmarketable." 25 C.F.R. § 151.13. The tax liens currently on the lands to be taken into trust – even if disputed – render title to those lands unmarketable. See Lynbrook Gardens, Inc. v. Ullmann, 291 N.Y. 472, 477 (1943) ("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 . . . ."); 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).

It cannot be credibly disputed that the tax liens over the property have not been eliminated, and neither the Federal Defendants ("letters of credit is a permissible way to address title infirmities" (U.S. Opp. Mem. at 45)) nor the OIN ("DOI did make adequate provision" (OIN Opp. Mem. at 25)) so contend. Instead, both attempt to construe "shall require elimination" to mean some more lenient standard that is to the satisfaction of the United States. (U.S. Opp.

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[49] The other case cited by the OIN for this proposition, Mich. Gambling Opposition v. Norton, 477 F. Supp. 2d 1, 11 (D.D.C. 2007), aff'd on other grounds, 525 F.3d 23 (D.C. Cir. 2008) (OIN Opp. Mem. at 24), specifically refuted the argument that the CEQ made a certain checklist binding on the DOI but also noted that the "contention is waived as it is raised only in the reply brief." 525 F.3d at 28-29 & n.3.

Mem. at 46; OIN Opp. Mem. 25).[50] This construction is not entitled to deference because the regulation is not ambiguous and the construction is plainly erroneous. Christensen v. Harris County, 529 U.S. at 588 ("Because the regulation is not ambiguous . . . deference is unwarranted."); Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 703-04 (9th Cir. 2004) (where plain language decides issue, deference is unwarranted); Mercy Catholic, 380 F.3d at 152-53; Aspenwood, 355 F.3d at 1261.

The DOI's irregular decision to accept qualified letters of credit and promises from the OIN to procure additional letters of credit cannot be defended as "reasonable" regardless of the tax litigation between the Counties and OIN. Even if the DOI were afforded discretion under section 151.13 (which in this case it is not), the DOI did not analyze any of the risks presented by the letters of credit from the OIN. (See Pl. Mov. Mem. at 62-67). Nor do the Federal Defendants or OIN point to a single document demonstrating that the DOI objectively analyzed the letters of credit before accepting them or found precedent to do so, other than the unsubstantiated conclusions stated in the ROD. The Federal Defendants contend that the "problem" was that at the time of the Determination, "it was not clear that the taxes in question were lawfully owed" (U.S. Opp. Mem. 47), but just because the legality of the liens was disputed does not mean that the DOI is excused from complying with its regulations or making an objective, reasonable assessment of the letters of credit before accepting them. Just as unpersuasive, the Federal Defendants actually ask the Counties to bank on the "possibility that the tax litigation will be resolved prior to formal acceptance of land in trust, allowing the

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[50] The Federal Defendants cite Tohono O'odham Nation v. Phoenix Area Director, BIA, 22 IBIA 220, 235 (IBIA 1992) (U.S. Opp. Mem. at 46) in support of the DOI's interpretation of its obligations. The language pertaining to section 151.13 in Tohono O'odham, however, is arguably dicta as it involved land acquired under the Gila Bend Indian Reservation Lands Replacement Act, not the IRA, and the IBIA specifically noted that it did not need to decide "the technical applicability of these regulatory provisions to the trust acquisition at issue here." Id. at 236 n.13.

Department opportunity to require payment of all lawfully owing taxes before formal acceptance of title." (Id. at 47). The import of this argument is unavoidable and precisely the problem with the DOI's conduct: if the tax litigation is not resolved before "formal acceptance"[51] the DOI will not have an opportunity to require the OIN to pay lawfully owing taxes. Regardless of whom the Defendants contend section 151.13 was meant to protect,[52] the Counties are directly harmed by the DOI's failure to satisfy its obligations under it.[53]

Accordingly, the Determination must be vacated because the DOI failed to act in accordance with its own policies and regulations and offered no explanation as to why it was deviating from those policies and regulations.

V. THE DOI'S CONCLUSIONS AS TO THE CONSIDERATIONS UNDER SECTION 151.10 ARE ARBITRARY AND CAPRICIOUS

A recurring theme in the opposition papers submitted by the Defendants is that the DOI's conclusions as to the mandatory considerations under the land-into-trust regulations are not arbitrary and capricious for the mere fact that the DOI reached a conclusion. Reaching

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[51] Notably, section 151.13 does not refer to "formal acceptance" of the land into trust, but rather requires elimination of liens and encumbrances prior to "final approval action." "Formal acceptance" is a term used in section 151.14, which occurs after section 151.13 is satisfied.

[52] The OIN's related argument that Plaintiffs do not have standing to challenge the DOI's failure to satisfy section 151.13 is inimical to section 151.12 of the land-into-trust regulations 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. Baldwin Reply Decl. Exh. J (61 Fed. Reg. 18082 (1996)). The Counties' ability to collect taxes due may be directly impaired by the DOI's failure to abide by its regulations. If the land is taken into trust without "elimination" of the tax liens, the United States will hold title and will no doubt argue that it is immune to the Counties' efforts to seek payment through foreclosure on the land. Baldwin Opp. Decl. Exh. Q (Answering Brief for Defendants-Appellees, 2010 WL 4569092 at *39).

[53] The Federal Defendants' argument that the Determination is independent of the DOI's obligations to require elimination of liens under the land-into-trust regulations is another example of the Federal Defendants attempting to isolate and analyze in a vacuum the DOI's various failings under its regulations, practices, and policies. As Plaintiffs explained in their moving memorandum, the plain reading of Part 151 and the policy explained by Mr. Cason is that tax liens must be eliminated before "final approval" – i.e., the Determination – is made. (Pl. Mov. Mem. at 62-63 n.39, 67 nn.43-44).

conclusions does not satisfy an agency's obligations to consider applicable criteria unless those conclusions are rationally connected to evidence in the record and rely on reasonable methodology. Natural Resources Def. Council v. EPA, 571 F.3d 1245, 1256-57, 1267 (D.C. Cir. 2009); see also Judulang v. Holder, 132 S. Ct. 476, 478, 485 (2011) (immigration agency's methodology to limit applicability of discretionary relief for alien must be used in "some rational way").

A. The DOI Drew Arbitrary Conclusions Regarding The OIN's Need For Land

The Federal Defendants' principal argument that the DOI's conclusion as to 25 C.F.R. § 151.10(b) should be affirmed is that the OIN's economic success, ability to pay taxes, and current land holdings and uses do not have to be considered when considering a tribe's need to have land taken into trust. (U.S. Opp. Mem. at 59-60). Instead, "[i]t is enough to conclude the Nation needs the land" (U.S. Mem. at 60) even if that conclusion is devoid of support from the Administrative Record. Under the Federal Defendants' estimation, so long as the DOI concludes that taking land into trust will serve the amorphous and ambiguous goals of "self-determination" and "self-government," the remaining considerations under section 151.10 are merely perfunctory and do not prevent the DOI from taking land into trust, regardless of its findings under each criterion.

Even the findings the DOI did make regarding the OIN's self determination do not support taking over 13,000 acres of land into trust. The DOI expressly found that "[f]or several years, the Nation was so successful in achieving its goals of enhancing self-determination and financial independence that it determined that it could return Federal Tribal Priority Allocation (TPA) funds to the BIA." Baldwin Mov. Decl. Exh. A (FEIS at 3-246). It also noted that the OIN "made significant progress in developing programs and services and delivery 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. (FEIS at 4-382). It concluded that the "Nation has constructed a diversified business structure." Id. (FEIS at 1-8). Neither the Federal Defendants nor the OIN point to any substantive findings – as opposed to unsubstantiated challenged conclusions – that the OIN has any need to have 13,000 acres of land taken into trust for its self-determination.

The Federal Defendants also argue that being free of property taxation and state and local control "are characteristic of a sovereign, self-governing tribal entity which is what the Nation is" (U.S. Opp. Mem. at 60) but this cannot support a finding of "need" for the Determination. If the Federal Defendants' argument is that there is a need for the Determination because having land free from state and local taxation and regulation is part-and-parcel of tribal self-determination, then it would render need merely a pro forma consideration. If the fact that once land is taken into trust it will be free of state and local tax and regulation were sufficient to demonstrate a need for the DOI to take land into trust, then need would be satisfied in every land into trust application, rendering section 151.10(b) meaningless.

Alternatively, if the Federal Defendants' argument is that the OIN has some need to be free from state and local taxation and regulation, that argument fails because it is contradicted by the DOI's own conclusions and the Administrative Record. The DOI concluded, albeit arbitrarily, that there would be no jurisdictional problems or potential land use conflicts because the "Nation's uses are generally consistent with local zoning" (Baldwin Mov. Decl. Exh. L (ROD at 59)), the "Nation has followed accepted practices" regarding building construction, inspections and food safety, id. (ROD at 67), and there will be continued "consultation and coordination between the Nation and Federal, New York State, and local agencies" after taking

land into trust. Id. (ROD at 68). There is no conclusion that the OIN is actually aggrieved by being subject to State regulatory control, and since the DOI found that "the Nation proposes no change in land use," id. (ROD at 67), then the Determination would do little in this regard. Similarly, the Federal Defendants and the OIN do not (and cannot) dispute the conclusions by Professor Jarrell found in the Administrative Record that "the OIN can meet the property tax burden for all OIN lands of $16.2 million without significantly financially impairing the OIN Enterprises or frustrating the OIN goals of economic self-sufficiency." Baldwin Mov. Decl. Exh. FFF (AR013112) (Jarrell Report at ¶ 98); see also id. at Exh. II (Supplemental Jarrell Report at ¶ 72). While self-determination and self-governance may be goals of taking land into trust generally, the Administrative Record lacks the support that the Determination is necessary for or actually serves those goals and purposes in this case.

The Federal Defendants' reliance on South Dakota v. Dep't of Interior, 423 F.3d 790 (8th Cir. 2005), is also unavailing. In South Dakota, the DOI's final decision detailed the need of the Lower Brule Sioux Tribe for a parcel to be taken into trust because its location was attractive to business and would enhance the tribe's economic rehabilitation. Id. at 801. The lower court explained that the Secretary found that the parcel was necessary "to generate much needed income for the Lower Brule Sioux Tribe." 314 F. Supp. 2d 935, 943 (D.S.D. 2004). Those are not the kind of findings that the DOI made with regard to the OIN's Application. Instead, the ROD goes to great lengths to explain that there is "no mathematical formula" to determine how much land is needed vis-à-vis tribal membership or "concerning the wealth (or lack thereof) of a tribe," and that the OIN is not disqualified by its "financial wherewithal and competence to manage its affairs." Baldwin Mov. Decl. Exh. L (ROD at 35). Rather than identifying concrete needs of the OIN – as opposed to referring to certain unexplained "current and near term needs"

– the DOI found that the Determination was needed for the OIN to "continue its existing uses of the Subject Lands" notwithstanding the fact that the DOI also concluded that trust status was not necessary for the OIN to continue its uses of the land. Compare id. (ROD at 36) with id. (ROD at 12 ("Turning Stone is now operating lawfully")), id. (ROD at 39 (future land uses that "may be completed whether or not the land is acquired in trust")), and id. Exh. SS (ARS004558) (Handwritten note by James Cason) (indicating that OIN SavOn gas stations can operate in fee).[54]

What the Administrative Record also demonstrates is that at least as early as September 2005, the DOI arbitrarily targeted a figure of 10,000 acres for the Determination – whether that target was referred to as a "limit" (Baldwin Mov. Decl. Exh. G (ARS001065)), "direction" (Baldwin Mov. Decl. Exh. WWW), or called a "ceiling" (OIN Opp. Mem. at 33).[55] It is undisputed that this figure was arrived at before local governments and school districts provided their tax assessments, before formal comments were received from the affected governments,[56] before an EIS was prepared, and before environmental assessments were conducted on the land. Much as the Federal Defendants and OIN disingenuously try to spin this figure as evidence of

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[54] The Federal Defendants' own opposition brief is just as contradictory. On the one hand, the Federal Defendants argue that the Second Circuit never held "that the Oneidas lacked governmental jurisdiction over its members within its Reservation" (U.S. Opp. Mem. at 38), and on the other hand contend that the Determination is somehow necessary for the OIN to "take responsibility for its member's (sic) health, welfare, and social needs as participants in a self-governing tribal community." (U.S. Opp. Mem. at 61).

[55] Though the OIN try to argue that 10,000 acres was a "ceiling" it concedes that "[u]ltimately, DOI decided to take more than 10,000 acres into trust . . . after a thorough parcel by parcel review, a complete EIS, and the benefit of comments from plaintiffs and others." (OIN Opp. Mem. at 33). Thus, even in the OIN's estimation, the 10,000 acre figure was not supported by any analysis and was arrived at before substantive review of the Application.

[56] Sections 151.10 and 151.11 provide the procedure for the DOI to send notice and receive written comments from affected governments and the undisputed fact is that the DOI targeted 10,000 acres before sending that notice and receiving those comments. The OIN suggests that if a state or local government informally knew about an application to take land into trust and had some contact with the DOI, then it is acceptable for the DOI to formulate conclusions as to agency action before the formal comment period. (OIN Opp. Mem. at 34). Such a contention makes a mockery of the DOI's land-into-trust regulations.

scrutiny of the Application, the Administrative Record reflects that this number was arbitrarily selected even before the OIN itself prioritized its lands. See Baldwin Mov. Decl. Exh. K (Sept. 2, 2005 internal DOI e-mail). And notwithstanding the Defendants' attempts to downplay that amount, it is clear that the decision-making process was driven by it, as 10,000 acres was still the guiding principle approximately two years into the decision-making process. See id. at Exh. WWW (Feb. 26, 2007 internal DOI e-mail) ("Tom has come up with 3 options that he hopes Mr. Cason to choose from. . . . Tom is just basing his options on that old direction from Mr. Cason of around 10,000 acres."); id. Exh. XXX (Mar. 7, 2007 internal DOI e-mail) ("Tom mentioned that Mr. Cason had selected a preferred alternative for the Oneida issue that involved approximately 10,000 acres, primarily in Madison Co. NY (specific details to come later)."). This is illustrative of irrational, arbitrary and capricious decision making.[57]

B. The DOI's Conclusions Regarding Tax Impacts Under Section 151.10(e) Rely On Irrational Methodology And Are Arbitrary And Capricious

Instead of proffering analysis from the Administrative Record demonstrating that the DOI's consideration of the tax impacts of the Determination was reasonable and not arbitrary and capricious, the Federal Defendants and OIN engage in a meritless exercise to contort the meaning of the DOI's findings and argue that, even if those findings are incorrect, "nothing about the tax impacts in this case . . . would justify denying trust status." (OIN Opp. Mem. at 39). What the Federal Defendants and OIN cannot do is reconcile the DOI's findings in the Administrative Record with its methodology in considering the tax impacts of the Determination. Though it may be true that an agency can select its own methodology so long as it is reasonable,

[57] As Plaintiffs contend, the Administrative Record also demonstrates that the DOI was concerned with rectifying perceived historic wrongs to the OIN under its own sense of justice. (Pl. Mov. Mem. 87-88). The Federal Defendants admit that their view of the State's past conduct toward the OIN is a "significant" reason for taking land into trust. (U.S. Opp. Mem. at 63 n.40 ("New York's past conduct in dispossessing the Oneidas is a significant factor contributing to the need to have reservation land placed in trust.")).

the DOI's methodology in analyzing tax impacts was not reasonable. See Ctr. for Biological Diversity v. Dep't of Interior, 623 F.3d 633 (9th Cir. 2010) (holding that an EIS examining the transfer of federal land to a mining company was invalid because the analysis of alternatives was based on the illogical assumption that there would be no change in the mining company's activity regardless of whether it was subject to a federal mining statute). Since the DOI's methodology and results in considering this mandatory factor are contradicted by the Administrative Record, the Determination is arbitrary and capricious.

1. The DOI Is Required To Analyze The Impact On Local Governments Of Removing Land From Tax Rolls

The mandatory consideration for the DOI to undertake is the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e). It is not required to consider the "overall fiscal impacts of trust acquisition" or "the tribe's ongoing business activities," but rather, the mandatory consideration is how the State and political subdivisions will be impacted by removing the land from the tax rolls under the Determination. The DOI did make a finding in that regard: "Implementation of the Preferred Alternative (Alternative I) is projected to result in a net contribution to the New York State and local governments of between $16.66 million and $4.46 million, depending on the taxable value of the casino lot." Baldwin Mov. Decl. Exh. L (ROD at 49) (noting that "[i]n all scenarios (with and without casino tax lot, and with casino tax lot valued at $6.5 million or $10.5 million), the net impact on the individual jurisdictions is positive under the Preferred Alternative (Alternative I)" and noting few exceptions).[58] That finding is arbitrary and capricious because it was reached using an unreasonable methodology that is contradicted by the Administrative Record.

[58] The DOI did not undertake an impact analysis using the assessment for the Turning Stone tax lot that the DOI concluded was applicable ($22.55 million). Baldwin Mov. Decl. Exh. L (ROD at 53). Instead, the DOI

2. The Methodology Used By The DOI To Conclude That The Determination Would Positively Impact The State And Local Governments Is Contradicted By The Administrative Record

The mathematics behind the DOI's conclusion can be found in tables under Appendix E to the FEIS (Baldwin Mov. Decl. Exh. A). For example, Table 18 contains the calculations for the DOI's conclusion that the Determination will result in a positive net effect to the State and local governments of $16.66 million. The DOI added "Nation Payments" (including OIN payments under the Gaming Compact to reimburse the State for expenses incurred in execution of its regulatory role at the Turning Stone Casino), "Other Tax Revenue Payments" (income, sales, and property taxes paid by non-member OIN employees) and "Taxes Paid From Multiplier Effect" and subtracted property tax losses and users costs paid by agreements and charges. Id. (FEIS App. E, Table 18). The methodology treats OIN employee taxes and money reimbursed to the State under the Gaming Compact as positive impacts as a result of the Determination. This methodology is unreasonable because the Administrative Record demonstrates that the DOI had concluded that (1) Turning Stone is operating lawfully without trust status (Baldwin Mov. Decl. Exh. L (ROD at 12); (2) the continued operation of the OIN's business enterprises does not depend on trust status (Id. at Exh. SS (ARS004558) (Handwritten note by James Cason)); and (3) the OIN's future business enterprises and projects "are not dependent upon the final determination because they may be completed whether or not the land is acquired in trust." Id. at Exh. L (ROD at 39). Thus, there is no logical reason for offsetting tax losses by considering payments under the Gaming Compact, taxes paid by OIN employees and taxes paid from the

analyzed scenarios (1) not including the Turning Stone tax lot; (2) using the Town of Verona's assessment of $362.55 million; and (3) using an assessment of the tax lot valued for non-gaming uses based on non-gaming lands at "comparable" locations. Id. (ROD at 49). In any event, the DOI uses the same flawed methodology in each of its tax analyses.

multiplier effect, because those "benefits" do not result from the Determination.[59] The Administrative Record does not support this treatment and demonstrates that these activities would occur regardless of whether land is taken into trust.[60] As Plaintiffs explained in their moving brief, factoring out the contradicted figures from the DOI, the effect of the Determination is a negative impact of between $1,638,800 and $13,839,100.[61] (Pl. Mov. Mem. at 98-99).

The Federal Defendants try to justify the DOI's unreasonable methodology by describing the analysis as "an assessment of the overall economic benefits the presence of a given tribe in the region brings" (U.S. Opp. Mem. at 65) notwithstanding that the DOI itself refers to the analysis as an "impact" of the Determination. Baldwin Mov. Decl. Exh. L (ROD at 49). If the

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[59] Even the Federal Defendants' treatment of the DOI's methodology is inconsistent. In its moving papers, the Federal Defendants argued that the DOI considered

> '[T]he degree to which the tribe's ongoing business activities generate economic and tax benefits to the local community that offset the taxes that would be lost as a result of the trust acquisition.' [ROD] at 47. Those benefits include: (1) Nation grants and payments to local governments; (2) Nation employee property taxes; (3) Nation employee state income taxes withheld and remitted by the Nation; (4) Nation spending and Nation employee spending; (5) Nation payments to the New York State Police and the New York State Racing and Wagering Board.

(U.S. Mov. Mem. at 54 (emphasis added)). It is only now, in opposition to Plaintiffs' motion for summary judgment, that the Federal Defendants argue that the DOI took an approach that "avoids reducing the analysis to a question of whether taking land off the tax rolls by placing it in trust yields local governments a net gain or loss in tax receipts, i.e, whether the decision yields the local governments a profit or loss." (U.S. Opp. Mem. at 66).

[60] The OIN concedes in effect that the DOI methodology is contradicted by the Administrative Record by acknowledging that the DOI concluded that "if Nation businesses, particularly the casino resort, were to close that there were not sufficient local alternatives to provide employment for thousands of workers living in the area who would lose their jobs." (OIN Opp. Mem. at 37). According to the conclusions reached by the DOI in the Administrative Record, there would be no reason for businesses to close if the land upon which they are located are not taken into trust.

[61] It is this substantial negative impact that distinguishes this situation from the situation in County of Sauk v. Midwest Reg'l Dir., BIA, 45 IBIA 201, 215 (IBIA 2007). There, the potential negative tax impact complained of was less than $6,000. This was a factor noted by the Western District of Wisconsin in reviewing the IBIA's decision in that "[e]ven if plaintiff is correct, it is evident that the positive economic impact of the Nation's financial contributions dwarfs the property tax receipts attributable to parcel 7." Baldwin Reply Decl. Exh. K (Sauk County v. Dep't of Interior, No. 07-cv-543, 2008 WL 2225680, at *3 (W.D. Wis. May 29, 2008)). To the extent this or any other IBIA authority cited by the Federal Defendants condone a methodology that is contradicted by an agency's own findings, it should not be followed here.

DOI were calculating the economic benefits of the OIN's presence as the Federal Defendants contend, then those "benefits" should be the same under every alternative given the DOI's conclusions that Turning Stone is now operating lawfully and the other OIN enterprises do not depend on taking land into trust. Instead, under the DOI's analysis of the No Action Alternative – where no land would be taken into trust – the DOI calculated the OIN as making no "Nation Payments" (not even under the Gaming Compact) and $2,112,000 (as opposed to $11,685,500 (see Baldwin Mov. Decl. Exh. A (FEIS, App. E, Table 18))) in "Other Tax Revenue Payments." Baldwin Reply Decl. Exh. L (FEIS App. E Table 16). The underlying assumption is that OIN enterprises will close if land is not taken into trust. That is an assumption directly contradicted by the DOI. Using this flawed assumption, the DOI also concluded that taking all of the OIN's land into trust (put another way, taking all of the OIN's land off the local tax rolls), would be a greater positive impact to the State and local governments than a decision to take less land or no land at all. Baldwin Reply Decl. Exh. L (FEIS App. E Table 11). The Federal Defendants also contend that the DOI's approach is "fair to the tribal applicant"[62] (U.S. Opp. Mem. at 66) after spending considerable amount of time arguing about Plaintiffs' standing to raise which of the DOI's policies and regulations it ignored in the decision making process. (U.S. Opp. Mem. at 42-45). Section 151.10(e) was enacted in response to comments about "the erosion of tax base and the serious jurisdictional problems." Baldwin Reply Decl. Exh. M (45 Fed. Reg. 62034, 62035 (1980)). The adoption of some analysis that is "fair to" (i.e., meaning biased in favor of) the tribal applicant should not trump the purpose of the regulation in protecting state and local governments.

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[62] If such an approach is "fair" to the OIN, it is more than "unfair" to the affected governments as, by the DOI's own findings, any closure of OIN businesses would be entirely self-inflicted.

Plaintiffs do not challenge the DOI's calculations simply because they believe another methodology would be better. Plaintiffs challenge the DOI's calculations as contradictory, illogical and lacking a rational basis.

3. The DOI's Decision That Assessing Improvements To The Turning Stone Tax Lot Is Preempted By IGRA Is Contrary To Law

The Federal Defendants contend that even if IGRA does not preclude taxation of real property improvements to the Turning Stone tax lot (which it does not), the Determination should be affirmed because the DOI considered the scenario in which improvements were taxed. To be clear, Plaintiffs do not seek to tax gaming operations as the Defendants erroneously contend. Instead, Plaintiffs assert that improvements to the land on which the casino sits are subject to property tax and not prohibited or preempted by IGRA.

As explained above, the DOI does not discharge its obligation to consider tax impacts by using an unreasonable methodology. Plaintiffs demonstrated in their moving brief (Pl. Mov. Mem. at 95-99), when the property tax loss from taking the Turning Stone lot into trust is properly calculated, the State and local governments suffer a negative impact of $13,839,100 dollars, which is a $18,298,700 difference from the DOI's conclusion, and not a "net benefit" as the Federal Defendants contend. (U.S. Opp. Mem. at 69). The Federal Defendants' and OIN's intimations that the DOI would have reached the same exact Determination regardless of how negative the impact only highlights the arbitrary decision making of the DOI.

The DOI's conclusion that assessing the improvements to the Turning Stone tax lot – including golf courses, restaurants, luxury hotels, and event centers – is unlawful is incorrect as a matter of law. The Federal Defendants cite case law that holds that "IGRA seeks to 'ensure that the Indian tribe is the primary beneficiary of the gaming operation.'" Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433 (9th Cir. 1994) (emphasis in original) (U.S. Opp. Mem. at

70-71 n.46). The Cabazon court found a state licensing fee on racing wagers preempted by IGRA where the state had "benefited from the tribal gaming operation to a considerably greater extent than the Bands." Id. at 433 (emphasis added). That is not the case here where the OIN makes over $300 million per year in revenue from Turning Stone. As discussed in Plaintiffs' opposition brief to the Defendants' summary judgment motions, the real property tax assessment does not threaten to usurp the OIN's control over its gaming operations nor does it undercut the federal government's authority to regulate such gaming. (Pl. Opp. Mem. at 82-83). Contrary to the assertions of the OIN, it is irrelevant whether the Turning Stone conference centers, hotels and other entertainment improvements would be "economically viable" (OIN Opp. Mem. at 38) in someone else's hands, the Town of Verona's assessment seeks to tax improvements to real property and is not preempted by IGRA's regulation of gaming activity, especially where IGRA itself does not prohibit State taxation. (Pl. Mov. Mem. at 95-96; Pl. Opp. Mem. at 81). IGRA regulates how Indian casinos function, 25 U.S.C. § 2702(2), and does not "preempt any commercial activity remotely related to Indian gaming – employment contracts, food services contracts, innkeeper codes." Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1193 (9th Cir. 2008).

As a matter of law, IGRA does not preempt the assessment of real property taxes on improvements to land upon which Indian gaming occurs, the DOI's conclusion that it does is contrary to law, and contributes to the unreasonable result reached by the DOI under section 151.10(e).

C. The DOI Inadequately Considered Jurisdictional Conflicts Under 25 C.F.R. § 151.10(f)

The DOI's consideration of "[j]urisdictional problems and potential conflicts of land use which may arise" under 25 C.F.R. § 151.10(f) is not rationally supported by the evidence in the

Administrative Record. This is an action to enforce the DOI's obligation[63] to support the Determination by rational extension from the evidence. The Defendants' repeated citation to bald statements in the ROD without contesting undisputed Administrative Record evidence raised by Plaintiffs, and the DOI's refusal to investigate issues cutting against taking over 13,000 acres into trust, is evidence that the DOI's analysis on this point is a product not of the evidence in the Administrative Record, but of prejudgment.

Defendants complain throughout their opposition briefing that Plaintiffs have demonstrated only speculative "potential impacts" of the Determination on state jurisdiction. (U.S. Opp. Mem. at 72-74, 77; OIN Opp. Mem. at 41-42). Examination of future impacts is precisely what is called for by the DOI's own regulation. 25 C.F.R. § 151.10(f) ("Jurisdictional problems and potential conflicts of land use which may arise") (emphasis added). A refusal to evaluate the potential consequences of the DOI's actions without some consideration of the "potential" problems is a refusal to comply with the DOI's own regulations.[64] The best available evidence of the consequences of the Determination is how the OIN has managed its lands in the past. The OIN's record of land management contrary to State law is relevant to the potential of future harms stemming from interspersing the subject lands with non-trust land. (Pl. Mov. Mem. at 73-76).

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[63] The OIN stresses the Environmental Protection Agency's perfunctory approval of the FEIS (attached to the FEIS in an appendix). (OIN Opp. Mem. at 40 n.22). Congress, of course, placed responsibility for the land-into-trust process in the hands of DOI, not the EPA. 25 U.S.C. § 465. The DOI's conclusions must flow logically from the record evidence; the approval of the EPA is irrelevant under this standard.

[64] Contrary to the Defendants' arguments, it is not just "actual harm" that has to be evaluated under the land-into-trust regulations. (U.S. Opp. Mem. at 73-74; OIN Opp. Mem. at 44). So, for example, the DOI has to consider the potential jurisdictional problems arising from the Atunyote golf course's encroachment on State-regulated wetlands rather than "concrete environmental problem[s]" (U.S. Opp. Mem. at 73) to surrounding non-trust land. The sections of the FEIS cited throughout the Federal Defendants' opposition dealing with Audubon International certification is not germane to the effect of the wetland encroachment to non-trust land.

The Defendants protest that the Court should not consider either potential future effects or past behavior: their argument shuns consideration of the consequences of the Determination as speculation and justifies the OIN's prior behavior as ignorant of the law pre-Sherrill. Stripped of those analytical tools, to show that the conclusions in the ROD and FEIS are sound and supported by the evidence, the Defendants simply point to the challenged conclusions in the ROD and FEIS. (See, e.g., U.S. Opp. Mem. at 73 (baldly stating OIN has had no significant deficiencies in land management); id. at 74 (stating without elaboration that FEIS and ROD demonstrate that OIN is environmentally conscious)). The real reason DOI seeks to rule out consideration of the facts is that it failed to investigate at least six issues key to the section 151.10(f) analysis which were raised by the State and Counties that were unfavorable to the OIN. See U.S. Response SMF at ¶¶ 127 (failure to investigate OIN changes to agreement with Verona Fire District), 128 (failure to investigate OIN withholding of payments to Stockbridge Valley Central School District to exert political pressure), 141 (failure to investigate OIN's lack of permit authority when it built cogeneration plant), 143 (failure to investigate OIN's lack of legal permit authority to construct Turning Stone Casino and Resort), 144 (failure to investigate OIN's destruction of wetlands regulated by State but not federal government in construction of Atunyote golf course), 149 (failure to investigate OIN's actions restricting City of Oneida's access to water main line).

Moreover, the Federal Defendants and the OIN do not consider that the Determination will cement any nonconforming land use and attendant effects on the non-Indian community. The Defendants take the position that taking the land into trust will not present any new effects for surrounding communities and local governments because the OIN has previously acted in accordance with State law or zoning regulations. But this reasoning ignores the fact that the OIN

is currently acting contrary to applicable State law and zoning regulations and the Determination will make that nonconformance permanent.

Plaintiffs' briefing in support of this motion demonstrated that the evidence does not support the DOI's Determination because its reasoning is faulty in four key ways: (1) reliance on federal law where state law is more proscriptive; (2) reliance on OIN agreements the reliability of which the Determination undermines; (3) reliance on conclusions unsubstantiated by the Administrative Record; and (4) reliance on the circular argument that removing state jurisdiction itself resolves jurisdictional problems. (Pl. Mov. Brief at 99-109). Without meaningfully refuting those arguments, the Defendants carry forward the same logical errors and lack of Administrative Record support that render DOI's discussion of these issues in the ROD and FEIS arbitrary and capricious.

The Defendants' argument rests on the premise that the DOI's consideration of jurisdictional problems is evidenced by the alleged contiguity of the lands subject to the Determination. That the lands to be taken into trust are "contiguous" is a gross exaggeration; just because the trust parcels are in the same general area does not mean they are contiguous and does not alleviate jurisdictional conflicts produced by the Determination. A simple review of the map of the Determination properties demonstrates that there are many non-trust lands that are "landlocked" by trust lands, or adjacent to and interspersed with them. Baldwin Mov. Decl. Exh. A (FEIS at 2-44). It is the magnitude of the Determination that exacerbates jurisdictional conflict, and the amount of non-trust land that would be negatively impacted could be minimized by taking less land into trust.

1. The Defendants Cannot Deny That Federal Law Is Substantively Different Than State Law And That Application Of Federal Law Does Not End The DOI's Obligation To Consider Potential Impacts

Plaintiffs have shown that federal law is in several important respects less strict than State law, providing specific examples of wetlands protection and air quality regulation. (Pl. Mov. Mem. at 100-03). The Federal Defendants do not respond, but instead note that "Federal environmental and other laws apply equally to state and tribal land and thus ensure uniform standards regardless of . . . jurisdiction over the land" (U.S. Opp. Mem. at 72) and disingenuously suggest that "[t]he State and Nation are free, of course, to establish more protective environmental standards" notwithstanding the OIN's adamant refusal to recognize State regulation. (Id.) The notion that federal law will continue to apply is the keystone of the jurisdictional conflict provisions of the ROD and FEIS.[65] If the applicability of federal law on the subject lands is sufficient to establish that jurisdictional checkerboarding will not affect a given government function, then the jurisdictional-conflict prong of the regulation is a nullity, because federal law applies on both subject and non-subject lands regardless of whether land is taken into trust. Because State law is more restrictive than federal law, it is undisputed that if the Determination stands, regulatory standards will not be consistent. The Federal Defendants justify this glib treatment by repeating that "the Department cannot sacrifice the Nation's right to

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

self-government" (U.S. Opp. Mem. at 72), because "the Nation is entitled to regulate its lands differently from the State" (U.S. Opp. Mem. at 74), which is circular. It is the Determination that grants the OIN the ability to ignore State regulations; without a federal grant of trust status the subject lands are under the State's regulatory jurisdiction and there is no checkerboarding problem, as the Sherrill decision made clear. 544 U.S. at 220-21.

The OIN asserts that "[t]here is no reason to predict that the Nation will not comply with federal environmental law once the land is taken into trust on the basis of pre-Sherrill non-compliance with state law" because the OIN did not expect Sherrill to be decided in favor of the state and the OIN's pre-Sherrill conduct does not reflect disregard for the environment or lawful regulatory authority. (OIN Opp. Mem. at 43) (emphasis in original). The importance of examining jurisdictional conflicts is not to evaluate the OIN's past acts in a vacuum, but to examine the splintering of uniformity in "regulatory controls that protect all landowners in the area." Sherrill, 544 U.S. at 220. The applicability of federal law to OIN parcels says nothing about the burden of the checkerboard effect on the State's ability to govern adjacent non-subject lands.[66] Wetlands preservation and air quality were raised by the Plaintiffs as examples of regulatory areas where the non-applicability of state law affects neighboring lands. See Baldwin Mov. Decl. Exh. SSS (AR000334) (O'Brien and Gere Report (Group 1 parcels)) (OIN development may degrade hydrology and wildlife habitats in adjacent wetlands and subject them to contaminants); id. AR000338 (impacts to off-site wetlands from OIN development include uncontrolled contaminants in runoff courses, petroleum contaminants and heavy metals in runoff from paved surfaces, and dispersion of litter); id. at AR000339, AR000341 (air emissions are not

[66] In any event, the OIN has also demonstrated a disregard for federal regulation in the past. See Baldwin Mov. Decl. at Exh. SSS (AR00338) (O'Brien and Gere Report (Group 1 parcels)) (federal wetlands destroyed without notice to or approval by Army Corps of Engineers); id. at AR000340 (cogeneration facility constructed without compliance with federal, as well as State, regulations).

limited to property boundaries and non-trust downwind receptors are subject to health impacts of operations). These potential impacts are not assuaged by the OIN's purported compliance with less proscriptive federal law – for example its cogeneration plant belatedly securing federal but not state permits, and its damage to state-regulated (but not federal-regulated) wetlands.

As to those specific substantive OIN departures from State law, the Federal Defendants trumpet the discussion of wetlands preservation and air quality in the ROD and FEIS without recognizing that material itself relies on the federal law fallacy. The State and Counties raised in comments that the OIN had damaged wetlands in building some of its facilities. The FEIS' primary substantive response to this evidence is to cite the OIN's Germany Road wetlands mitigation bank in the Town of Verona. Baldwin Mov. Decl. Exh. A (FEIS at 4-66). But the mitigation bank was a result of State pressure; and the OIN's incentive to take steps that respond to State law and regulations will be removed or greatly reduced absent the threat of State enforcement.[67] The FEIS' incorrect assumption that past wetlands damage does not reflect jurisdictional conflict cannot logically inform its conclusion that wetlands will not be damaged in the future, because where the state has no leverage over the OIN, the OIN will have no reason to comply with state standards, and regulatory congruity will be frustrated.

It is not the responsibility of the State and Counties to investigate jurisdictional conflicts; the regulation obligates the DOI to do so, and it cannot excuse its failure by repeating the broken logic that federal law suffices.

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[67] This is true regardless of the OIN's purported tribal immunity from suit. As explained in Plaintiffs' moving brief, after the Supreme Court had granted certiorari on the issue of whether the OIN still enjoyed tribal sovereign immunity from suit, the OIN affirmatively disclaimed any reliance on that doctrine against the enforcement of real property taxes. See Madison County v. Oneida Indian Nation of New York, 131 S. Ct. 704 (2011); Pl. Opp. Mem. at 96 n.66. The OIN has demonstrated a willingness to waive its purported immunity from suit when that immunity is challenged, and could do so again when sued for regulatory infractions.

2. The DOI's Dismissal Of Past OIN Conduct Is Arbitrary And Capricious

The DOI's reliance on OIN service agreements with certain municipalities, the OIN's statement that it does not plan any changes in land use, and the OIN's statement that it "intends for all rights-of-way, including those used to access utility infrastructure, to remain in effect after placement of lands into trust" (Baldwin Mov. Decl. Exh. L (ROD at 66)), is arbitrary and capricious in light of the OIN's past actions.

Plaintiffs argued in support of this motion that the references in the ROD and FEIS to agreements between the OIN and various levels of government were insufficient to solve the jurisdictional conflict issue, because the Plaintiffs would lack leverage to enforce those agreements post-Determination, and because the OIN has a history of reneging on such agreements. The Defendants respond that the OIN can nonetheless be relied upon to uphold its agreements, and that therefore the DOI reasonably concluded that the agreements avoid adverse jurisdictional consequences. But as the Federal Defendants concede: "The Department, as it made clear, is not in a position to know what third parties will do." (U.S. Opp. Mem. at 58).

This is another instance of the DOI's failure to properly consider an issue, resulting in a failure to base conclusions on the Administrative Record.[68] Plaintiffs have raised several concrete instances of the OIN breaching intergovernmental agreements: its unilateral change in its favor to the payment formula for fire services to the Town of Verona (Pl. Mov. Mem. at 91); its withdrawal of a pledge to the Stockbridge Valley Central school district because the school district refused to accede to the OIN's demand to fire a teacher who was critical of the OIN (id.); and its unilateral termination of the silver covenant payment program. (Pl. Opp. Mem. at 79).

[68] Notably, though the DOI refused to consider the OIN's past conduct, the Federal Defendants note that "New York's past conduct in dispossessing the Oneidas is a significant factor contributing to the need to have reservation land placed in trust." (U.S. Opp. Mem. at 63 n.40).

The DOI investigated none of these issues (U.S. Response SMF at ¶¶ 127-28), so it is not surprising that it failed to take the relevant evidence into account when considering the OIN's history of intergovernmental agreements. The Federal Defendants claim that the ROD "considered the Nation's history of making agreements with its neighbors," (U.S. Opp. Mem. at 74), but its Response to Plaintiffs' Statement of Material Facts demonstrates that it turned a blind eye to the OIN's history of subsequently breaking or manipulating those agreements.

Because the OIN cannot be counted on to uphold its agreements, the DOI's reliance on those agreements as abating any jurisdictional conflict is arbitrary and capricious, and the subject matters covered by some of those agreements are bound to give rise to adverse consequences from differential regulatory treatment. Compare Baldwin Mov. Decl. Exh. L (ROD at 62-63) (promoting agreement between OIN and City of Oneida as solution to difference in water rights law between OIN and State) with id. at Exh. SSS (AR000346) (O'Brien and Gere Report Group 1 parcels) (loss of State jurisdictional oversight on water rights likely to have impact on non-OIN lands).[69]

Similarly, the DOI concludes that "the Nation proposes no change in land use as part of its fee-to-trust request. Thus, there is no direct environmental, health, or safety impact that would result from a change in jurisdiction following the acquisition of land in trust, regardless of differences between Federal/Nation and New York State/local requirements" (Baldwin Mov. Decl. Exh. L (ROD at 67). But this conclusion ignores the fact that the OIN changed the usage of a significant amount of its lands between 1987 and 2005. Id. at Exh. A (FEIS at 4-40, Table

[69] Not only is the OIN an unreliable partner in agreements which the State cannot enforce, at least one agreement cited by the DOI does not cover the relevant issues. Plaintiffs previously highlighted that the ROD refers to agreements between the OIN and the City of Oneida regarding water usage, but the State, not the City, sets and enforces water quality standards. (Pl. Mov. Mem. at 104). Neither the Federal Defendants nor the OIN respond to this deficiency.

4.2-1) (demonstrating where former uses included 7 acres for recreation and entertainment, current OIN use totals 1,340 acres for recreation and entertainment, while commercial use has expanded from 15 acres to 161 acres). The DOI goes so far as to acknowledge that at the time of the ROD, the OIN had a number of new land uses under way. Id. at Exh. L (ROD at 40) (listing nightclub, tennis facilities, wedding venues, and additional golf courses among new commercial projects). Consequently, it was arbitrary and capricious for the DOI to accept that the OIN would not alter additional land uses (a conclusion which, in any event, is contradicted by the purported purpose of the Determination to help the OIN diversify its economic base).

The DOI's conclusions as to easements suffer from the same arbitrary and capricious decision to ignore the OIN's past conduct. Notwithstanding that the City of Oneida raised specific concerns during the decision-making process about OIN actions that restricted access to its easement for water main maintenance and threats from the OIN to excavate the water main right-of-way, the DOI did not investigate or consider those comments. (U.S. Response SMF ¶ 149; U.S. Opp. Mem. at 78). Instead, the DOI simply decided that it would be in the OIN's "best interests" to work with the local governments. Baldwin Mov. Decl. Exh. L (ROD at 66). Even presuming that is true, it does nothing to account for the prior actions of the OIN and the DOI does not explain what change of OIN interests would occur from the Determination that would justify ignoring the City of Oneida's concerns.[70] It was arbitrary and capricious for the DOI to ignore the concerns expressed by the City of Oneida regarding OIN conduct.

[70] The ROD stated that the OIN's "government, enterprises, and other endeavors are dependent upon [utility] systems being adequate and well-maintained." Baldwin Mov. Decl. Exh. L (ROD at 66). That would be true regardless of the Determination; in other words, the OIN was dependent upon those systems when they were obstructing the City of Oneida's access to the water main right-of-way. Notably, the OIN has not denied the conduct complained of by the City of Oneida.

3. The DOI Predetermined That Jurisdictional Issues Were Not Salient To The Determination

Defendants argue in a pair of footnotes that DOI correspondence advising Malcolm Pirnie to not seriously regard the State's, Counties' and local municipalities' comments under section 151.10(f) has been taken out of context by the Plaintiffs and does not demonstrate the position of the DOI. (U.S. Opp. Mem. at 73 n.47, OIN Opp. Mem. at 44 n.25). The OIN go so far as to argue that the EIS is not concerned with regulatory authority (OIN Opp. Mem. at 44 n.25), and thus the DOI's instructions to Malcolm Pirnie not to consider jurisdictional issues as an impediment to taking land-into-trust in preparing the EIS are irrelevant. This argument is disingenuous in light of the reliance by the OIN and Federal Defendants on the FEIS's supposed comprehensive treatment of jurisdictional issues and the fact that portions of the ROD dealing with section 151.10(f) rely almost entirely on the conclusions in the FEIS. (See OIN Opp. Mem. at 40 (dismissing jurisdictional conflict harms to environment because DOI prepared a FEIS); U.S. Opp. Mem. at 75 (arguing that concept of jurisdictional harm was not dismissed because FEIS spends many pages discussing it)).

The Federal Defendants minimize DOI personnel's reliance on a misguided sense of "justice" for land "stolen" by New York State, Baldwin Mov. Decl. at VV (ARS000904) (Internal DOI e-mail), by claiming that it is an "informal but voluble memorandum" that does not comport with the DOI's position on the issue. (U.S. Opp. Mem. at 73). Elsewhere in their opposition, however, the Federal Defendants assert that "New York's past conduct in dispossessing the Oneidas is a significant factor contributing to the need to have reservation land placed in trust." (Id. at 63 n.40). And the DOI's failure to reasonably consider jurisdictional conflicts in the ROD is entirely consistent with the bias reflected in the referenced memorandum.

D. Neither The Federal Defendants Nor The OIN Can Point To Evidence Establishing The DOI's Consideration Of Its Ability To Discharge Its Additional Responsibilities

As they do with most of their oppositions to Plaintiffs' Summary Judgment Motion, the Federal Defendants and OIN point to the unsubstantiated conclusion in the ROD as a basis for asserting that the BIA can discharge its additional responsibilities and cannot cite any actual consideration by the DOI from the Administrative Record. See Penobscot Indian Nation v. HUD., 539 F. Supp. 2d 40, 53 (D.D.C. 2008) ("[T]he APA imposes on HUD a duty to publicly 'identif[y] a reasonable basis in the record' for its conclusions."). The DOI has admitted that it has had "difficulties in its own administration of [trust] assets" (Baldwin Mov. Decl. Exh. L (ROD at 69)). Those difficulties can be seen in the amount of time it took the DOI to acknowledge administrative receipt of administrative custody and accountability of an 18-acre parcel of excess property from a former U.S. Air Force Base in Verona. Even though the GSA purportedly transferred the excess property in 2002, the ROD stated in 2008 that the DOI did not know "if or when such a transfer for the Nation will occur." Id. (ROD at 36). Such delay and disorganization is indicative of the difficulties the BIA has in administering trust assets.

Defendants complain that Plaintiffs reference non-record materials in support of their motion for summary judgment and that Plaintiffs have not met their burden to demonstrate that the DOI's consideration under section 151.10(g) was arbitrary and capricious. The Administrative Record contains no evidence, however, that the DOI considered its ability to discharge additional responsibilities stemming from the Determination. A GAO-authored report notes that the BIA's responsibilities regarding land held in trust "include the administration of education systems, social services, and natural resource management, among other things," (Baldwin Mov. Decl. Exh. TT at 9), but the ROD makes no mention of these responsibilities, merely stating that the OIN "will pay for any municipal services that may be required." Baldwin

Mov. Decl. Exh. L (ROD at 69). Given the unprecedented and unusual size of the Determination (see Pl. Mov. Mem. at 112-13), the Administrative Record should contain at least some analysis beyond the DOI's exaggerated conclusion that the lands are contiguous.[71]

CONCLUSION

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

[71] To that extent, the cases cited by the Federal Defendants are inapposite because the comparatively diminutive trust acquisitions imposed minimal burdens. Kansas v. Acting So. Plains Reg'l Dir., BIA, 53 IBIA 32, 39 (IBIA 2011) (cited at U.S. Opp. Mem. at 79), is distinguishable on the grounds that the record contained evidence of the Superintendent's consideration of section 151.10(g) for taking an undeveloped 96-acre parcel into trust. Id. at *39. Similarly, South Dakota v. Acting Great Plains Reg'l Dir., BIA, 49 IBIA 84, 108-09 (IBIA 2009) (cited at U.S. Opp. Mem. at 79), also contained BIA response to evidence in the record in evaluating additional BIA responsibilities for accepting 39 acres into trust. Iowa v. Great Plains Reg'l Dir., BIA, 38 IBIA 42 (IBIA 2002) (cited at U.S. Opp. Mem. at 79), involved a single parcel. To the extent any of these administrative decisions stand for the proposition that the DOI can merely state a conclusion without actual consideration of a factor, they are contrary to federal law of administrative review. See Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 683 (D.D.C. 1997) (finding an agency does not satisfy its obligations where it "merely states the category heading and then ignores the evidence and analysis of its experts in making conclusory statements about each factor").

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