UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs, **6:08-cv-644 (LEK/DEP)**

v.

KENNETH L. SALAZAR, et al.,

Defendants.

DEFENDANT-INTERVENOR ONEIDA NATION'S MEMORANDUM OF LAW SUPPORTING ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Department of the Interior (DOI) carefully weighed competing interests in considering the Oneida Nation's trust application, just as the Supreme Court expected when the Court pointed to discretionary federal trust authority under 25 U.S.C. § 465 as the "proper avenue" for the Oneida Nation to pursue sovereignty over the fraction of its reservation that it has been able to reacquire. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005).

DOI went beyond legal requirements with respect to trust land decisions, producing an in-depth Environmental Impact Statement (EIS) that was not required and compiling an administrative record of over 90,000 pages. Despite their unyielding opposition to the trust application, Plaintiffs were invited to participate in developing the scope of the EIS and were afforded abundant opportunities to express concerns and to provide information throughout the process. DOI also gave a full hearing to community groups and individuals.

At the conclusion of a review that took three years, DOI issued a meticulous Record of Decision (ROD) that explains how and why DOI arrived at its decision to take some, but not all, of the Nation's land into trust. Balancing the Nation's need for a territorial land base against countervailing interests, DOI approved an acquisition of trust land configured to be "as compact and contiguous as possible, with minimal jurisdictional impacts." ARS001036. DOI staff supported taking into trust all Oneida lands, ARS001351 and ARS001378, but DOI decided on about 4,000 acres less, to address "checker boarding concerns by making the lands compact and contiguous." ARS000903-05. DOI excluded important Oneida economic, cultural and governmental sites. ROD, § 2.2.9 at 19.

Although Plaintiffs offer a laundry list of legal challenges to the ROD, they cannot prove that the trust decision was arbitrary, capricious or contrary to law in any respect. Therefore, summary judgment should be entered against Plaintiffs.

STATEMENT OF FACTS

A. The Record of Decision and Procedural History of the Litigation

On May 20, 2008, DOI concluded an exhaustive three-year review of the Oneida Nation's application to convey 17,370 acres of land to the United States to be held in trust for the Nation pursuant to 25 U.S.C. § 465. DOI granted the Nation's application in part, issuing a 73-page ROD supported by hundreds of pages of appendices and a full EIS.[1] DOI agreed to accept 13,003.89 acres in trust, including 80 Nation member residences; most (but not all) of the current sites of Nation government services; Turning Stone Resort and Casino; most of the Nation's social and cultural facilities; and a majority of identified archaeological sites. ROD, § 1.1 at 7; § 2.2.9 at 19. DOI declined to grant trust status to 4,366 acres of Nation-owned land, including 18 Nation member residences; some government offices; some cultural and social facilities; nine of the thirteen SavOn gas stations/convenience stores; and other Nation businesses. *Id.*, § 1.1 at 7; § 2.2.9 at 19.

Pursuant to 25 C.F.R. § 151.12(b), DOI published notice of its decision in the Federal Register on May 23, 2008. 73 Fed. Reg. 30144. On June 19, 2008, the State of New York, Oneida County and Madison County filed this action against the federal defendants, challenging DOI's decision under the Administrative Procedure Act. (DE 1.) The Oneida Nation moved to intervene as a defendant on October 1, 2008. (DE 37.) The Court granted the motion on November 5, 2008. (DE 48.) The State and Counties filed an amended complaint on July 15, 2008. (DE 19.) Plaintiffs filed their Second Amended and Supplemental Complaint ("SASC") on February 12, 2009. (DE 94.) The government submitted the compiled administrative record

[1] The ROD is attached as Exhibit A to the November 15, 2011 Declaration of Michael R. Smith supporting the Nation's summary judgment motion. The Draft EIS and the Final EIS are in the administrative record at AR030028 and at AR020131, respectively.

on March 2, 2009. (DE 99-100.) The government produced a supplemental record on April 13, 2011. (DE 198-200.) The administrative record now consists of more than 90,000 pages.

On September 29, 2009, the Court granted motions to dismiss certain of Plaintiffs' claims. The Court dismissed Counts One (non-delegation), Two (Tenth Amendment), and Seventeen (IGRA) for failure to state a claim, and dismissed Supplemental Counts Eighteen through Twenty-Two (trust transfer of excess Air Force land) for lack of jurisdiction because the State and Counties failed to establish "injury in fact" as required by Article III. The Court also denied the State's and Counties' motion for summary judgment with respect to the claim in Count Three that DOI lacked authority under the Indian Reorganization Act (IRA) to take land into trust for the Nation. Memorandum-Decision and Order, *State of New York v. Salazar*, No. 08-CV-644 (Sept. 29, 2009) (DE 132) (hereinafter Memorandum-Decision and Order).

On October 31, 2009, Plaintiffs moved to compel production of deliberative process documents and for extra-record discovery, claiming bad faith or misconduct as alleged in Count Five of the SASC. Magistrate Judge Peebles granted the motion in part, ordering disclosure of documents withheld on the basis of the deliberative process privilege and permitting Plaintiffs to depose James E. Cason, the former Associate Deputy Secretary of DOI who was one of the two DOI officials who approved the ROD. (DE 183.) This Court upheld that decision on March 8, 2011. (DE 196.) The government then produced 5,280 pages of documents as a supplemental administrative record. (DE 198-200.) Next, on June 30, 2011, Plaintiffs deposed Mr. Cason. Rather than seek support for their theory that Mr. Cason issued a biased decision, Plaintiffs devoted almost the entire deposition to improper questions about the substance of the decision.

Plaintiffs did not seek any additional discovery and did not amend their complaint to add any further factual allegations in support of their bias claim.[2]

B. History of the Land to Be Taken into Trust

All of the land included in the Nation's trust application lies within the six million acres occupied by the Oneida Nation prior to European settlement. *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230-31 (1985) (*Oneida II*). The land is also within the boundaries of the Oneida reservation acknowledged by the United States in Article II of the Treaty of Canandaigua. 7 Stat. 44 (Nov. 11, 1794); *see Oneida II*, 470 U.S. at 231 (Oneidas "retained a reservation of about 300,000 acres"). That federal reservation has not been disestablished. ROD, § 7.1 at 32; Memorandum-Decision and Order, 17 (DE 132); *Oneida Indian Nation v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010); *Oneida Indian Nation v. Madison Cnty.*, ___ F.3d ___, 2011 WL 4978126, *26 (2d Cir. Oct. 20, 2011). The Oneidas lost possession of all but a small fraction of the reservation in a series of transactions that involved the State of New York and violated federal law. 25 U.S.C. § 177; *Oneida II*, 470 U.S. at 232.

In 1970, the Nation filed suit to challenge the illegal transfers, seeking trespass damages from Oneida County and Madison County for the Counties' occupation of certain parcels of Oneida land. In 1974, the Supreme Court held that the federal courts have jurisdiction over such claims. *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661 (1974) (*Oneida I*). After a trial, the District Court awarded the Oneidas trespass damages based on the Nation's continuing right

[2] In authorizing the Cason deposition, the Magistrate Judge did not determine the admissibility of particular lines of questioning. *New York v. Salazar*, 2011 WL 1938232, at *7 (N.D.N.Y. Mar. 8, 2011) (DE 196). The Magistrate Judge also did not determine that the deposition transcript would be part of the record for purposes of APA review, explicitly leaving that decision for this Court. *New York v. Salazar*, 701 F. Supp. 2d 224, 223 n.14 (N.D.N.Y. 2010). Plaintiffs have not filed a motion to make the transcript part of the administrative record.

of possession, and the Second Circuit and the Supreme Court affirmed the Counties' liability for such damages. *Oneida II*, 470 U.S. 226.[3]

Through open-market purchases between 1987 and 2005, the Nation reacquired possession of land within its reservation, including the land that DOI has decided to take into trust. In 1993, the Nation entered into a gaming compact with the State of New York pursuant to the Indian Gaming Regulatory Act (IGRA). DOI approved the compact. 58 Fed. Reg. 33160 (June 15, 1993). The Nation opened Turning Stone Casino in 1993, and then developed a resort including golf courses, hotels, restaurants and entertainment facilities.

As it reacquired possession of reservation land, the Nation instituted a Silver Covenant program by which it offered payments to local jurisdictions in place of property taxes. Some jurisdictions accepted Silver Covenant payments. ROD, § 7.5.3 at 47. Others refused them. *See, e.g.*, Aaron Gifford, *City Gets $100,000 from Oneidas*, Syracuse Post-Standard, April 7, 2004, *available at* 2004 WLNR 467136. The Nation paid a total of $38.5 million to local governments in grants and service agreements. ROD § 7.5.3 at 47.[4]

When the City of Sherrill threatened to foreclose on Nation property and to evict the Nation for non-payment of property taxes, the Nation sued to enjoin tax foreclosures. In 2001, the District Court ruled that the Nation's land was within a federal reservation that had not been

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[3] In subsequent proceedings relating to other land, the Second Circuit affirmed this Court's dismissal of possessory claims (trespass claims, like those at issue in *Oneida II*) and also ordered dismissal of the Oneidas' other claims that were based on the fact that the State cheated the Oneidas regarding the price paid for the purchase of Oneida lands. *Oneida Indian Nation v. Oneida Cnty.*, 617 F.3d 114 (2d Cir. 2010). The Supreme Court denied certiorari. *Oneida Indian Nation v. Cnty. of Oneida*, ___S. Ct. ___, 2011 WL 1933740 (Oct. 17, 2011).

[4] DOI did not credit any of those payments against the property tax obligations for which the Nation is required to post letters of credit to secure tax payments that might be due to taxing authorities. *See* AR75751; AR74078; AR81311-12. And neither Madison County nor Oneida County credited any of the $38.5 million when seeking back taxes, penalties and interest from the Nation. However, Madison County treated the Silver Covenant grants as tax payments for the purpose of its obligation under state law to reimburse local governments for uncollected taxes, insisting that a school district that sought reimbursement after receiving Silver Covenant payments was "double dipping." *County Can't Pay District Money It Hasn't Collected*, Syracuse Post-Standard, Aug. 22, 2002, at A7 (Letter from Rocco DiVeronica, Chairman of the Madison County Board of Supervisors to Harry T. Kilfoile, Superintendent of the Canastota Central School District).

disestablished, and was therefore immune from real property taxation. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226 (N.D.N.Y. 2001). The Second Circuit affirmed that ruling in 2003. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003).

On March 29, 2005, the Supreme Court reversed the tax immunity ruling, applying "equitable considerations" alluded to in its prior *Oneida II* decision. *City of Sherrill*, 544 U.S. at 221. The Court ruled that the Nation could not unilaterally assert sovereignty and tax immunity by reacquiring land. Instead, the Court pointed to the Secretary of the Interior's discretionary trust authority under 25 U.S.C. § 465 as "the proper avenue for [the Nation] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." 544 U.S. at 221. Invoking that statutory authority, the Nation submitted a trust application to the Bureau of Indian Affairs' (BIA) Eastern Regional Office on April 4, 2005. Final EIS (FEIS), at ES-5.

Three weeks later, Madison County sought summary judgment in a proceeding to foreclose on Nation land for nonpayment of property taxes, and also penalties and interest imposed during years prior to the Supreme Court's *City of Sherrill* decision, when the federal courts had held that federal law barred state taxation of Nation land. *Oneida Indian Nation v. Madison Cnty.*, 376 F. Supp. 2d 280, 281-82 (N.D.N.Y. 2005) (County moved to foreclose on April 28, 2005); ROD, § 7.3.1.2 at 36. After the failure of efforts to resolve the dispute through a tax agreement, AR49166 (letter proposing tax settlement), the Nation sought a preliminary injunction against foreclosure. The District Court granted the preliminary injunction against Madison County, and subsequently granted summary judgment in favor of the Nation on all of its claims. *Oneida Indian Nation v. Madison Cnty.*, 376 F. Supp. 2d 280 (N.D.N.Y. 2005) (preliminary injunction); *Oneida Indian Nation v. Madison Cnty.*, 401 F. Supp. 2d 219

(N.D.N.Y. 2005) (summary judgment). The Court entered a similar judgment against Oneida County. *Oneida Indian Nation v. Oneida Cnty.*, 432 F. Supp. 2d 285 (N.D.N.Y. 2006).

Madison and Oneida Counties appealed the injunctions to the Second Circuit, which affirmed, based on tribal sovereign immunity. *Oneida Indian Nation v. Madison Cnty.*, 605 F.3d at 151. The Counties petitioned for a writ of certiorari, and the Supreme Court granted review on October 12, 2010. *Madison Cnty. v. Oneida Indian Nation*, 131 S. Ct. 459 (2010). On November 29, 2010, the Oneida Nation waived tribal sovereign immunity to foreclosure. Consequently, on January 10, 2011, the Supreme Court vacated the Second Circuit's decision and remanded the case. *Madison Cnty. v. Oneida Indian Nation*, 131 S. Ct. 704 (2011). On remand, the Second Circuit requested additional briefing. The parties submitted letter briefs principally addressing the applicability of the state property tax exemptions for reservation land. On October 20, 2011, the Second Circuit issued a decision vacating the District Court's injunctions against foreclosure; the Court also affirmed the District Court's decision that penalties and interest could not be imposed for nonpayment of taxes during the period of time preceding the Supreme Court's *Sherrill* decision, and held that the District Court should not exercise supplemental jurisdiction over the state property tax exemption claim, which could be decided by state courts in pending litigation. *Oneida Indian Nation v. Madison Cnty.*, 2011 WL 4978126, at *26 (2d Cir. 2011).

The Nation entered into agreements with the City of Sherrill and the City of Oneida providing for payments in lieu of taxes, and so there is no foreclosure issue with respect to land in those cities. ROD, § 7.5.1.1.1 at 42; FEIS, at App. G. The Nation also posted letters of credit securing payment of all accrued taxes, penalties and interest on all reacquired properties, including properties DOI did not decide in the ROD to take into trust. ROD, § 7.5.5 at 53. The

lone exception is the letter of credit covering property taxes on Turning Stone casino parcels. As to those, the letter of credit is based on DOI's determination of the fair market value of the parcels to a willing purchaser, rather than the parcels' non-transferable value as a casino resort. DOI concluded that taxing the property based on its value as a casino would violate the prohibition in the federal Indian Gaming Regulatory Act (IGRA) on the state's taxation of Indian gaming. ROD § 7.5.4 at 50-53. The ROD indicates that DOI will not require the Nation to post an additional letter of credit with respect to the Turning Stone parcels "unless litigation over this issue is pending at the time the Department could formalize acceptance of the casino tax lot into trust." *Id.* at 53.

ARGUMENT

I. APA REVIEW IS DEFERENTIAL.

APA review is based on the record of decision compiled by the agency, not on a new record created during litigation. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Jennison v. Hartford Life & Accident Ins. Co.*, 2011 WL 3352449, at *5 (N.D.N.Y. Aug. 3, 2011) (Kahn, J.) ("In the Second Circuit, review under the arbitrary and capricious standard is limited to the evidence in the administrative record.") (citation omitted). The record in this case consists of the administrative record and the supplemental record, which were filed by the government.[5]

Courts defer to an agency's reasonable interpretation of the federal statutes that the agency administers (*e.g.*, *Mei Fun Wong v. Holder*, 633 F.3d 64, 68 (2d Cir. 2011); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 206 (2d Cir. 2009)), and to the agency's interpretation of

[5] The record rule, as Judge Peebles recognized, precludes the use of the transcript of Associate Deputy Secretary Cason's deposition in determining the merits of Plaintiffs' claims unless Plaintiffs receive this Court's permission. *New York v. Salazar*, 701 F. Supp. 2d at 243 n.14 ("I emphasize that this decision merely authorizes the plaintiffs to take a limited deposition of Associate Deputy Secretary Cason and does not purport to represent my finding that the results of that deposition should be included in the record for consideration by District Judge Kahn when ruling upon plaintiffs' claims. The determination of whether, and if so to what extent, the transcript of that deposition should be considered in determining the merits of plaintiffs' claims is a matter for the trial court."). Plaintiffs have not sought leave to supplement the administrative record.

its own regulations (*e.g.*, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 (2011); *Brodsky v. U.S. NRC*, 578 F.3d 175, 182 (2d Cir. 2009)).

APA review is also deferential to the agency's resolution of disputed factual questions, especially when the agency's expertise is invoked. *Fund for Animals v. Kempthorne*, 538 F.3d 124, 131-32 (2d Cir. 2008). The agency's resolution will be upheld if it is supported by substantial evidence. *Id.* "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706(1)(F).

The greatest deference is given to the agency's balancing of competing policy considerations, such as DOI's balancing of the Nation's need for trust land and the asserted interests of the State and local governments in retaining tax and regulatory jurisdiction. The agency's choice is upheld if there is a "rational connection" between the facts in the record and the choice that the agency made. *Kempthorne*, 538 F.3d at 132; *City of New York v. Permanent Mission of India*, 618 F.3d 172, 181 (2d Cir. 2010) ("We give a policy determination made by an agency pursuant to its explicitly delegated authority 'controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.'") (internal quotations omitted and citations omitted). "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *accord Envtl. Defense v. EPA*, 369 F.3d 193, 201 (2d Cir. 2004) ("The arbitrary and capricious standard of review is narrow and particularly deferential.").

II. COUNT THREE MUST BE DISMISSED BECAUSE THE NATION IS A TRIBE ELIGIBLE FOR TRUST LAND UNDER TITLE 25 U.S.C. § 465.

The Court previously denied Plaintiffs' summary judgment motion based on the claim in Count Three that DOI lacks the power to take land into trust for the Oneidas because they voted

to reject application of the IRA, holding that a 1983 statute removed the disability for IRA-rejecting tribes. Memorandum-Decision and Order, 23-28 (DE 132). In their summary judgment motion, Plaintiffs chose not to present, and therefore the Court did not consider, the contradictory claim also asserted in Count Three – that the Nation is ineligible for trust land under the IRA because the Oneidas were not a "recognized Indian tribe . . . under federal jurisdiction" at the time of the IRA, notwithstanding the contemporaneous, DOI-supervised vote by the Oneidas concerning the IRA. The Court should now enter summary judgment dismissing Count Three in its entirety.

Plaintiffs' claim is based on the Supreme Court's ruling in *Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009), decided after DOI issued the ROD. The Supreme Court construed the IRA to limit DOI's trust authority to tribes that were federally recognized and under federal jurisdiction when the IRA was enacted, rather than at the more recent time that a trust decision is made. *Id.* In the ROD, DOI noted that the Nation is eligible for trust land because under DOI's regulations, *see* 25 C.F.R. § 151.2(b), the Nation is a federally recognized tribe eligible to receive services from the BIA. ROD, § 7.1 at 32. Nothing more was required as to an Indian tribe that is a party to federal treaties that are still in force and that was treated as a tribe by DOI at the time of the IRA and asked to vote on the IRA. As a matter of law, it is clear that the Nation was federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934, and at all relevant times.[6]

[6] Put another way, a remand to DOI to address this point would be an "idle and useless formality[,]" because the point the agency would be required to address is already clear as a matter of law. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006) (recognizing that, under the general principle of futility, "an error does not require a remand if the remand would be pointless because it is clear that the agency would adhere to its prior decision in the absence of error") (citation omitted); *cf. Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614 630 (2d Cir. 2008) (declining to remand to ERISA administrator, because facts that were not developed before the administrator are clear).

A. A Conclusory Allegation Stated on Information and Belief Fails to State a Claim.

Plaintiffs' *Carcieri* claim is insufficient because it is conclusory and, even then, made only on information and belief. "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009). In *Ashcroft*, the Supreme Court held that a conclusory allegation that the defendants had discriminated against the plaintiff because of his religion, race or national origin was not enough to state a claim absent factual support. *Id.* Likewise, Plaintiffs' conclusory allegation that the Nation was not under federal jurisdiction at the time of the IRA is not enough. The allegation in this case is even weaker than that in *Ashcroft*: (1) the conclusory allegation here is made only "upon information and belief," and no facts are alleged to justify such a belief, SASC ¶ 153; (2) the conclusory allegation is contradicted by Plaintiffs' specific factual allegation that the Nation voted against IRA reorganization, SASC ¶ 147, which, as the Interior Board of Indian Appeals recently noted, could only have happened if an Indian tribe was under federal jurisdiction at the time, *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62, 63 (Feb. 28, 2011); and (3) the conclusory allegation is contrary to the indisputable propositions that the Nation was recognized in federal treaties before the IRA, has always been listed as a recognized tribe under federal jurisdiction and was never terminated by Congress.

There can be no dispute that the United States recognized the Oneida Nation in treaties going back to 1784. Treaty of Ft. Stanwix, 7 Stat. 15 (Oct. 22, 1784); Treaty of Ft. Harmar, 7 Stat. 33 (Jan. 9, 1789); Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794); Treaty with the Oneida, 7 Stat. 47 (Dec. 2, 1794); Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838). A federal treaty is the classic example of federal recognition. Felix S. Cohen, Handbook of Federal Indian Law, § 3.02[3], at 138 (2005 ed.). Recognition "permanently establishes a government-to-

government relationship between the United States and the recognized tribe." H.R. Rep. No. 103-781, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768. Once a tribe is recognized, it is up to Congress to terminate the relationship. *United States v. Nice*, 241 U.S. 591, 598 (1916). Plaintiffs' theory therefore requires a showing that Congress terminated federal recognition before the IRA, but no such event is alleged. Nor could one be. *See* Section II(C), *infra*.

Because Plaintiffs have failed to allege facts "plausibly showing" that the federal government terminated its jurisdiction over the Oneida Nation before the time of the IRA, Count Three should be dismissed in its entirety. *See Ashcroft*, 129 S. Ct. at 1952; *see id.* at 1949 ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. *Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.* To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (emphasis added) (citations and internal quotation marks omitted).

B. The Administrative Record Establishes that the Political Branches Recognized the Oneida Nation at the Time of the IRA.

Even if Plaintiffs had pleaded a sufficient claim under *Carcieri*, Count Three must be dismissed because DOI found facts demonstrating as a matter of law that the federal government recognized the Oneida Nation as an Indian tribe under federal jurisdiction at the time of the IRA.

The ROD explicitly "consider[ed] the existence of statutory authority for the acquisition [of trust land for the Oneidas] and any limitations contained in such authority." ROD, § 7.2 at 33. The ROD presents no facts suggesting that the Oneidas were not recognized at the time of the IRA. To the contrary, the ROD determined that the federal government entered into the Treaty of Canandaigua with the Oneida Nation in 1794, ROD, § 1.2 at 8, and that the Oneidas voted on IRA reorganization. ROD, § 7.2 at 33-34. The former is conclusive as to federal

recognition of the Oneidas from the beginning of this country, and the latter as to recognition at the time of the IRA. The ROD also establishes that the federal government recognized the Oneidas in the period intervening between the Treaty of Canandaigua and the IRA, referring to the ongoing federal protection of the Oneidas that was acknowledged and enforced in *United States v. Boylan*, 265 F. 165, 172 (2d Cir. 1920). ROD, § 7.2 at 34.

The administrative record establishes the federal government's uninterrupted adherence to its annual financial obligations to the Oneidas under the Treaty of Canandaigua, and with it uninterrupted federal recognition of and jurisdiction over the Oneidas. "Since the treaty cloth has continued to be provided by the Federal government annually since 1794, this is evidence that the Federal government's constitutional obligation to abide by the treaty has been continually acknowledged since 1794." AR75949.

C. The Nation's Status as a Recognized Tribe Under Federal Jurisdiction at the Time of the IRA Is Established as a Matter of Law.

1. Recognition Is Committed to the Political Branches.

Tribal recognition is committed to the political branches under the Indian Commerce Clause and under the Treaty Clause. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *see Baker v. Carr*, 369 U.S. 186, 215-16 (1962) (citing tribal recognition as an example of a political question); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). "Courts have invariably deferred to such acts of recognition by the political branches." Felix S. Cohen, Federal Indian Law § 3.02[5], at 143 (2005 ed.). Responsibility for tribal recognition now resides with DOI, in the exercise of its statutory responsibility to manage Indian affairs. *See Golden Hill Paugussett*

Tribe of Indians v. Weicker 39 F.3d 51, 58-60 (2d Cir. 1994) (deferring to DOI's primary jurisdiction over tribal recognition).

2. The Political Branches Recognized the Oneida Nation at All Relevant Times.

Federal treaties recognize the Oneida Nation. The treaties include the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), which is the foundation of the tribal land rights recognized in the Oneida land claim litigation (notwithstanding an equitable bar to current litigation regarding them). This Court, the Second Circuit and the Supreme Court have all referred to the Nation as a "direct descendant" or successor of the Oneida Nation which was a signatory to these treaties with the United States establishing mutual governmental recognition. *Oneida II*, 470 U.S. at 230; *Oneida Indian Nation v. Cnty. of Oneida*, 719 F.2d 525, 527-28, 538-39 (2d Cir. 1983); *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 118-19 (N.D.N.Y. 2002); *Oneida Indian Nation v. Cnty. of Oneida*, 434 F. Supp. 527, 532-33, 538, 540 (N.D.N.Y. 1977); *accord Oneida Indian Nation v. United States*, 26 Ind. Cl. Comm. 138, 149 (1971), *aff'd*, 201 Ct. Cl. 546 (1973).

The Oneida Nation's government to government relationship with the United States never terminated. The Nation was listed in the very first formal list of already-recognized tribes – a list promulgated before DOI had even implemented procedures for newly acknowledging tribes. 44 Fed. Reg. 7235, 7236 (Jan. 31, 1979). The judgment of the political branches to include the Oneidas on the first list of already-recognized Indian tribes rested on a long unbroken record of federal recognition. Only forty-five years before – and fatal to Plaintiffs' *Carcieri*-based arguments – DOI asked the Oneidas to vote on acceptance or rejection of the 1934 Indian Reorganization Act, and conducted that election, all of which establishes federal recognition as a matter of law at the time of the IRA. "By including the Tribe among those tribes for which such

elections were conducted, the Secretary necessarily determined that the Tribe was under Federal jurisdiction at that time, notwithstanding the lack of a reservation or tribal trust land. Therefore, BIA properly relied on § 465 to take land into trust for the Tribe." *Shawano Cnty. v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 63 (Feb. 28, 2011).[7]

Uninterrupted recognition of the Oneidas also is established by the federal government's annual payment (including at the time of the IRA) of annuities (in the form of muslin cloth) required by the 1794 Treaty of Canandaigua. *See United States v. Boylan*, 256 F. 468, 487 (N.D.N.Y. 1919) (noting the continued payment of treaty annuity); *Six Nations v. United States*, 23 Ind. Cl. Comm'n. 376, 387, 392-93 (1970) (same); *Oneida Indian Nation v. Cnty. of Oneida*, 434 F. Supp. at 538, 540 (same).

The fact that federal recognition of the Oneidas continued in the years just prior to the IRA was demonstrated by the federal government's litigation in 1919 and 1920 to protect the Oneidas and their tribal land rights. *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920). The United States asserted its jurisdiction over the Oneidas by filing suit as trustee to set aside a state court partition and foreclosure that had resulted in the eviction

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[7] Plaintiffs allege that, "[f]ollowing the adoption of the IRA, the Oneidas (as well as other New York Indians) voted to reject the IRA." SASC ¶ 147. By alleging that the Oneidas were given the opportunity to vote on whether to accept reorganization under the IRA, Plaintiffs necessarily admit that the Oneidas were a "recognized Indian tribe . . . under federal jurisdiction" at the time of the IRA. This Court's earlier Memorandum-Decision and Order notes that there is a factual dispute concerning the *validity* of the election, but not about whether an election was called and held by DOI. Memorandum-Decision and Order, 24-25 (DE 132). The fact that DOI called for and conducted an Oneida election under the IRA is decisive as to recognition at that time.

Under the IRA, only "Indians" are eligible for trust land. 25 U.S.C. § 465. Similarly, only "Indians" were permitted to vote on reorganization under the IRA, and the outcome was to be decided by the vote of a "majority of the adult Indians." 25 U.S.C. § 478. The same definition of "Indian" under the IRA applies both to eligibility for trust land and eligibility to hold an election concerning reorganization under the IRA: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . ." 25 U.S.C. § 479. Thus "Indians" eligible to vote under the IRA are "Indians" eligible for trust land under the IRA. Moreover, because tribal votes concerning reorganization under the IRA could occur only in "a special election duly called by the Secretary of the Interior," and Plaintiffs concede that the Secretary of the Interior called for and conducted such a special election by the Oneidas, it follows that the Secretary made a determination that the Oneidas were "Indians" under the IRA before calling for and conducting the Oneida election.

of Oneidas from a 32 acre parcel of land in the Oneida reservation. The District Court upheld the government's position that the Oneidas as a tribe had continuously held the land, which could not be alienated without approval of the federal government. The Court therefore set aside the foreclosure, 256 F. 468 (N.D.N.Y. 1919), and the Second Circuit affirmed, 265 F. 165 (2d Cir. 1920). The Second Circuit held that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward." *Boylan*, 265 F. at 174. *Boylan*, thus, establishes two things: that the political branches of the federal government recognized and asserted jurisdiction with respect to the Oneida Nation, and that the courts, based on a factual record developed at trial, confirmed that the trust relationship between the federal government and the Oneidas remained intact.

In 1930 and 1931, on the eve of the IRA, an Oneida chief represented the Oneida Nation in testimony before Congress by representatives of federally recognized tribes located in New York. Indians of New York, Before the House Comm. on Indian Affairs, 71st Cong. 26-35 (1930); Before a Subcomm. of the House Comm. on Indian Affairs, 71st Cong. 5046-52 (1931).

In 1977, in the Oneida land claim trial, Judge Port explicitly found that the "trust relationship between the Oneidas [referring specifically to evidence concerning the Oneida Nation of New York] and the United States [has] never [been] terminated or abandoned." *Oneida Indian Nation v. Cnty. of Oneida*, 434 F. Supp. at 540.

3. The Second Circuit Has Rejected the Claim that the Oneida Nation Ceased to Be Recognized in the Late 19th Century.

The State and Counties do not say when, or by what official act, the United States is supposed to have terminated its recognition of and governmental relationship with the Oneida Nation. Instead, the State and Counties rely on isolated, outlier documents that failed in the Second Circuit and the Supreme Court in *City of Sherrill*. In that case, the City of Sherrill

contended that Oneida lands are not subject to federal protection because the Oneidas have not had "continuous tribal existence." The courts considered all of the historical documents that Plaintiffs offer here, arguing that the Oneidas ceased to exist at some point in the late 19th century. The Second Circuit rejected that argument, holding that there had been no executive or congressional action "withdrawing recognition" of the Nation:

> [C]ontrary to Sherrill's contentions, even if continuous tribal existence were required, the record before us shows it. Once a tribe has been recognized, the removal of that recognition . . . is a question for other branches of government, not the courts. The OIN is a federally recognized tribe that is a direct descendant of the original Oneida Indian Nation. And Sherrill has identified no legislative or executive action withdrawing recognition.
>
> Rather, the authorities offered by Sherrill merely reflect the opinions of a handful of government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased. In particular, letters from the Assistant Commission of Indian Affairs in 1916 and 1925 stated that the tribe no longer existed in New York. This conclusion is, to some degree, understandable, since most of the Oneida reservation land had been sold to the State, with the remaining parcels divided among members who, increasingly, lived separately from one another and received state services. But these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in *Boylan*. Moreover, this Court determined in *Boylan* in 1920 – between the time of the two letters in question – that the Oneida tribe did in fact exist.

337 F.3d at 166-67 (footnotes and citations omitted). This holding of the Second Circuit was not in any way affected by the Supreme Court's later decision in *City of Sherrill* (which did not mention the issue even though Sherrill argued the point), and so remains controlling circuit precedent. *See Oneida Indian Nation v. Madison Cnty.*, 2011 WL 4978126, at *26 (2d Cir. 2011).[8]

[8] In *City of Sherill*, the Second Circuit also referred to a footnote in the 1942 edition of Felix Cohen's treatise that reproduced a 1915 memorandum by a lawyer in the Office of Indian Affairs who believed that the Oneidas were no longer present as a tribe in New York – the same memorandum that was the basis for the 1916 letter that the Second Circuit found, in the part of its opinion quoted above in the text, to be without legal significance. 337 F.3d at 167 n.26. The Second Circuit's holding that federal recognition of the Oneidas had not been withdrawn and that the Oneidas continuously existed as a tribe demonstrates that the Court also found the treatise and the 1915 memorandum to be without legal significance as to Oneida tribal existence and recognition. 337 F.3d at 166-67.

Plaintiffs' "information and belief" allegations of a cessation of tribal recognition at the time of the IRA are insufficient to call into question the decisions in the *Boylan*, Oneida land claim and *City of Sherrill* litigations. Even without those decisions, the evidence identified in the administrative record and in the ROD, such as uninterrupted annual federal annuities to the Oneidas and the decision of DOI to conduct an IRA election among the Oneidas in the 1930s, is so one-sided and powerful that there could be no basis for upsetting DOI's decision to accept Oneida land to be held in trust. AR75949; ROD, § 7.2 at 33-34.

III. COUNT FOUR MUST BE DISMISSED BECAUSE THERE IS NO CONFLICT WITH PRIOR DOI PRACTICE, AND AN AGENCY CANNOT BE ESTOPPED BY PRIOR PRACTICE.

Plaintiffs allege a conflict between the trust decision and two purported DOI policies. First, Plaintiffs allege that DOI "has taken the position that it will not take additional land in trust for tribal groups that have the ability to manage their own affairs and who have been highly successful through their own efforts." SASC ¶ 159. There is no such DOI policy. Plaintiffs' allegation must be a reference to a statement in an unpublished 1959 intra-agency memorandum, which the State has conceded was revised in 1960. AR80478-9 n.3. More important, the ROD cites a series of IBIA decisions for DOI's understanding that "[a] tribe's casino income does not disqualify it from, and financial difficulties are not a prerequisite for, acquisition of land in trust." ROD, § 7.3.1.2 at 35; *see Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 85, 88, 92 (2d Cir. 2000) (tribe's right to trust land and other legal rights are not reduced because tribe has casino revenues); *City of Takoma v. Andrus*, 457 F. Supp. 342, 345

Yet, in a letter to this Court dated November 4, 2009, Plaintiffs referred to the same footnote in the 1942 Cohen treatise as evidence that the Oneidas ceased to exist as an Indian tribe prior to the IRA. (DE 153.) Apart from the unambiguous rejection of these materials by the Second Circuit, the Cohen footnote merely referred to the 1915 memorandum as an "interesting account" regarding New York Indian tribes; the treatise does not explain or endorse the account. It is in no way an exercise of recognition power by DOI. And the memorandum's suggestion that the Oneidas ceased to exist in New York is incompatible with the later findings of the District Judge in *Boylan* regarding the Oneidas, and with DOI's decision to conduct an Oneida election under the IRA.

(D.D.C. 1978) (IRA does not "limit its application [regarding trust land] to landless, destitute or incompetent Indians").

Second, Plaintiffs claim that deciding to take into trust land that is subject to tax liens is a violation of a DOI policy regarding a requirement for marketable title. SASC ¶ 161. There is no such policy. DOI regulations do not require the Department to evaluate title before deciding whether to take land into trust. The Department's inquiry into the sufficiency of title is made after the trust decision at the later time that the title transfer to the United States is to occur. 25 C.F.R. § 151.13. "The requirement to furnish satisfactory title evidence does not arise until after a decision is made as to whether or not the land should be taken into trust." *Avoyelles Parish v. E. Area Dir.*, 34 IBIA 149, 154 (Oct. 27, 1999); *accord Tohono O'Odham Nation v. Acting Phoenix Area Dir.*, 22 IBIA 220, 235 (Aug. 14, 1992) (recommending a payment bond or other means of satisfying water district lien before transfer into trust).

Further, as explained in the discussion of Count Twelve, pp. 55-57, *infra*, the point of 25 C.F.R. § 151.13, which addresses marketability of title in the trust context, is to protect the *federal government* against interference with the purpose of the acquisition or potential Fifth Amendment takings liability for eliminating the value of a lien, not to protect lienholders. Because the interests to be protected are those only of the federal government, they are not subject to APA review. Plaintiffs have no standing to challenge a trust decision on the ground that the acquisition could harm the federal government. That is why administrative title review occurs after the opportunity for APA review of the underlying trust decision has passed.

If there were a policy as alleged, DOI has presented a reasoned analysis supporting a departure, as explained in the discussion of Count Twelve, pp. 53-61, *infra*. There is a dispute over the validity of the property taxes under state law, and therefore over the validity of the liens.

Oneida Indian Nation v. Madison Cnty., 2011 WL 4978126 (2d Cir. 2011). As the ROD explains, the letters of credit are "adequate provision" for satisfying valid liens, if the courts ultimately determine that the Nation's property is not tax exempt under state law. ROD, § 7.5.5 at 53-55. DOI regulations do not require the Department to predict the outcome of litigation that will decide that dispute. Further, the ROD explains why it would be inappropriate to condition trust status on satisfying liens based on tax assessments of Turning Stone parcels that violate federal law prohibiting taxes on gaming. *Id.*, § 7.5.4 at 50-53; *id.*, § 7.5.5 at 54.

IV. COUNT FIVE MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM OF AGENCY BIAS VIOLATING THE DUE PROCESS CLAUSE OR THE APA.

Plaintiffs claim that DOI acted with improper bias in violation of the due process clause of the Fifth Amendment and the APA. Plaintiffs allege: (a) that Malcolm Pirnie, Inc., the contractor that prepared the EIS for DOI, was biased, SASC ¶¶ 166-71; (b) that DOI's response to FOIA requests shows bias, SASC ¶¶ 172-73; and (3) that the Nation's retention of an experienced former government lawyer to advocate for the Nation before DOI biased the decision-maker in some unspecified way, SASC ¶ 174. *See also* SASC ¶¶ 65-87. These allegations are insufficient to call the ROD into question. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir 2009), *cert. denied*, 131 S. Ct. 127 (2010).

A. Plaintiffs Have Not Alleged Deprivation of a Liberty or Property Interest Protected by the Due Process Clause, and the State and Its Officials May Not Invoke the Due Process Clause.

The due process clause is inapplicable. The State is not a "person" protected by the due process clause; so neither the State nor state officials are proper plaintiffs. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966); *Frontera Res. Azerbaijan Corp. v. State Oil. Co.*, 582 F.3d 393, 399 (2d Cir. 2009). Plaintiffs also fail to identify a liberty or property interest that has

been denied without due process. The State and Counties do not have a liberty or property interest in the Oneida-owned land that is to be held in trust or in the trust decision itself.

Nor do Plaintiffs have a liberty or property interest in future regulatory or tax jurisdiction that would be affected by taking the land into trust. Sovereign interests in regulation are not property. *Cleveland v. United States*, 531 U.S. 12, 22-25 (2000) (State's sovereign and economic interest in regulating video poker licensing is not "property" right for purposes of federal mail fraud statute). Similarly, the authority to impose future taxes, as distinct from the collection of taxes owed, is an attribute of sovereignty, not a property right. State and local governments do not lose constitutionally-protected property when federal law preempts their future taxing authority. *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) (no impediment to federal statute removing Indian-owned property from tax rolls).

Plaintiffs allege that an infringement of their statutory right to request information under FOIA is a due process violation. SASC ¶ 172. But statutory claims cannot be transmuted into constitutional rights so easily. FOIA includes its own detailed procedures for seeking redress, and those procedures are ample to satisfy any substantive property or liberty interest arising from the Act. *See* pp. 30-31, *infra*. The due process clause certainly does not give the State and Counties any right to pre-decisional access to government documents in order to "address the evidence submitted in support of the Nation's application." SASC ¶ 173. Moreover, Plaintiffs elected not to sue under FOIA until after DOI made its decision, discrediting and forfeiting any claim of a right to access documents before the trust decision was made. Plaintiffs now have the documents, so the supposed FOIA violation cannot be a predicate for a live due process claim.

B. Plaintiffs Have Not Alleged Facts Sufficient to Support an Inference that DOI's Decision Was Improperly Biased.

Plaintiffs' allegations fail under the APA as well as under the due process clause. Agency action can be challenged for bias only if it was "intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Schaghticoke Tribal Nation*, 587 F.3d at 134 (citations omitted). Under this standard, Plaintiffs' claim fails.

First, the claims regarding Malcolm Pirnie fail because DOI itself was responsible for preparing the EIS and because Malcolm Pirnie itself was not biased in performing its duties as DOI's contractor. DOI, not the Nation, selected Malcolm Pirnie, supervised its work and controlled the drafting of the EIS.

Second, DOI has made its FOIA production. It involved an enormous amount of requested material, which explains why it took time. The delay does not show bias in DOI's process of reviewing the trust application. There is no evidence that the late production of FOIA documents was intended to or did hide facts about the trust application, which would have been pointless because the relevant documents are in the administrative record. There is also no right to pre-decisional discovery from an administrative agency, and Plaintiffs have had ample opportunity to review the administrative record in pursuing their APA challenge, so there could not be any basis for granting any relief related to delay in the FOIA response.

Third, there is no evidence that there was any bias produced by, or improper influence on, DOI's trust decision associated with the Nation's retention of attorney Thomas Sansonetti with respect to trust land matters. The only cases in which agency actions have been successfully challenged under the APA on the basis of bias or improper influence involve efforts to wield political influence (chiefly the power of an existing governmental office), such as in the campaign mounted *against* the Nation's trust application by Plaintiffs through elected federal

and state office-holders, and then only when the agency has reversed an earlier position. *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009). And even that usually is not enough. *Schaghticoke Tribal Nation*, 587 F.3d at 134 (affirming finding of no improper influence despite evidence of concerted political pressure by government officials and a reversal of agency's prior decision to recognize tribe).

No inference of bias can be drawn from Mr. Sansonetti's communications with DOI officials because they also met with representatives of all stakeholders, including powerful elected federal officials representing the State and Counties, as well as elected officials of county and local governments staunchly opposed to a trust acquisition. Unlike a formal administrative agency adjudication, there is no prohibition against such communications when making a trust decision, and they are required to assure a good, informed administrative decision addressing the various interests explicitly described in DOI's trust regulations found at 25 C.F.R. pt. 151.

Plaintiffs focus on one document: Mr. Sansonetti's "final entreaty" regarding Nation businesses that DOI actually decided *not* to take into trust. SASC ¶ 87. The "entreaty" failed. AR083803-08. If it proves anything, it would be the absence of bias in favor of the Nation or its advocates. Mr. Cason rejected the "final entreaty." AR083803-08. Moreover, it is crystal clear in the record that DOI and BIA staff wanted to accept all of the Nation's land in the trust but that Mr. Cason would approve acceptance of only part of the land. ARS000903-08; ARS001351; ARS001378. Mr. Cason's decision to take less land into trust than his career staff recommended hardly suggests bias in favor of the Nation.

Finally, Mr. Cason did not act alone to approve the ROD. Deputy Secretary Lynn Scarlett, who had authority independently to approve the ROD and who is not alleged to have

been improperly influenced, also made the final decision and independently signed the ROD. ROD, § 8.0 at 73.

1. DOI Complied with CEQ Regulations in Selecting and Supervising Malcolm Pirnie.

DOI's routine use of a contractor did not show bias. CEQ regulations contemplate preparation of an EIS by a contractor. 40 C.F.R. § 1506.5(c) (requiring contractors to be selected by lead agency or cooperating agency); *see* 43 C.F.R. § 46.105 (formal DOI regulation effective October 15, 2008 permits use of contractor to prepare any environmental document, provided that the "Responsible Official remains responsible for (a) Preparation and adequacy of the environmental documents; and (b) Independent evaluation of the environmental documents after their completion").

(a) DOI did not delegate selection of the contractor to the Nation.

DOI's selection of Malcolm Pirnie, Inc. fully complied with the CEQ regulation governing the selection of contractors. 40 C.F.R. § 1506.5(c) ("It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest."). The Nation as a cooperating agency provided information concerning four qualified environmental consulting firms winnowed from an original list of ten firms: Ecology and Environment, Inc., of Lancaster; C & S Companies, of Syracuse; O'Brien & Gere, of East Syracuse; and Malcolm Pirnie, of White Plains. AR81034. Malcolm Pirnie had prior experience working for the EPA, the Army Corps of Engineers, and city and state agencies. AR81201; AR81206. Local government clients of the firm included the cities of Albany and Buffalo, AR81206; AR81209, and the Buffalo Sewer Authority, AR81209. Malcolm Pirnie also did work for New York City's Department of Environmental Conservation. AR81211. In a

letter to DOI, the Nation's counsel said that all four firms were qualified, and recommended the selection of Malcolm Pirnie because its "exemplary experience and professionalism nationwide and in New York, made its team distinctive and best qualified." AR81034.

DOI itself made the selection of Malcolm Pirnie. A letter from the Acting Director of BIA's Eastern Region to the Nation's counsel states:

> We have reviewed the qualifications for the environmental firms submitted to the Solicitor's Office that may be used for the preparation of the Environmental Impact Statement (EIS) for the transfer of 17,370 acres of Oneida Indian Nation fee land into trust status. We agree with your recommendation and accept Malcolm Pirnie, Inc. as the best qualified candidate. The Solicitor's Office has also reviewed and accepted your Memorandum of Agreement as an acceptable agreement and National Environmental Policy Act disclosure statement. Please prepare this document and forward it for signatures. Since the Bureau of Indian Affairs will be assuming responsibility for the EIS, Malcolm Pirnie, Inc. will have to work directly with our staff in the preparation of the document. Please designate a lead person for the EIS preparation from Malcolm Pirnie, Inc. as the Bureau of Indian Affairs contact. AR81033.

In contrast to DOI's selection of the contractor based on the Nation's recommendation concerning a list of multiple candidates, in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991), the court held that the FAA had violated the CEQ regulation by delegating responsibility to the applicant to select the contractor, merely concurring in the selection after the fact. Even so, the court did not overturn the agency's action on that ground, because it did not compromise the integrity of the NEPA process. *Id.*

(b) Malcolm Pirnie had no bias or interest in the outcome of the EIS.

Malcolm Pirnie was impartial. As required by CEQ regulations, Malcolm Pirnie and its subcontractor certified that they had no financial or other interest in the outcome of the project. AR80987 (Malcolm Pirnie); AR80990 (Louis Berger). The Nation had no prior contractual or other relationship with Malcolm Pirnie. The Nation paid Malcolm Pirnie's fees as DOI required, but did not control the work. DOI simply required the Nation to defray the costs of performing

an EIS to reduce the expenses to federal taxpayers. AR80994 (Memorandum Agreement providing that "Malcolm Pirnie will be working under the direction of the BIA, not the Nation"). The three-way agreement among BIA, Malcolm Pirnie and the Nation designates Malcolm Pirnie as the "project manager on behalf and at the direction of the BIA." *Id.* Malcolm Pirnie acknowledged that BIA was responsible for the "scope and content" of the EIS. AR64113.

(c) Malcolm Pirnie performed its work impartially and obtained information from many sources, including Plaintiffs.

The administrative record shows that Malcolm Pirnie performed its duties impartially, consulting with federal, state and local governments, as well as with the Nation. For example, Malcolm Pirnie requested development and zoning information from local governments.[9]

The record shows requests for information to the New York State Canal Corporation, the New York State Department of Environmental Conservation (DEC), including the DEC Natural

[9] AR63666; AR63677-82; AR63683 (requesting information on local code compliance); AR63706-760 (same): AR63771-73 (letter listing status of requests). The Madison County Planning Department's interim response to Malcolm Pirnie requests is in the administrative record. AR63696-63703; AR63765-66 (interim response). Madison County responded further and provided documents. AR23205-06. Madison County also responded to a follow-up telephone request. AR23207. Oneida County likewise responded to Malcolm Pirnie's information request, after first reserving the right to wait until the Memorandum of Understanding for cooperating agencies "is agreed to." AR23213; AR2314-18. Both Counties responded jointly to a request from Malcolm Pirnie for their input regarding the way public hearings to comment on the DEIS should be conducted. AR23221. *See also* AR63945-46 (response of Stockbridge Valley Central School District); AR63947-58 (submission from Stockbridge Valley Central School District opposing trust application); AR63995 (response of Morrisville-Eaton Central School System); AR23448 (request to Canastota Central School District); AR23451 (request to Cazenovia Central School District); AR23453-55 (request to Madison Central School District); AR23460-62 (request to Oneida City School District); AR2347 (request to Vernon-Verona Sherrill Central School District); AR23225 (request to Town of Augusta); AR23234 (request to Village of Canastota); AR23248-50 (requests to Town of Cazenovia); AR23259 (request to Town of Fenner); AR23260 (email response); AR23272 (request to Town of Lenox); AR23273-74 (memoranda regarding telephone conversation concerning Town of Lenox zoning and master plan); AR23280 (Town of Lenox response regarding code violations); AR23288 (request to Town of Lincoln); AR23302 (request to City of Oneida); AR23305 (further request to City of Oneida); AR23307 (City of Oneida response); AR23313 (memorandum regarding planning for Village of Oneida Castle); AR23319 (City of Rome acknowledgment of Freedom of Information request); AR23325 (memorandum regarding communication with City of Sherrill); AR23338 (request to Town of Smithfield); AR23343 (response of Town of Smithfield); AR23349 (response of Town of Stockbridge); AR23350 (follow-up request to Town of Stockbridge); AR23352 (response of Town of Stockbridge to follow-up request); AR23365-67 (request to Town of Sullivan); AR23374 (Freedom of Information request to Town of Sullivan); AR23376 (response to Freedom of Information request); AR23381-82 (request to Village of Sylvan Beach); AR23390 (memorandum regarding communication with Town of Vernon); AR23391 (request to Town of Vernon); AR23401 (memorandum regarding communication with Town of Vernon); AR23415 (request to Town of Verona); AR23440 (request to Town of Westmoreland).

Heritage Program, the New York State Office of Parks, Recreation and Historic Preservation, the New York State Police, the New York Department of State, the New York Department of Taxation and Revenue, the New York Thruway, and the New York Department of Transportation. The State agencies insisted on formal requests under the state Freedom of Information Law (FOIL).[10] DOI personnel also conferred directly with the New York State Office of Parks, Recreation and Historic Preservation. AR23109-12.

The EIS also included information provided by other federal agencies.[11] Moreover, other federal agencies participated in the evaluation of the EIS and facets of the trust application. EPA concluded in its review of the FEIS that it did not "anticipate that conveying up to the 17,730 acres now owned by the Oneida Nation of New York into trust will result in significant adverse impacts to the environment." AR10182. The Department of Agriculture evaluated the trust application and concluded that it was exempt from the Farmland Protection Policy Act. AR76480-81; AR23107. The Fish and Wildlife Service of DOI (FWS) contacted BIA officials involved in reviewing the trust application and indicated that BIA would either have to request the information itself (which it did) or designate Malcolm Pirnie as its representative in writing. AR76450 (fax cover sheet referring to communications between BIA and FWS); AR23106 (request for consultation by BIA); AR23113 (BIA clarification of request); AR23119; ARS773-74 (FWS response to BIA request). EPA provided comments on the Draft EIS (DEIS).

[10] AR63704-05; AR63962 (response of DEC Natural Heritage Program); AR23192 (DEC response indicating documents will be sent); AR63975 & AR63984 (response of New York State Police); AR23186 (New York State Police response denying FOIL request as too broad); AR63944 (response of New York Thruway Authority and New York Canal Corporation); AR23191 (providing documents); AR23193 (same); AR63982 (response of Department of General Services); AR23185 (General Services found no sites within its jurisdiction in the trust area).

[11] AR63777-63941 (EPA environmental justice report); AR64068 (request to EPA); AR64048 (request to U.S. Geological Survey); AR64052 (request to FEMA); AR64071 (request to U.S. Fish and Wildlife Services); AR23103 (request to U.S. Department of Agriculture Natural Resources Conservation Service).

AR78190-91. The US Geological Survey reviewed the DEIS and had no comments. AR23121. A component of the BIA also submitted comments on historical sites. ARS346-48.

(d) DOI took responsibility for the EIS and oversaw the entire process.

Because of DOI's oversight and involvement, challenges to Malcolm Pirnie's impartiality are legally irrelevant. When an agency assumes responsibility for the EIS, allegations of contractor bias, even if well-founded (unlike here), do not state a NEPA claim. *See Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) (contractor bias made no difference because agency exercised sufficient oversight); *Friends of Endangered Species, Inc. v. Jantzen*, 596 F. Supp. 518, 526-27 (N.D. Cal. 1984) (agency involvement sufficient); *Burkholder v. Wykle*, 268 F. Supp. 2d 835, 845 (N.D. Ohio 2002); *Valley Cnty. Pres. Comm'n v. Mineta*, 231 F. Supp. 2d 23, 42 (D.D.C. 2003) (even where contractor had an interest in outcome, NEPA is satisfied when agency exercises sufficient oversight). As in *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 166 (D.D.C. 2002), a recent unsuccessful NEPA challenge to a trust decision, the administrative record shows that DOI took responsibility for the NEPA document (an EA in *Roseville*, an EIS here) and independently evaluated the environmental impacts.

DOI did not rubber stamp Malcolm Pirnie's work. DOI complied with the CEQ regulation requiring it to provide "guidance and participation in the preparation [of an EIS] and . . . independently evaluate the statement prior to its approval and . . . take responsibility for its scope and contents." 40 C.F.R. § 1506.5(c). DOI, not Malcolm Pirnie, performed one of the most important steps in the process by developing the Preferred Alternative chosen in the FEIS, ARS000903-08; ARS001351. The documents cited in the foregoing sentence are definitive proof of DOI's deep participation in and total control of the analysis and the decision-making.

Representatives of DOI presided over public meetings called to gather information for the EIS.[12] The record of these hearings includes testimony or written submissions by numerous local elected officials, including County Executive Joseph Griffo, State Assemblyman David Townsend, State Senator Raymond Meier, former Congressman Sherwood Boehlert, and numerous town and county legislators. AR43885; AR44161; AR74794; ARS855.

DOI was directly involved in creating and reviewing both the DEIS and the FEIS. DOI staff conducted three multi-day site visits. ARS661; ARS662-64; ARS566-67. The administrative record shows that Malcolm Pirnie submitted drafts to DOI and that DOI reviewed and commented on them. *See, e.g.*, AR76285; ARS643-54. The Acting BIA Eastern Regional Director evaluated and commented on a partial draft of the preliminary DEIS in a letter dated June 2, 2006. AR58315-19; ARS201-332 (markup of draft). In a six-page letter dated July 17, 2006, BIA Eastern Regional Director Franklin Keel offered extensive revisions to the then-preliminary DEIS. AR76393-99. The Acting Eastern Regional Director made further comments on the DEIS in a letter dated September 22, 2006. AR76271-77. A 21-page letter dated February 16, 2007 edited proposed responses to public comments on the EIS. AR75940-61. A letter from DOI's Assistant Solicitor dated January 25, 2008 gave extensive responses to comments on the DEIS. AR27060-75. A February 5, 2008 letter conveyed even more extensive revisions to the responses to comments on the DEIS. AR27076-27108 (DOI edits to the FEIS); AR53388 (same); AR53395 (same); AR54438 (same).

[12] AR43884-44159 (transcript of January 10, 2006 EIS scoping meeting presided over by a representative of DOI and attended by three other DOI officials); AR44160-372 (transcript of January 11, 2006 EIS scoping meeting presided over by a DOI representative and attended by four other DOI officials); ARS643-654 (letter from Franklin Keel to Malcolm Pirnie regarding comments on preliminary DEIS); AR74793 (transcript of December 14, 2006 public hearing on DEIS, presided over by a DOI representative and attended by one other DOI official); AR75020- (transcript of February 6, 2007 public hearing on DEIS, presided over by a DOI representative and attended by three other DOI officials); AR7187 (report of meeting by presiding DOI official).

A letter from DOI dated March 19, 2007 exemplifies DOI's control over and responsibility for the EIS. The letter to Malcolm Pirnie explained:

> The Bureau of Indian Affairs, Eastern Regional Office, continues to prepare guidance for the final Environmental Impact Statement (EIS). Several items are currently in the Office of the Solicitor for their review. While this Office understands your desire to complete this task, we are unable to project when all reviews by the Office of the Solicitor will be completed. AR23122.

Malcolm Pirnie actively solicited additional DOI review. For example, Malcolm Pirnie asked BIA to examine comments on the DEIS submitted by the attorney for the Stockbridge-Munsee Community. AR75962. Malcolm Pirnie identified comments on the DEIS "requiring a BIA response." AR13502.

Thus, the administrative record shows that DOI exercised responsibility for the EIS, supervised all work on it and shaped its form and contents.

2. DOI's FOIA Response Is Not Probative of Agency Bias and Is Irrelevant to the Decision Under Review and Is Not the Basis of a Due Process Claim.

There is no basis to infer from delay in responding to massive and burdensome FOIA requests that DOI was biased. *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (complaints about agency unresponsiveness and hostility do not establish bad faith). DOI had to and did produce the administrative record as the basis for APA review. It is irrelevant to the soundness of the ROD and the trust decision how DOI responded to the State and Counties' burdensome FOIA requests, which amounted to a demand that the administrative record be produced even before the trust decision was made. There is no due process right to obtain a preview of the administrative record before the agency makes a decision.

Because Congress created a detailed and comprehensive statutory scheme to enforce FOIA, FOIA claims cannot be re-stated as due process claims. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002) (FOIA violation not a proper basis

for due process *Bivens* claim); *Edmonds Institute v. U.S. Dep't of Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) (FOIA claim not redressable under other statutes, including APA); *see Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1204-05 (9th Cir. 2008) (statutory violation cannot be recast as denial of due process); *McNulty v. Bd. of Educ.*, 2004 WL 1554401, at *7-8 (D. Md. July 8, 2004) (same). These cases establish that the process due with respect to any interest created by FOIA is satisfied by the administrative and judicial remedies in FOIA itself, which Plaintiffs here did not pursue during the pendency of the Oneida trust application. Plaintiffs chose instead to sit on their claimed FOIA rights and to assert them only after DOI made its trust decision.

The FOIA records have now been produced, which moots the issue. (For this reason, in part, the Nation will not address the merits of Count Fifteen, Plaintiffs' FOIA claim.) *See Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) ("[H]owever fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform."); *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (no live controversy because all nonexempt materials had been released).

3. There Is Nothing Improper About the Nation's Retention of an Attorney Who Is a Former Government Official or About His Representation of the Oneidas.

Plaintiffs allege bias because of the Nation's retention of Thomas Sansonetti, a partner in the Holland & Hart law firm and formerly an Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice. Plaintiffs allege that Mr. Sansonetti knew James Cason, one of the two DOI officials who approved the ROD. However, Plaintiffs have not proffered a credible motive for why DOI's decision would have been improperly affected by Mr. Sansonetti, much less the required evidence that DOI's decision actually was altered favorably to the Nation for reasons other than the proper statutory criteria.

See Schaghticoke Tribal Nation, 587 F.3d at 134 (no showing that contacts between DOI officials and state and federal elected officials affected decision to reverse previous grant of recognition to tribe). Even though Plaintiffs obtained permission to conduct a deposition of Mr. Cason in connection with their claim of bias, they have neither amended the SASC to make new factual allegations nor sought to make the deposition transcript, which does not help Plaintiffs at all, a part of the record in this case.

There is no support for the proposition that an administrative agency action can be set aside because a party is represented by a lawyer who has a social or prior professional relationship with the agency's decision-maker. The law requires more than speculation and uncharitable inferences to challenge agency action for bias. *Friends of the Shawangunks, Inc. v. Watt*, 97 F.R.D. 663, 667 (N.D.N.Y. 1983) (Miner, J.) (must present *specific facts* demonstrating improper influence on agency decision-making). The need for specific facts is especially great here, where it is indisputable (1) that the ROD was approved and signed, not just by Mr. Cason, but also by Deputy Secretary Lynn Scarlett, who is not alleged by Plaintiffs to have been biased, ROD, § 8.0 at 73, and (2) that DOI staff wanted to take all Oneida lands into trust and that Mr. Cason insisted on a lesser amount. ARS000903-08; ARS001351; ARS001378.

Plaintiffs allege two specific facts to support their bias claim: (a) a trip that former Associate Deputy Secretary James Cason took to view the Nation's facilities; and (b) a document titled "final entreaty," submitted by Mr. Sansonetti regarding the selection of a "preferred alternative" in the EIS. SASC ¶ 87. Neither the trip nor the entreaty supports an inference that DOI's decision was biased. They prove just the opposite.

With regard to Mr. Cason's trip to tour the proposed trust lands and meet with Nation officials, Plaintiffs fail to acknowledge that Mr. Cason made a similar trip to meet with County

and local government officials in roughly the same time frame. *See* AR008492-93 (April 17, 2006 Paul Miller e-mail to DOI coordinating Mr. Cason's visit with the Counties); AR049091 (May 3, 2006 Paul Miller e-mail to Mr. Cason's assistant coordinating his upcoming visit and noting: "we are having a catered dinner for Mr. Cason's party on May 8th"); AR064658-67 (news coverage of Mr. Cason's visit). As the FEIS notes, "[i]n 2006, officials from both the Washington and Nashville offices of the BIA visited with local community officials on five occasions to tour the proposed trust lands as well as discuss the issues of concern with local government representatives." FEIS, § 6.5 at 6-4. Both trips were equally "ex parte" in the sense that Mr. Cason met with opponents and proponents of the trust decision separately. Neither trip was in the least bit improper, because this was not an adjudicatory decision and the agency was entitled to collect information from concerned parties informally. The trips show only that Mr. Cason went to some effort to hear from all sides and to personally review the land that was the subject of the pending trust application.

Mr. Sansonetti's "final entreaty" proves the absence of bias. Mr. Cason actually *rejected* the "final entreaty" and its plea to include certain important properties (convenience stores/gas stations) in the preferred alternative. AR083803-08; ROD, § 2.2.9 at 19; § 7.3.1.2 at 38-39. Moreover, because of DOI's FOIA responses, Plaintiffs were aware of the entreaty and responded to it with their own contrary argument prior to the ROD. AR73998-74004 (December 11, 2007 letter from Madison County Attorney to Mr. Cason); *see Power Auth. v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984) (ex parte communications could not call agency's impartiality into question where they were disclosed, permitting opposing side to respond).

The deliberative process documents, which were produced in the supplemental administrative record, underscore the lack of bias in favor of the Nation that is evident in Mr.

Cason's rejection of the "final entreaty." The fact is that DOI staff favored taking into trust all Nation lands, about 17,000 acres. An internal 2007 email shows staff urging Mr. Cason to take the land into trust. "[A]ll the [agency] lawyers in the room actually support bring in all 17 K acres, but are trying to make Mr[.] Cason happy by trying to find out what he wants." ARS001351. "All the land Mr[.] Cason had in mind is in Oneida County. Tom asked about the Madison County lands around the 32 acre territory that include the graveyard, cultural center, government building, etc. Mr. Cason didn't care about those." ARS001351. These themes recur in a 2008 internal e-mail, which contains a synopsized analysis of the countervailing considerations bearing on the Oneida trust application and of Mr. Cason's role in the decision not to include 4,000 acres of Oneida land in a trust transfer. "Alternative I is Mr[.] Cason's preferred alternative, worked out between Mr[.] Cason and the DOI Solicitor's Office. Mr[.] Cason wanted two small contiguous parcels, one in each county to address [Justice] Ginsburg's comments and since Alternative F got out of hand with the addition of noncontiguous culturally important parcels, they decided to leave out the Tribal lawyers and try it again between Mr[.] Cason and the DOI lawyers and came up with this." ARS000903. "Mr[.] Cason wants to acknowledge Judge Ginsburg's checker boarding concerns by making the lands compact and contiguous." ARS000904; *see* ARS001378. On this record, which ordinarily would not be available because deliberative process documents ordinarily are privileged, it could not be clearer that Mr. Cason influenced the administrative decision-making in the direction of less, not more, trust land for the Nation and that he was not biased in the Nation's favor.

It also could not be clearer that Mr. Cason and DOI took a hard, informed and thoughtful look at all the trust issues and made a balanced choice about which Oneida lands should be in trust. ARS000903-953 (memorandum attaching two draft RODs, one taking about 17,000 acres

into trust, and the other taking about 13,000 acres). As one DOI staffer put it: "So it boils down to justice, socioeconomics, cultural resource protections and cumulative impacts supporting Alternative A, all 17,370 acres, versus jurisdictional impacts on the 'justifiable expectations' of people living on and governing stolen lands supporting Alternative I [4,000 acres less]." ARS000904. DOI identified and evaluated reasonable choices and made a reasonable, principled decision that Plaintiffs cannot second-guess on APA review.

4. Ex Parte Contact Is Not Improper Regarding Trust Applications, As Shown by the Contacts of Plaintiffs and Their Representatives.

Although Plaintiffs insinuate otherwise, there is no prohibition against "ex parte" contacts when a federal agency is making a decision such as the one now before this Court. Ex parte contacts are forbidden by the APA only when the agency decision-making is "on the record," in the context of formal rulemaking or formal adjudication. 5 U.S.C. § 551(14) (defining ex parte communication); 5 U.S.C. § 557(d)(1) (forbidding ex parte communications); 5 U.S.C. § 554(a) (formal adjudication is determined on the record created at an agency hearing); 5 U.S.C. § 554(a) (formal rulemaking is made on the record). The same distinction applies to the due process analysis. *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188-89 (2d Cir. 1984) (rejecting due process claim based on ex parte communications by local legislators).

Ex parte communications are appropriate and necessary for DOI to get the information required by the trust regulations at 25 C.F.R. pt. 151. DOI is not expected to hold, and could not reasonably hold, adversarial trial proceedings to assess tribal need for trust land or tax and regulatory impacts on non-Indian communities. In informal decision-making, such as consideration of a trust application, agencies should lend an ear to interested parties. "The department or its specific decisionmaker does not appear biased when it accepts a broad range of information and viewpoints in proceedings that are not limited by the evidentiary constraints of a

formal adjudicative setting." *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996). Trust decisions do not require and would not benefit from a trial-like adjudicative process.

The problem with the Connecticut Attorney General's "ex parte" communication in *Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *5 (D. Conn. Nov. 3, 2006) – a personal meeting with the Secretary of the Interior to oppose tribal recognition – was that the court had previously enjoined communications with the agency in related litigation involving the Attorney General. The court in *Schaghticoke* acknowledged that contacts with DOI by state officials and members of Congress "are not necessarily impermissible ones and do not necessarily prove that impermissible factors were taken into consideration in the acknowledgement process." *Id.*[13]

The administrative record here shows extensive contacts with DOI by numerous government officials, including local elected officials and members of Congress, who vigorously opposed the Nation's trust application. From the beginning, DOI was bombarded with congressional inquiries and attempts to influence the trust decision. Only a few days after the Nation filed its trust application, Congressman John M. McHugh wrote to DOI Secretary Gale Norton enclosing a letter from the Chair of the Madison County Board of Supervisors and insisting that "it is *imperative*" that DOI take no action while land claim litigation and negotiations are pending. AR49427 (emphasis in original). Congressman Sherwood Boehlert also wrote to Secretary Norton and demanded that she "immediately suspend all action on the submitted trust applications." AR49422. A few days later, Secretary Norton's office arranged a

[13] The court ultimately rejected the tribe's claim of political interference in the tribal acknowledgment decision. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008). The Second Circuit affirmed. *Schaghticoke Tribal Nation*, 587 F.3d 132. Rather than supporting an ad hominem attack on Associate Deputy Secretary Cason (who was involved in the *Schaghticoke* case as well) the court's ruling in that case vindicates the impartiality of his decision despite the efforts of political figures to influence it.

briefing for Senator Schumer. AR7845; ARS562. Congressman McHugh also submitted correspondence from the State of New York opposing the Nation's trust application. AR49314-19. An email in June 2005 indicates that "WH Leg" (*i.e.*, the White House Office of Legislative Affairs) contacted DOI in response to pressure from Congressman McHugh, and also indicates that DOI staff were conferring with Congressman Boehlert. AR8510.

A joint letter to Mr. Cason from Congressmen Boehlert and McHugh referred to an earlier meeting with them and posed a number of questions at the behest of County officials. AR49260-64. An e-mail dated December 16, 2005, indicates that DOI granted a request to extend the time for comments on the trust application in response to requests from Congressmen Boehlert and McHugh as well as Governor Pataki. AR7932; AR 64723-24 (news story referring to congressional request). On January 30, 2006, Senator Schumer wrote to urge BIA's Eastern Regional Director to "decline to acquire this land for the Nation." AR49446. Congressman Boehlert also wrote to Associate Deputy Secretary Cason to urge a negotiated settlement instead of a trust decision. AR49165. On November 29, 2006, Congressman McHugh wrote to request still another extension of time for comments. AR4979. The request was granted. ARS62-64. In March, Congressman McHugh again wrote to Mr. Cason and propounded questions on behalf of Upstate Citizens for Equality. AR49036-37. Both members of Congress jointly wrote to Secretary Kempthorne on March 19, 2008 to convey their "adamant oppos[ition] to the Bureau of Indian Affairs (BIA) current proposal to take 13,086 acres of land in Oneida and Madison Counties into trust." AR10440. Likewise, Senator Schumer copied Associate Deputy Secretary Cason on a letter to Secretary Kempthorne urging him to defer any decision on the Nation's trust application. AR66583-85. On May 5, 2008, Senator Schumer also made a personal call to Mr. Cason, in which — according to the Senator's press release — Associate Deputy Secretary

Cason promised to defer action on the trust application until certain local community concerns were addressed. AR66565-68.

State, County and local officials communicated directly with DOI. DOI officials met with County officials to discuss the trust application on April 22, 2005. AR7369-73 (memorandum describing meeting, agenda and sign in sheet). An email dated June 21, 2005 refers to a conference call involving DOI, New York Governor Pataki's office, and Madison and Oneida Counties. AR8507. A letter from Oneida and Madison County officials to Associate Deputy Secretary Cason refers to a meeting with the officials on March 2, and thanks him for accepting the Counties' invitation to visit. AR49158. DOI officials met with Madison and Oneida County officials on February 6, 2007 to discuss their "Alternative H" proposal. AR7187. Associate Deputy Secretary Cason also met with County officials (and their outside lawyer) in March 2007. AR49039. State and County officials and their outside counsel met with DOI staff and DOJ lawyers on February 22, 2008. AR48542. After that meeting, the Madison County Board of Supervisors invited a DOI lawyer to meet with the Board. AR48538-39. Assemblyman David Townsend wrote to Secretary Kempthorne to oppose the trust application on March 21, 2008. AR10477. So did Governor Spitzer's Special Counsel, in a March 24, 2008 letter copied to the Counties' outside lawyer. AR10515-20.

These extensive ex parte contacts between DOI and members of Congress and local officials opposed to the trust application preclude any possible inference of bias favoring the Nation. Mr. Cason and DOI were open to discussion with both sides, and the political influence was all in favor of the State and Counties.

V. COUNT SIX MUST BE DISMISSED BECAUSE DOI DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN RELYING ON THE "ON-RESERVATION" REGULATIONS.

DOI has one regulation governing on-reservation trust land applications, and another governing off-reservation applications. 25 C.F.R. §§ 151.10 & 151.11. Plaintiffs claim DOI should have used its "off-reservation" regulation, contending that *City of Sherrill* casts doubt on whether the land qualifies as "within the exterior boundaries of the tribe's reservation or adjacent thereto," because the Court held that the Nation could not unilaterally reestablish tribal sovereignty over the land. SASC ¶ 180. Yet the Supreme Court's *City of Sherrill* decision cited DOI's "on-reservation" trust regulation in describing the "proper avenue" to restore Oneida sovereignty over the reacquired land. 544 U.S. at 221 (citing 25 C.F.R. § 151.10(f)). More recently, the Second Circuit has decided that its holding in *City of Sherrill*, that the Oneida reservation was not disestablished, remains the controlling law of the circuit. *Oneida Indian Nation v. Madison Cnty.*, 2011 WL 4978126, at *26 (2d Cir. 2011). This dispute is, in any event, a tempest in a teapot, because the on-reservation trust regulations apply to land within a disestablished reservation, 25 C.F.R. § 151.2(f), and because DOI stated in the ROD that it would have reached the same conclusion under either the on-reservation or the off-reservation regulations. ROD, § 7.1 at 33 n.5.

A. Congress Did Not Disestablish the Oneida Reservation.

As the ROD explains, the land is within the boundaries of the Oneida reservation acknowledged in the 1794 Treaty of Canandaigua. ROD, § 1.2 at 8; § 7.1 at 32. In *City of Sherrill*, the Supreme Court noted that the Second Circuit had held that the reservation had not been disestablished, and explicitly declined to disturb that holding. *City of Sherrill*, 544 U.S. at 215 n.9. As this Court has decided before, the Second Circuit's holding remains binding

precedent. Memorandum-Decision and Order, 17 (DE 132). The Second Circuit has reached the same conclusion twice, rejecting arguments that *City of Sherrill* effected a back-door disestablishment. *Oneida Indian Nation v. Madison Cnty.*, 2011 WL 4978126, at *26 (2d Cir. 2011); *Oneida Indian Nation v. Madison Cnty.*, 605 F.3d at 157 n.6.

B. The "On-Reservation" Regulations Do Not Require a Tribe to Exercise Sovereignty Over the Land Prior to Trust Status.

There is no merit to the claim that, even if the reservation remains intact, the Supreme Court's decision in *City of Sherrill* makes the Nation's land ineligible for consideration under DOI's "on-reservation" regulations. SASC ¶¶ 179-80. DOI's regulation, 25 C.F.R. § 151.2(f), refers to "governmental jurisdiction" over the land, which is obviously different from the sovereignty at issue in *City of Sherrill*, because trust status would never be required for already-sovereign tribal land. It would be pointless for a tribe to seek trust status for land over which it already has sovereignty. Trust status is only important for land within a reservation if the land has lost its sovereign status, for example through statutory allotment, as in *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), or through unlawful state purchases, as in *City of Sherrill*. The "governmental jurisdiction" requirement simply limits "on-reservation" trust applications to the tribe to which the reservation belongs, and has nothing to do with sovereignty over the land subject to the trust application. *See* 25 C.F.R. § 151.8 (requiring consent of tribe having jurisdiction over the reservation when another tribe seeks trust land within the reservation); *Aitkin Cnty. v. Acting Midwest Reg'l Dir.*, 47 IBIA 99, 106 (June 12, 2008) (presumption that the tribe inhabiting the reservation has jurisdiction).

C. DOI's Regulations Define "On-Reservation" Trust Applications to Include Those Concerning Land in Disestablished Reservations.

The text and context of DOI's regulation demonstrates that tribal sovereignty is not required for "on-reservation" treatment. The regulation defines "Reservation" to include land within a former reservation that was diminished or disestablished, and so the on-reservation regulations apply here whether or not the reservation was disestablished. 25 C.F.R. § 151.2(f); *South Dakota v. Acting Great Plains Dir.*, 49 IBIA 129, 145 (Apr. 30, 2009) (definition also applies to the diminished portion of an extant reservation); *South Dakota v. Acting Great Plains Dir.*, 39 IBIA 301, 306 (Apr. 8, 2004) (same). And DOI has authoritatively construed the scope of its own regulations to include land that is adjacent to a reservation as within the scope of "on-reservation" trust acquisitions. ROD, § 7.1 at 32 (citing 25 C.F.R. § 151.3(a)(1)).

D. DOI's Reliance on the "On-Reservation" Regulations Is Not a Basis for Challenging the Decision Because DOI Was Clear that It Would Have Reached the Same Conclusion Under the "Off-Reservation" Regulations.

The ROD states that "even if the off-reservation criteria applied to the Nation's fee-to-trust request, the Department would still acquire the Subject Lands in trust," because of tribal need and close proximity to undisputed reservation land. ROD, § 7.1 at 33 n.5. All of the trust land at issue here is near the 32 acres protected in *Boylan*, which even Plaintiffs will concede retains reservation status. It is, therefore, impossible for Plaintiffs to demonstrate any prejudice from the application of the on-reservation regulations. *See* 5 U.S.C. § 706; *Shinseki v. Sanders*, 129 S. Ct. 1696, 1705-06 (2009) (burden of showing prejudice is on the party challenging administrative action); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007) (§ 706 is an administrative "harmless error" rule).

Courts reviewing agency decisions do not order futile remands which would be an "idle and useless formality." *Wyman-Gordon Co.*, 394 U.S. at 766 n.6. The Court can be confident,

on this record, that DOI would have made the same decision even if Plaintiffs' claim of error had any merit. *Li v. Mukasey*, 529 F.3d 141, 150 (2d Cir. 2008) (decision whether to affirm agency action or remand turns on the court's confidence that the agency would make same decision in absence of asserted error); *Karpova v. Snow*, 497 F.3d 262, 269 (2d Cir. 2007) (declining to remand because agency would reach same conclusion absent error).

VI. COUNTS SEVEN THROUGH TEN MUST BE DISMISSED BECAUSE DOI COMPLIED WITH 25 C.F.R. § 151.10.

A. The Standard of Review Applicable to Counts Seven Through Ten, Which Challenge DOI's Exercise of Discretion, Is Narrow and Deferential.

Plaintiffs' challenges to DOI's application of its Part 151 trust regulations, in Counts Seven through Ten, fail to state APA claims. Each count concerns DOI's discretionary application of its regulations to particular facts. Judicial review of such agency action is "necessarily narrow." *Islander East Pipeline, Co. v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008). "A reviewing court may not itself weigh the evidence or substitute its judgment for that of the agency." *Id.*; s*ee Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 247 F.3d 437, 441 (2d Cir. 2001) (review is "narrow and 'particularly deferential'") (citation omitted).

> Under 5 U.S.C. § 706(2)(A) a reviewing court must hold unlawful and set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow," and courts should not substitute their judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Instead, an agency determination will only be overturned when the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id*. In other words, so long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned. *Id*.

Karpova, 497 F.3d at 267-68. Applying these principles in *Henley v. FDA*, 77 F.3d 616, 621 (2d Cir. 1996), the Court upheld the FDA's decision not to include a warning that oral contraceptives containing estrogen had been shown to cause cancer in animal studies, although "we might not have chosen the FDA's course had it been ours to chart."

B. DOI Properly Exercised Its Discretion Under 25 C.F.R. § 151.10(b).

25 C.F.R. § 151.10(b) requires DOI to consider "[t]he need of the individual Indian, or of the tribe, for additional land," as among the factors used "in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated." The ROD refutes Plaintiffs' claim that DOI made the trust decision "without regard to" need. Section 7.3 of the ROD specifically addresses the "Nation's Need for Land." ROD, § 7.3 at 34-39.

Plaintiffs make two more specific arguments regarding need. *First*, they contend that Turning Stone Casino and Resort generates sufficient revenue to sustain the Nation, so that the tribe has no need for land other than the land at its casino resort. SASC ¶ 189. But the purpose of trust land goes beyond just generating gaming revenue. ROD, § 1.3 at 8 ("Nation's need for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth"); *id.*, § 7.3.1.2 at 36 ("a demonstration of necessity may take into account more than economic need and may also consider the tribe's need for land to support self-determination and tribal housing"). Trust land provides a homeland for a tribe over which it can exercise self-government and protect historic and culturally important sites. ROD, § 1.3 at 8; § 7.3.1.2 at 36. Moreover, it would be imprudent and contrary to DOI's trust obligations to commit the Nation's future entirely to reliance on gaming revenue, which could be eroded by changes in federal law or by state-sponsored competition. *See* Thomas Kaplan, *Cuomo Weighs*

Ending State Limits on Casino Gambling, N.Y. Times, Aug. 10, 2011, at A17. The ROD appropriately notes that "the Nation has sought to diversify its economy and land base so that it is not as heavily dependent on its gaming enterprise, which is not a guaranteed future source of revenue." ROD, § 7.3.1.2 at 36.

Second, Plaintiffs argue that trust status should be limited to the Nation's government offices and tribal housing, which together with the casino parcels "comprise slightly more than 1000 acres." SASC ¶ 190. As the ROD explains, the land to be accepted in trust also includes important economic enterprises other than Turning Stone, such as a cattle farm, a gas station and convenience store, and land important to the maintenance of Oneida culture, such as the Three Sisters Traditional Cropland, reforested land for traditional craft-making, and hunting and fishing lands. ROD, § 7.3.1.2 at 38. The land to be taken in trust also includes archaeological sites of significance to the Oneidas. *Id.*

There is nothing in the trust statute or the regulation that requires DOI to adopt Plaintiffs' parsimonious view of a tribe's need for land. A tribal land base requires diverse lands sufficient in size to form a homeland subject to meaningful self-governance. There is no requirement that trust land be limited to a corporate park or a housing development, or that in any other way trust land not exceed the bare minimum that can be imagined.

C. DOI Properly Exercised Its Discretion Under 25 C.F.R. § 151.10(e).

25 C.F.R. § 151.10(e) includes, as a factor to be considered, "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." Section 7.5 of the ROD addresses this factor over fourteen single-spaced pages of text. ROD, § 7.5 at 40-55. The record does not support the claim that "The Determination was Made Without Regard to 25 C.F.R. § 151.10(e)." SASC, at 42. Plaintiffs simply disagree with the way that DOI applied this

factor, particularly the importance DOI attributed to the claimed loss of tax revenue in relation to the benefits of taking the land into trust.

A major point of taking land into trust is to insulate it from state taxes and to subject it instead to tribal sovereignty. The statute authorizing trust land explicitly provides that land held in trust "shall be exempt from State and local taxation." 25 U.S.C. § 465. Every trust decision leads to a loss of tax revenue, possibly leading to future increases in assessments and tax rates. *See* SASC ¶¶ 194, 202. While state tax considerations are relevant to a trust decision, the loss of state tax revenue cannot bar trust acquisitions, or else there would be no trust land. Moreover, Plaintiffs misstate the impact. Taking land into trust does not cause local governments to lose past taxes that have already accrued (as alleged in SASC ¶ 199). With the exception of the tax on the Turning Stone Casino that DOI determined to violate federal law, and of penalties and interest prior to the *City of Sherrill* decision, *Oneida Indian Nation v. Madison Cnty.*, 2011 WL 4978126, at *24 (2d Cir. 2011) (Second Circuit affirmance of ruling), all taxes and related charges will be paid from letters of credit if the courts determine that state tax exemptions do not apply and that they are due. This is fully explained *infra*, at pp. 53-61, which addresses Count Twelve.

DOI did not fail to consider the impact on particular municipalities of taking land into trust. SASC ¶¶ 196-198. The ROD addresses the tax impact in Verona, ROD, § 7.5.2 at 45; Stockbridge, *id.*, § 7.5.2 at 46; and the VVS School District, *id.* Moreover, the magnitude of other alleged impacts on Verona and the VVS School District are premised on the improper assessment of Turning Stone as a casino enterprise, rather than on what a willing arms-length buyer would pay for the property and improvements that can only be operated as a casino by the Nation, and may have little or no value in the hands of others. ROD, § 7.5.2 at 45-46; *id.*,

§§ 7.5.4.1-7.5.4.3 at 51-53. Prior to 2005, these municipalities did not levy any property taxes on the Turning Stone parcels, *id*., § 7.5.4 at 50; AR49088-89 (letter describing Town's treatment of Turning Stone as tax exempt), so they cannot claim to have relied in any way on the collection of property taxes on the Casino, much less on the inflated assessments imposed in 2005. *See* AR75751 (Town of Vernon increased the assessment on a Nation golf course from $4.5 million to $21 million in 2008). The casino was taxed for the first time only after the trust application was filed in 2005, and so no tax liability would have accrued but for the time required to review the application. Also, DOI clearly considered the cost of services attributed to the Nation. ROD, § 7.5.3.1 at 48. *See* SASC ¶ 202.

In asserting that DOI failed to consider the competitive advantage Nation businesses have because of the absence of local property taxation, (SASC ¶ 201), Plaintiffs ignore the fact that DOI elected not to take into trust the sites of the Nation businesses that most directly compete with other businesses. "[F]or the most part, Nation enterprises conducted on the Preferred Alternative (Alternative I) lands do not compete with other local businesses." ROD, § 3.1.2.1 at 25 (noting that the Preferred Alternative excludes 9 of 13 SavOn gas stations and all of the three Nation-owned marinas); AR083803-08 (Mr. Cason disagreed with the premise of the "final entreaty" and stated that "[t]he future opportunity to continue Sav-On operations do [sic] not depend on our trust decision[]. If the[y] are competitive operations, they can operate in fee."). In addition, the principal "competitive advantage" of the Nation's retail businesses stems from New York State's policy of forbearance with regard to the collection of sales and excise taxes by Indian tribes, a policy that is not affected by the trust decision. *See* ROD, § 3.1.2.1 at 25 & § 7.5.1.2 at 44.

The ROD did not, as alleged, equate tax payments by Nation employees or vendors with direct payments by the Nation. SASC ¶¶ 205-208. To the contrary, the ROD explains that DOI is considering "the overall fiscal impacts of trust acquisition," ROD, § 7.5.3 at 47, which include tax revenues generated by Nation enterprises. That is entirely appropriate in an area which has lost many large employers in recent years. The Nation's businesses have provided jobs for local residents and attracted new residents to the area, boosting local housing prices as well as increasing local income and sales tax revenue. DOI properly considered the entire tax picture, not just the particular taxes on which Plaintiffs focus.

D. DOI Properly Exercised Its Discretion Under 25 C.F.R. § 151.10(f).

Plaintiffs erroneously claim that DOI failed to consider the effect of trust status on regulation by local jurisdictions. DOI plainly considered those issues. ROD, § 7.6 55-69. DOI addressed the consequences of trust status for local land use and for environmental regulation. As to the former, the ROD explains that the Nation has generally conformed to local uses, and on the occasions when it has not (including at Turning Stone), there has not been a spillover effect. *Id.*, § 7.6.2.4 at 59. As to the latter, the ROD considers at length the effect of trust status on various environmental laws. *Id.*, §§ 7.6.3.2.2-7.6.3.3 at 62-68.

Plaintiffs argue that *City of Sherrill* conflicts with or somehow modifies DOI's regulation. SASC ¶ 214 (regulations adopted before *City of Sherrill* "are silent as to evaluating the checkerboard jurisdictional problems that were of central concern to the Supreme Court"). Plaintiffs invoke the *City of Sherrill* opinion to mask what is really just another claim that DOI should have exercised its statutory discretion differently. *See, e.g.*, SASC ¶ 224 (complaining that the ROD fails to address "in any serious way" effect on environmental regulation); *id.* ¶ 222 (complaining that the ROD "never comes to grips" with regulatory issues despite discussing

them). The ROD clearly indicates, however, full consideration of jurisdiction and configuration (checkerboard) issues, *see, e.g.*, ROD, § 7.6.3.4 at 68-69, and, indeed, reflects that such issues led DOI to refuse to put over 4,000 acres of Oneida land in trust, *see, e.g.*, *id.* ¶ 3.1.1.1 at 21; *id.*, 7.3.1.2 at 38.

1. Deference Is Owed to DOI's Interpretation of Its Own Regulation.

"An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. at 672 (citation omitted); *accord Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2469 (2009); *Forest Watch v. United States Forest Serv.*, 410 F.3d 115, 117-18 (2d Cir. 2005). There is no basis here to reject DOI's interpretation of its own regulation as permitting a trust acquisition to include parcels that are near but not always abutting each other.

2. *City of Sherrill* Approved DOI's Regulation as Sensitive to Jurisdictional Conflicts, and Nothing in the Opinion Conflicts with or Overrides the Regulation.

There is no basis for concluding that statements in the Supreme Court's *City of Sherrill* decision override DOI's regulation. The Supreme Court considered the implications of the Nation's assertion of sovereignty over land that it was able to reacquire through open-market purchases. *See* 544 U.S. at 220. The Nation's position in that case was that the Nation could exercise sovereignty over any parcel within the reservation that it reacquired. The Supreme Court concluded that the Nation's approach would threaten "justifiable expectations" based on the long exercise of authority by the State of New York and its municipal subdivisions. *Id.* at 215-16. The Supreme Court held the "unilateral" restoration of tribal sovereignty through re-purchase of land to be inequitable, and therefore beyond the scope of permissible remedies for the violation of federal laws and treaties protecting the Nation's land. *Id.* at 221.

An important part of the Court's analysis of the equities was the availability of an alternative means for the Nation to re-establish sovereignty – DOI's "on-reservation" trust regulations, which the Court cited in its opinion. *Id*. at 220-21. The Court explicitly contrasted sovereignty resulting from DOI's trust process with the Nation's unilateral re-purchase decisions. Far from suggesting that there is any deficiency in DOI's regulations, the *City of Sherrill* opinion states: "The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; '[t]he purposes for which the land will be used'; 'the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise.' 25 CFR § 151.10(f) (2004)." *Id*. The Supreme Court held that a trust decision guided, *inter alia*, by 25 C.F.R. § 151.10(f), was the "proper avenue" by which to restore sovereignty. *Id*. at 221.

The Supreme Court thus endorsed DOI's regulations as a vehicle for balancing the relevant interests. Nothing in *City of Sherrill* suggests that DOI's regulations are inadequate to address inter-jurisdictional conflicts, or that the regulations should be construed to forbid taking land into trust whenever that would affect state and local regulatory jurisdiction over trust land adjacent to land fully subject to such jurisdiction. The ROD confirms that DOI was duly "sensitive" to these issues. DOI "recognize[d] that checkerboard ownership could affect a community's ability to effectively plan and regulate." ROD, § 7.6.3.4 at 68. DOI explained that checkerboarding was not a concern with regard to taxation, because that is necessarily done parcel-by-parcel. *Id.* (citing *Cnty. of Yakima v. Confederated Tribes & Bands*, 502 U.S. 251, 265 (1992)). By taking land into trust where "the Nation's development is focused" DOI minimized

checkerboarding and the disruption of jurisdictional lines. *Id.*, § 7.6.3.4 at 69. The trust lands are "highly contiguous and compact, thereby facilitating the Nation's successful governance and minimizing impacts to the State and local governments." *Id.* DOI declined to take into trust thousands of acres of Nation land that it believed were not sufficiently contiguous and compact. *See* ARS903; ARS808; ARS1036 (Mr. Cason "wants to have what he decides upon as compact and contiguous as possible, with minimal jurisdictional impacts."). In other words, DOI made a judgment call, and drew a line, based on the very considerations urged by the State and Counties. That is just what the Supreme Court called on DOI to do.

Plaintiffs' argument seems to be that taking *any* land into trust would be contrary to *City of Sherrill* because it would disrupt a uniform regulatory scheme, SASC ¶ 217, and would "circumvent the types of concerns articulated by the Court in *Sherrill*," SASC ¶ 215. That is an unreasonable proposition to read into a decision that explicitly approved of the trust process and its evaluation of jurisdictional problems as the "proper avenue" to restore sovereignty.

E. DOI Properly Exercised Its Discretion Pursuant to 25 C.F.R. § 151.10(g).

Plaintiffs allege that DOI disregarded 25 C.F.R. § 151.10(g), which requires the agency to consider BIA's ability to discharge additional responsibilities resulting from acquisition of trust land. The ROD addresses this consideration in section 7.7. ROD, § 7.7 at 69-70. DOI explained that this acquisition was likely to "impose limited additional responsibilities" because BIA would not be required to provide municipal services and because leasing issues are unlikely to arise. *Id.*, § 7.7 at 69. DOI also noted that the contiguity of the lands to be taken into trust would ease the management burden. *Id.* Plaintiffs' disagreements with DOI's determination with regard to the burdens the agency will face are conclusory and unsupported by anything in the administrative record.

VII. COUNT ELEVEN MUST BE DISMISSED BECAUSE DOI PROPERLY CONSIDERED EXISTING EASEMENTS AND RIGHTS OF WAY, WHICH IN ANY EVENT ARE PROPERTY RIGHTS OF OTHERS THAT PLAINTIFFS HAVE NO STANDING TO ENFORCE.

Plaintiffs' claim that DOI did not consider the effect of the trust decision on existing easements and rights of way fails for two reasons.

First, the easements and rights of way are private property rights that do not belong to Plaintiffs, and thus they have no standing. National Grid (whose property interests are invoked in SASC ¶¶ 235-36) settled with the Nation and the United States, and has dismissed its challenge to the trust decision. No. 6:08-CV-00649. The City of Oneida has filed its own complaint. No. 6:08-CV-648. There is no reason for the Court to permit Plaintiffs to litigate the City's property claim, or the claim National Grid has dismissed.

Both the Constitution and the APA impose standing requirements. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues*." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). It is of no moment that Plaintiffs may have standing to raise other claims arising from the same nucleus of operative facts. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Davis v. FEC*, 554 U.S. 724, 734 (2008); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (recognizing that a Plaintiff must demonstrate standing for each claim).

Plaintiffs do not allege the required "injury in fact" to their own property rights. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Even if Plaintiffs could identify a redressable injury, prudential standing rules preclude them from pursuing claims based on the rights of third parties who can themselves bring (or settle) the claims. Just as the Supreme Court declined to allow a non-custodial parent to assert the constitutional rights of a child in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004), this Court should decline to address

allegations about injuries to property rights belonging to others. *See Michigan v. EPA*, 581 F.3d 524, 528-29 (7th Cir. 2009) (state lacks standing to challenge EPA ruling on basis of harm to businesses that could challenge decision themselves). Nor can the State invoke the *parens patriae* doctrine as a basis for challenging federal agency action. *Id*. at 529.

Further, under the APA, a party bringing an APA challenge must be aggrieved by the specific agency action that is the subject of the claim. *Ctr. for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143, 1154 (N.D. Cal. 2002); *San Juan Citizens' Alliance v. Salazar*, 2009 WL 824410, at *5 (D. Colo. Mar. 30, 2009). Plaintiffs cannot be aggrieved by the agency's alleged failure to consider the effect of a trust transfer on the enforcement of easements. Plaintiffs are not within the "zone of interest" of the legal protections of existing easements belonging to others that they purport to invoke in Count Eleven. *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1190 (10th Cir. 2006) (local governments having no ownership interest in the land lack standing to bring APA challenge to agency's issuance of mineral patent); *Inter-Tribal Council of Nevada, Inc. v. Hodel*, 856 F.2d 1344, 1351-52 (9th Cir. 1988) (non-owner tribal group lacked standing to bring APA challenge to DOI's transfer of school property to a state).

Second, there is no merit to the claim that DOI did not consider, or incorrectly resolved, issues regarding easement impairment. DOI fully considered the issues. AR75670-75 (National Grid's comments); AR83796-97 (Dominion Resources' comments). DOI also addressed specific comments concerning the City of Oneida's water lines, ROD, App. B at 118, and National Grid's utility lines. *Id.* at 217-218.

Moreover, the Nation's transfer of title does not eliminate existing valid encumbrances. The ROD states that valid existing rights of way "will not be affected by this decision to place

lands in trust." ROD, § 7.6.3.2.12 at 66. Plaintiffs concede, if only grudgingly, that the ROD is "technically accurate" in denying any effect on easements. SASC ¶ 234.

Plaintiffs' allegations about past events are not a basis for speculating that problems will arise after a trust transfer, when the United States has title to the land. There is no basis to speculate that the federal government would thwart access to a water or utility easement, and speculation about future decisions by the Nation and the United States cannot establish standing. *See* Memorandum-Decision and Order, 21 (DE 132). In any event, the ROD duly considered the future, concluding that it is in the Nation's interest to maintain and improve the infrastructure necessary for its own endeavors. ROD, § 7.6.3.2.12 at 66. The ROD also took account of the Nation's intentions regarding the future: "The Nation has stated that it intends for all rights-of-way, including those used to access utility infrastructure, to remain in effect after placement of lands into trust." *Id.* The Nation's agreement with National Grid is evidence of that intention.

Finally, the trust decision has no effect on the enforcement of easements. Plaintiffs' concerns about the effect of sovereign immunity on the enforcement of such property rights is misplaced because the Nation itself has sovereign immunity now, before any trust transfer (as acknowledged in SASC ¶ 239). *Schilling v. Wis. Dep't of Natural Res.*, 298 F. Supp. 2d 800 (W.D. Wis. 2003) (United States and tribe have immunity to suit to establish easement).

VIII. COUNT TWELVE MUST BE DISMISSED BECAUSE DOI PROPERLY DETERMINED THAT THE NATION SATISFIED 25 C.F.R. § 151.13 BY POSTING LETTERS OF CREDIT TO SECURE PAYMENTS OF ANY TAXES LAWFULLY DUE.

The ROD acknowledged DOI's regulation concerning elimination of any liens that would make title to the land unmarketable at the time of transfer. 25 C.F.R. § 151.13; ROD, § 7.5.5, at 53-54. Plaintiffs claim that DOI acted arbitrarily, capriciously and contrary to law by concluding that letters of credit posted by the Nation satisfied the regulation.

The Nation posted letters of credit covering the full amount of taxes, penalties and interest that the courts determine, at the conclusion of pending litigation, are owed. The letters of credit secured payment as to all properties, with the exception of certain casino-related properties. The letters of credit are triggered, and payment occurs, if the courts finally decide that certain state tax exemptions do not apply to the Nation's lands. The applicability of the state tax exemptions remains a matter in litigation, as reflected in *Oneida Indian Nation v. Madison County*, 2011 WL 4978126 (2d Cir. 2011) (declining supplemental federal jurisdiction without prejudice to litigation in state court, where state exemptions issue is pending); N.Y. Real Prop. Tax Law § 454 (one of state statutes exempting tribally owned land in reservation).

As to the casino-related properties, the letters of credit covered the amount of taxes that DOI determined in the ROD reflected the value of the land for non-casino uses. The letters of credit do not cover the huge amount of taxes based on the value of the casino business itself. DOI determined those taxes to be invalid under IGRA's prohibition of state taxation of tribal casinos. ROD, § 7.5.4.2, at 52. Even as to those taxes, however, the ROD is clear that, if litigation is still pending concerning the legality of the taxes under IGRA when the property is to be transferred to the United States to be held in trust, then the Nation will be required to post an additional letter of credit in an amount sufficient to secure even those taxes. Thus, as to all Nation properties (without exception), the ROD conditioned acceptance of actual transfer of title to the United States on letters of credit assuring payment of any taxes and related charges determined by the courts actually to be due.

A. The Letters of Credit Fully Protect the Government's Interest in the Title It Acquires, Which is the Sole Purpose of the Regulation.

DOI noted and addressed the Counties' comments regarding the adequacy of the letters of credit, ROD, App. B at 126, and reasonably concluded that they are adequate under 25 C.F.R. § 151.13, which provides:

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

DOI properly construed its own regulation to require "liens [to] be addressed to the satisfaction of the Federal government pursuant to Federal title standards," not to the "satisfaction of the local taxing authority." ROD, § 7.5.5 at 54.[14] As explained at pages 8-9 and 48, *supra*, courts defer to agencies' interpretations of their regulations.

The requirement to eliminate liens kicks in well after the trust decision has been made, "prior to taking final approval action," meaning when title to the property is ready to be transferred. In other words, it applies *after* there has been an opportunity for APA review of the discretionary decision to approve an application for trust land. ROD, § 7.5.5 at 54 ("title issues

[14] The background of the regulation confirms DOI's interpretation. The DOI title evidence regulation stems from federal statutes dating to 1841 that require the Attorney General to approve title before money can be spent to purchase land for the United States. 40 U.S.C. § 3111, Pub. L. 107-217 § 1, 116 Stat. 1144 (2002); 28 C.F.R. § 0.66; s*ee* Acquisition of Land by the Dep't of the Air Force, 6 Op. O.L.C. 431, 432 n.2 (1982). The statute protects the federal government from acquiring land subject to encumbrances that may frustrate the purpose of the acquisition or subject the United States to liability, not a local taxing authority. H.R. Rep. No. 91-970, at 5 (1970) (discussing predecessor statute, 40 U.S.C. § 255; title inquiry is to determine "[w]hether the interest in land, that is the title being acquired, is sufficient for the purpose of a program or presents unwarranted risks for the United States"); Purchase of Lands, 10 Op. Att'y Gen. 353, 354 (1862) ("The purpose of this provision was to protect the United States against the expenditure of money in the purchase or improvement of land to which it acquired a doubtful or invalid title.").

need not be resolved prior to issuing a fee-to-trust decision, but they must be addressed prior to actual acceptance of the land into trust"). DOI had no obligations under this regulation at the time of the ROD, and alleged non-compliance with section 151.13 is not, in any event, a basis for challenging DOI's decision. The timing of the regulation fits its purpose, which is to protect the federal government's *own* interests, not the interests of third parties to the trust acquisition.[15]

Because the regulation is intended to protect the federal government against loss, immediate payment of liens is not required when the government is otherwise protected by provisions for later payment. 10 Op. Att'y Gen. 353, 355 (1862). The purpose of the statute can be satisfied by assuring that there is a mechanism in place to satisfy liens in the future. Other regulations promulgated for the same purpose recognize that defects in title can be satisfied or waived, depending on what is in the federal government's interest. 32 C.F.R. § 644.67(e) (Army regulation requiring opinion of the Attorney General to waive a title defect); 36 C.F.R. § 254.15(c)(i) (Agriculture Department regulation requiring elimination, release or waiver of title defects); 43 C.F.R. § 2201.8(c)(1)(i) (DOI regulation concerning Bureau of Land Management land exchanges requiring elimination, release or waiver of title defects according to an opinion of DOI Solicitor).

The letters of credit satisfy 25 C.F.R. § 151.13. DOI could not predict with certainty how tax disputes in litigation would be resolved. By assuring that all taxes, penalties and interest that are due will be paid *if* the courts ultimately determine that the Nation's land is not exempt from

[15] As an illustration of a title defect that could impair the federal program, consider the Office of Legal Counsel's disapproval of the Air Force's proposed acquisition of a right of way on state land because the property would be subject to later condemnation under state law, potentially interfering with the federal government's use. 6 Op. O.L.C., at 441-42. The other potential harm to the federal government from acquisition of property subject to encumbrances is monetary liability for a taking. If the federal government acquires real property subject to a lien, then the lien cannot be enforced, but a taxing authority might argue that the federal government may be liable to suit in the Court of Federal Claims for taking a property right. *United States v. Alabama*, 313 U.S. 274 (1941); *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Bair v. United States*, 515 F.3d 1323, 1330-31 (Fed. Cir. 2008).

taxes under state law, *see* N.Y. Real Prop. Tax Law § 454, the letters of credit fully protect the federal government from any loss of value or liability for land acquired in trust for the Nation. ROD, § 7.5.5 at 54 ("The purpose of the letters of credit, however, is to provide assurances that revenues will be paid over to the Counties *if and when* taxes are judicially determined to be due and owing."). It is worth noting that the Second Circuit decided just recently that certain penalties and interest had been unlawfully imposed on the Nation with respect to property taxes, and so the Counties cannot lawfully collect them. *Oneida Indian Nation v. Madison Cnty*., 2011 WL 4978126 (2d Cir. 2011) (also indicating that litigation concerning taxability of Nation land will continue in state court). DOI was right to use letters of credit to secure the Counties while such litigation progresses to a conclusion.

B. DOI Properly Refused to Use the Trust Process to Enforce Invalid Taxes on the Nation's Gaming Enterprise.

The ROD also explains why DOI has not required the Nation to post a letter of credit to secure payment of all of the taxes assessed on the Turning Stone Casino parcels.[16] "[T]he Department has determined that as a matter of Federal law the taxes and related charges on the casino are unlawful in large part, and therefore the liens are in part invalid for that reason." ROD, § 7.5.5 at 54; *see also* ROD, § 7.54 at 50-53. DOI correctly determined that Oneida County's imposition of property taxes assessed on the basis of Turning Stone's value as a casino resort was contrary to and preempted by federal law forbidding taxation of tribal casinos.

[16] All taxes, penalties and interest on the casino parcels were charged after the Nation filed its trust application. ROD, § 7.5.4.2 at 52. Thus, but for the time required to process the trust application, and the time consumed by Plaintiffs' judicial challenge to the trust decision, there would be no tax liens of concern under 25 C.F.R. § 151.13. Moreover, a state statute requires that the Nation's casino properties be treated as if they were tax exempt for purposes of assessing taxes against all other properties in the Town of Verona; in other words, all other properties are assessed taxes sufficient to fund the entire Town of Verona budget – and the Nation's properties are assessed additional taxes. N.Y. State Finance Law § 99-n. Moreover, the Nation's properties are assessed taxes in an amount grossly exceeding the entire Town of Verona budget. ROD, § 7.5.4.2 at 52. For example, the Town of Verona Fire Department receives $142,844 of the Town of Verona budget, yet the Nation's taxes have been set so that its "share" of that expense is $539,359. *Id*.

The assessment of the casino resort parcels was based on an appraisal performed on April 22, 2005. ROD, § 7.5.4.2 at 52. The appraisal explicitly assumed for purposes of valuation that "the continued use of the improvements is legal, economically viable, and reflects the highest and best use of the assets." AR48951. Valuation was therefore conditioned on the continued operation of a casino resort, which would justify the cost of the facilities. *Id*.; ROD, § 7.5.4.2, at 52. The appraisal acknowledged that the value would be different if a casino resort could no longer be operated on the site, because "the economic value of the real property improvements would likely be impaired." AR48952.

DOI wrote to the Town of Verona assessor expressing the concern that the valuation of the parcels was based on their use as a casino resort. AR68396-97. The assessor responded that he had used the estimated replacement value of the improvements to determine valuation, seeking to avoid the statement in the appraisal that the valuation depended on the operation of the casino because the improvements would be obsolete absent the casino business and valuation could not then be based on the cost of the improvements. AR68394-95. DOI properly declined to condone and enforce the illegal tax assessment by requiring the Nation to discharge the related tax liens as a condition for taking the casino properties into trust.

"Intended to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments,' IGRA seeks to 'ensure that the Indian tribe is the *primary beneficiary* of the gaming operation.' 25 U.S.C. §§ 2701(1) and (2) (emphasis added)." *Cabazon Band v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). In the negotiation of a gaming compact, IGRA makes demand for casino tax payment presumptive proof of bad faith. In other words, tax demands are prohibited by IGRA. 25 U.S.C. § 2710(d)(4); 25 U.S.C. § 2710(d)(7)(B)(iii)(II); *Rincon Band v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3055 (2011).

In *Rincon Band*, all parties agreed that California could not demand a tax payment from the tribe. The only dispute was whether the state's demand for a share of gaming revenues was equivalent to a tax, given certain circumstances created by California law. The Ninth Circuit held that it was a tax demand forbidden by IGRA. *A fortiori*, IGRA conflicts with and preempts the unilateral imposition of state or local taxes on a tribal casino, as Verona has done by basing its tax assessment on the value of the casino resort to the Nation rather than on the fair market value of the property to a willing purchaser (that could not operate a casino on the land).

Allowing a local government to impose a property tax on the value of a casino resort enterprise would be contrary to the text and purpose of IGRA, and therefore preempted. The test for preemption of state law by federal statutes concerning Indian tribes is laid out in *Cabazon*:

> In determining whether federal law preempts a state's authority to regulate activities on tribal lands, courts must apply standards different from those applied in other areas of federal preemption. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). In balancing these federal, tribal, and state interests, no specific congressional intent to preempt state activity is required; "'it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.'" *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir.1987), *aff'd*, 484 U.S. 997 (1988) (quotation omitted). Furthermore, "ambiguities in federal law are, as a rule, resolved in favor of tribal independence." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989).

37 F.3d at 433. Thus, in *Cabazon* the Court held that the state could not impose a licensing fee on bets placed on horse races broadcast to a tribal gaming facility, even though—unlike here—the licensing fee was not imposed directly on the tribe, but rather on the non-Indian-owned racing association sponsoring the broadcasts. *Id.* at 434. Here, the burden placed on the Nation by the County's property tax assessment is much greater than the burden imposed on the tribe by the licensing fee in *Cabazon*. And, like the situation in *Cabazon*, the burden is being imposed on

an activity in which the Nation has made a heavy investment of its own tribal resources. *Id.* *See* ROD, § 7.5.4.2 at 52.

The decision in *Cabazon*, and DOI's similar conclusion that IGRA conflicts with and preempts the taxes on the Nation's investment in its casino resort, follows from the Supreme Court's rejection of generally-applicable state licensing and motor fuel taxes on a tribe's logging operation in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Court began by noting the comprehensiveness of federal regulation of tribal logging. *Id.* at 145-48. The Court therefore found no room for state taxation within this "pervasive" federal scheme. *Id.*; *see Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 842 (1982) (state cannot impose gross receipts tax on non-Indian contractor for tribal school construction subject to pervasive federal regulation).

IGRA is equally, if not more, comprehensive. Although it gives the states a particular, carefully-delineated role in gaming regulation (but one that explicitly precludes the exaction of taxes), IGRA occupies the field. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) (holding that IGRA completely preempts state law related to gaming, and permitting removal). As the Eighth Circuit noted, "'S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.' S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076." *Id.* at 544; *accord Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030 (11th Cir. 1995) ("The occupation of this field by [IGRA] is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute."). As in *White Mountain Apache* and

Ramah Navajo School Board, Inc., a county government's "general desire to raise revenue," 448 U.S. at 150; 458 U.S. at 839 (citation omitted), through the casino tax assessment does not outweigh conflicting federal and tribal interests.

DOI's interpretation of its regulations as requiring the federal government – not the Counties – to be satisfied, ROD, § 7.5.5 at 54, is well within its authority. *See* pp. 8-9, 48, *supra*, (discussing deference to agency construction of its regulations). And DOI has every reason to be satisfied with the amount of the letters of credit posted by the Nation with regard to the casino parcels. DOI is correct that it should not interpret its regulations to require a tribe to make a payment that violates a federal statute. Moreover, the law is clear that the government may be exposed to takings liability only for the value of a lien that is valid under pre-existing federal law. *Armstrong*, 364 U.S. at 80. Because the portion of the tax liability (and lien) attributable to Turning Stone's value as a casino enterprise under IGRA was invalid, no takings liability results from precluding enforcement.

In any event, whether DOI was correct or not in deciding that part of the tax on the casino parcels is invalid under IGRA, Plaintiffs' APA challenges to the ROD should be dismissed. The ROD is clear that valid liens must be removed before transfer to the United States, and that, if the validity of the casino tax is still subject to pending litigation when actual transfer is to occur, then the Nation must post a letter of credit to secure the full amount of tax, penalty and interest to which the Town of Verona and Oneida County claim entitlement. Either way, these taxing authorities are assured of getting what they deserve, and DOI did not act arbitrarily, capriciously or contrary to law.

IX. PLAINTIFFS NEPA CLAIMS MUST BE DISMISSED.

A. Counts Thirteen and Fourteen Must Be Dismissed Because DOI Had No Duty to Prepare an Environmental Impact Statement Regarding a Transfer of Title When No Change in Land Use Is Planned.

Counts Thirteen and Fourteen assert violations of the National Environmental Policy Act (NEPA). Count Thirteen claims generally that DOI violated NEPA by ignoring alleged environmental consequences of the trust decision. Count Fourteen claims that DOI's Final Environmental Impact Statement (FEIS) failed to consider the cumulative impact of the trust decision in relation to past and reasonably foreseeable future actions.

NEPA establishes a procedural regime to ensure that federal agencies consider environmental impacts when making major decisions that will significantly affect the human environment. 42 U.S.C. § 4332(2)(C); *Fund for Animals v. Babbitt*, 89 F.3d 128, 130 (2d Cir. 1996). Not all federal actions – not even all important federal actions – require preparation of an EIS. Agencies may categorically exclude from NEPA's procedural requirements categories "of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4.[17] When, as here, an agency voluntarily elects to prepare an EIS regarding an action that is categorically excluded, it has gone beyond what NEPA requires.

DOI has exercised its authority under NEPA to adopt categorical exclusions. *See* 73 Fed. Reg. 61292, 61304 (Oct. 15, 2008) (to be codified at 42 C.F.R. pt. 46) (adopting final rule implementing NEPA; noting that "[Departmental Manual] Chapters [listing bureau-specific categorical exclusions] remain in effect"); 43 C.F.R. § 210 (listing departmental categorical

[17] The CEQ regulations require agencies to provide for an EIS in "extraordinary circumstances." 40 C.F.R. § 1508.4. Plaintiffs do not allege extraordinary circumstances. Nor can they. The courts have consistently upheld DOI findings of no significant impact for trust acquisitions – even acquisitions involving new casino construction. *Ringsred v. City of Duluth*, 828 F.2d 1305, 1307 (8th Cir. 1987); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008) (rejecting argument that construction of large and controversial casino requires EIS); *TOMAC v. Norton*, 433 F.3d 852, 860-64 (D.C. Cir. 2006) (no EIS required for trust acquisition to build casino); *City of* Roseville *v. Norton*, 219 F. Supp. 2d 130, 165-170 (D.D.C. 2002), *aff'd*, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (noting that NEPA issue was not raised on appeal).

exclusions). The ROD notes that a trust transfer that proposes no change in land use is within a categorical exclusion adopted by BIA, and that the Oneida trust application fits this exclusion because it makes no change in the use of any of the land covered by the application. ROD, § 1.5 at 9 (citing 516 DM §10.5(I)); *see Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 680 (5th Cir. 1992) (government acceptance of an easement restricting development not subject to NEPA); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (transfer of title without change in use not subject to NEPA). The ROD is explicit that DOI chose to create an EIS not required by NEPA: "Although not required, the BIA, in consultation with the Nation, elected to prepare an EIS to evaluate the Proposed Action and reasonable alternatives in order to ensure that the Nation's fee-to-trust request received the most thorough environmental review available under NEPA." ROD, § 1.5 at 9.

Because the trust decision would comply with NEPA even if no EIS been prepared at all, alleged NEPA-related deficiencies in the EIS – which in any event lack merit for the reasons stated below – cannot invalidate DOI's decision.

B. Count Thirteen Must Be Dismissed Because Alleged Economic Harms, Such as Lost Tax Revenues, Are Not Caused by Changes in the Physical Environment and Are Not Subject to NEPA.

Most of Count Thirteen is devoted to criticism of DOI's use of four scenarios to assess the impact of the trust decision in light of disputes between the Nation and the State and Counties over property tax liabilities after *City of Sherrill*. SASC ¶¶ 256-59. DOI adopted these scenarios in order to explore the effect of the trust decision without having to predict how courts will ultimately resolve these tax disputes.[18]

[18] There is no merit to the allegation that DOI's discussion of the "PTNP-DC" scenario (taxes not paid while dispute about taxation and enforcement continues) shows that DOI improperly founded a trust decision on an assumption that the Nation would disobey federal law. SASC ¶ 258. The scenario was merely one of four future possibilities, specified and evaluated because DOI does not have a crystal ball showing exactly what the future

The four tax dispute scenarios in the FEIS are irrelevant to NEPA liability, because they are concerned with effects on taxation which are outside the scope of NEPA. "[A]llegations of economic injury alone, without something more to bring plaintiffs within the zone of interest of NEPA, is insufficient to raise a challenge under the statute." Memorandum-Decision and Order, *Cent. New York Fair Bus. Ass'n v. Salazar*, No. 08-CV-660, 18-19 (N.D.N.Y. Mar. 1, 2010). Economic harms such as lost property taxes are not within the zone of interests protected by NEPA. *Town of Stratford v. FAA*, 285 F.3d 84, 88-89 (D.C. Cir. 2002) (town lacked prudential standing to challenge FEIS); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (same). The extent of the Nation's property tax liability has nothing to do, under NEPA, with impact on the physical environment. Neither does the allocation of regulatory jurisdiction. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983). To be an "environmental impact" for purposes of NEPA, an economic effect must have been proximately caused by an impact on the physical environment. "If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." *Id.* at 778; *see* 40 C.F.R. § 1508.14 ("economic and social effects are not intended by themselves to require preparation of an environmental impact statement").

The Second Circuit held in *County of Seneca v. Cheney*, 12 F.3d 8, 12 (2d Cir. 1993), that NEPA was inapplicable to alleged economic harms from a proposed RIF at an Air Force base, reasoning that those harms were not consequences of changes to the physical environment. *Accord, Knowles v. U.S. Coast Guard*, 1997 WL 151397, at *10 (S.D.N.Y. Mar. 31, 1997); *Hammond v. Norton*, 370 F. Supp. 2d 226, 243 (D.D.C. 2005). Like the Plaintiffs here, SASC ¶¶ 260-63, the *County of Seneca* plaintiffs also cited "a litany of [alleged] environmental

holds. The scenario merely acknowledged that there were pending disputes, and it is indisputable that the Nation has already prevailed in part on them. *Oneida Indian Nation v. Madison Cnty.*, 2011 WL 4978126 (2d Cir. 2011), at *24 (no liability for pre-2005 penalties and interest).

problems" associated with the base. 12 F.3d at 12. The Second Circuit rebuffed their efforts to bootstrap the economic harms tied to the RIF to the allegations about the physical environment because those allegations, like those of Plaintiffs here, concern the past or the existing state of affairs, not a change resulting from a future government action. *Id.* The purported environmental problems in the past are not an effect of the trust decision, and there is no factual basis for Plaintiffs' speculation about future impact on the physical environment from a change in the regulatory regime. *See* Memorandum-Decision and Order, 21 (DE 132).

C. Count Thirteen Must Be Dismissed Because the FEIS Satisfies NEPA by Exhaustively Describing the Current Physical Environment and by Thoroughly Assessing the Effects of Various Alternative Actions.

NEPA does not invite courts to re-weigh the environmental effects of a major federal action. "Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (2d Cir. 1983). Instead, it establishes a procedure for agencies to integrate consideration of environmental consequences into their decision-making.

> The purpose of an EIS is to "provide full and fair discussion of significant environmental impacts and [to] inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. Thus, NEPA is "a procedural statute that mandates a process rather than a particular result." *Stewart Park & Reserve Coal., Inc. v. Slater*, 352 F.3d at 557. The agency's overall EIS-related obligation is to "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S. Ct. 2246, 76 L.Ed.2d 437 (1983). Significantly, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L.Ed.2d 351 (1989).

NRDC, Inc. v. FAA, 564 F.3d 549, 556 (2d Cir. 2009); *accord Stewart Park & Reserve Coal., Inc. (SPARC) v. Slater*, 352 F.3d 545, 557 (2d Cir. 2003) ("NEPA does not command an agency to favor any particular course of action, but rather requires the agency to withhold its decision to proceed with an action until it has taken a 'hard look' at the environmental consequences.") (citation omitted). "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (quoting *Kleppe*, 427 U.S. at 410 n.21). As the State put it in comments opposing the trust application, "NEPA essentially is procedural and places no obligation on a federal agency to mitigate the environmental impacts of an action it approves or permits." AR80496 (contrasting NEPA to the New York SEQRA, and citing *Jackson v. New York Urban Dev. Corp.*, 494 N.E.2d 429 (N.Y. 1986)).

DOI met and exceeded the procedural requirements of NEPA by preparing an FEIS of more than 6,000 pages. Section 1.5 of the ROD (pp. 9-10) describes the extensive process DOI used to develop the FEIS, which included the participation of the State and Counties as "cooperating agencies" in developing the scope of the EIS. The process included public meetings on the scope of the EIS and an opportunity to comment on the DEIS, as well as two public hearings on the DEIS, one in Utica and the other in Verona. ROD, Executive Summary at 6-7; § 1.5 at 10. DOI considered all of the comments it received on the DEIS and responded to each of them in the FEIS's appendix.

The FEIS describes in detail the current condition of the area affected by the trust decision, from the location and condition of wetlands (under both state and federal definitions),

to the presence of protected species, historical and cultural resources. As to the past environmental problems alleged only on information and belief in paragraphs 261, 262 and 263 of the SASC, the FEIS explicitly addresses even those allegations.

In SASC ¶ 261, Plaintiffs allege that the Nation "has recently constructed and commenced operation of a co-generation plant near their Turning Stone Casino without having first obtained the necessary permits and approvals under the Clean Air Act." The FEIS describes the Nation's application for, and EPA's approval of, a permit for the co-generation plant. FEIS, at 3-83-84.

Paragraph 261 goes on to allege, on information and belief, that the Nation "has constructed numerous golf courses without any permits or legally mandated environmental review." The FEIS considered these claims but found that the Nation had constructed the golf courses so as to minimize any effects on wetlands, following U.S. Army Corps of Engineers wetlands guidance. FEIS, at 3-65, 3-640-41.

Paragraph 262 alleges, again on information and belief, that the Nation "has violated other laws critical to the public welfare including dumping, wetlands and storm sewer regulations, fire safety and building codes, and laws regulating the storage of gasoline." The FEIS, however, addresses the State and Counties' complaints about these issues in detail. FEIS, at 3-615 (discussing resolution of Madison County's complaint in 2003 that a Nation-contracted hauler had used an out-of-county landfill); *id.* at 3-64-67 (addressing Nation wetlands management); *id.* at 3-640-41 (further addressing wetlands management); *id.* at 3-645 (addressing fire safety); *id.* at 3-647-48 (addressing building codes); *id.* at 3-618-19 (addressing gasoline storage); *id.* at 4-357-58 (also addressing gasoline storage).

Count Thirteen also must be dismissed because it does not allege any environmental effects from the trust decision. As the Second Circuit recognized in the *County of Seneca* case, old environmental problems not caused by the federal action are not covered by NEPA. 12 F.3d at 12. In addition, what NEPA requires is that the agency inform itself about the environmental consequences of a decision. The administrative record shows that the State and Counties had a full opportunity to present their allegations of environmental problems to DOI, which investigated them. The FEIS and the ROD each address these allegations and provide no basis for denying trust status on environmental grounds.

Plaintiffs lack standing to sue on the basis of speculation about environmental harms from future development. As this Court held in dismissing the Supplemental Counts:

> Plaintiffs do not allege that the OIN is currently developing the land in a manner harmful to Plaintiffs, and there is no indication in the record to suggest that the OIN is planning to develop the land in a manner that would implicate Plaintiffs' concerns. Thus, Plaintiffs' allegations regarding what the OIN might do with the land are too speculative and hypothetical to demonstrate an injury in fact.

Memorandum-Decision and Order, 21 (DE 132) (citation omitted).

D. Count Fourteen Must Be Dismissed Because DOI Considered Cumulative Impacts.

Count Fourteen should be dismissed because there is no basis for Plaintiffs' contention that "the DOI completely failed to consider the foreseeable actions by the OIN that must also be considered on a cumulative basis with the transfer of title." SASC ¶ 272. The FEIS considered ongoing and planned Nation construction activities even though unrelated to the trust decision, "for evaluation of potential cumulative impacts." FEIS, at 4-7-9. The FEIS discussed projects proposed by others in the area of the trust acquisition, including governmental projects. FEIS, at

4-10-12. The FEIS examined other possible federal actions in the area, including the cumulative impact of a transfer of excess federal land at the Verona Test Site.[19]

The FEIS examined and rejected the claims made by the State and Counties in comments to DOI and reiterated in the SASC (¶ 271, bullets 3 and 4) that the Nation's past activities "have had an adverse effect on groundwater in the region." FEIS, at 4-63. Likewise, the FEIS looked at the effect of past Nation activities on state-regulated wetlands (¶ 271, bullet 2), concluding that, "[b]ased on the available information, it appears that cumulative effects of past action of the Nation have had no significant effect on the wetland resources on Nation lands or the surrounding areas of Madison and Oneida Counties." FEIS, at 4-67. To the contrary, "[t]he Nation has employed the described environmental protection procedures to assess, minimize and mitigate effects on wetlands and consulted with the USCAE." *Id.* Finally, the FEIS addressed the State's concerns about the effect of past Nation activities on air resources, noting that Alternatives E or G might reduce emissions in the area if Turning Stone Casino closed, while the other alternatives "would result in a modest overall increase in air emissions." *Id.* at 4-75.

Plaintiffs' position comes down to speculation that the Nation will engage in future development that has environmental effects, despite the absence of concrete plans to do so. No

[19] FEIS, at 4-12-13; *see id*. at 4-16 (discussing cumulative effects on land resources); *id.* at 4-17 (discussing cumulative effects on geologic resources); *id.* at 4-39-51 (cumulative effects on land use); *id.* at 4-60-62 (cumulative effects on surface water resources)*; id*. at 4-63-64 (cumulative effects on groundwater); *id.* at 4-65-67 (cumulative effect on state jurisdictional wetlands and navigable waters); *id.* at 4-74-75 (cumulative effects on air resources); *id.* at 4-78-81 (cumulative effects on wildlife); *id.* at 4-84-86 (cumulative effects on plant resources); *id.* at 4-87-88 (cumulative effects on ecosystems); *id.* at 4-92-93 (cumulative effects on agricultural resources); *id.* at 4-113-14 (cumulative effects on cultural resources); *id.* at 4-126-27 (cumulative effects on archaeological resources); *id.* at 150-57 (cumulative effect on taxes and employment); *id.* at 4-165-67 (cumulative effects on demographics); *id.* at 4-171-72 (cumulative effects on housing); *id.* at 4-173-80 (discussing cumulative along with direct and indirect effects on Nation services); *id.* at 4-218-30 (cumulative fiscal effects); *id.* at 4-233-35 (cumulative effects on social conditions); *id.* at 4-243-45 (cumulative effect on Oneida culture); *id.* at 4-248-51 (cumulative effects on community infrastructure); *id.* at 4-256-57 (cumulative effects on resource use); *id.* at 4-261 (cumulative effects on agriculture); *id.* at 4-262 (cumulative effects on mining resources); *id.* at 4-263-64 (cumulative effects on recreation); *id.* at 4-271-80 (cumulative impacts on transportation resources including traffic); *id.* at 4-338-41 (cumulative effects on land use and zoning); *id.* at 4-344 (cumulative effects on wilderness); *id.* at 4-350-51 (cumulative effects on noise); *id.* at 4-352-53 (cumulative effects on light); *id.* at 4-354-56 (cumulative effects on visual resources); *id*. at 4-359-60 (cumulative effects on public health and safety).

such action is contemplated and, even if it were, "the mere 'contemplation' of certain action is not sufficient to require an impact statement." *Kleppe*, 427 U.S. at 404. Speculation about future development is of no meaningful benefit to DOI in evaluating the consequences of the trust decision. *Cnty. of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1378-79 (2d Cir. 1977); *see id.* at 1380 ("virtually useless speculation"). Moreover, the Nation's careful stewardship of natural resources, as determined in the ROD, disproves speculation that unanticipated development, if it were to occur, would be damaging to the environment. Finally, there is also no basis for speculating that federal oversight would not be sufficient to protect the environment if development were to occur. *See id.* at 1380 (noting agency's power to respond to future events).

CONCLUSION

For these reasons, summary judgment should be entered in favor of Defendants and Defendant-Intervenor.

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Respectfully submitted,

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