**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

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STATE OF NEW YORK, et al.,

Plaintiffs,

v. 6:08-cv-644 (LEK/GJD)

KENNETH L. SALAZAR, et al.,

Defendants.

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# DEFENDANT-INTERVENOR ONEIDA NATION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**IBIA CASES**

**STATUTES**



**OTHER AUTHORITIES**



**RULES**



**REGULATIONS**

## OVERVIEW

### A. Legal Standards Governing APA Review

From top to bottom, Plaintiffs' opposition to Defendants' motions for summary judgment disregards the legal rules governing judicial review of agency action under the Administrative Procedure Act (APA). Although Plaintiffs cite a few cases about the general summary judgment standard, Pls.' Opp. 7 & 8 n.3, they cite no authority contrary to the cases cited by DOI and the Nation in the sections of their respective summary judgment memoranda that discuss the standards for APA review. Nation Mem. 8-9; U.S. Mem. 12-13. Plaintiffs ignore the governing legal standards because they cannot prevail under them.

Nowhere do Plaintiffs acknowledge the rule that judicial review (with limited and inapplicable exceptions) is on the record before the agency, not on a new record created by the parties to APA litigation. Plaintiffs do not mention the deference that courts give to agencies when agencies apply delegated statutory authority and when they construe their own regulations. Nor do Plaintiffs acknowledge the deference given to agency fact-finding and to agency policy judgments. Contrary to Plaintiffs' unsupported submission, a court engaged in APA review cannot overturn an agency's decision for lack of "substantial evidence" just because there may be conflicting evidence in the administrative record (or in extra-record material). Pls.' Opp. 2. That approach would make a court, not the agency, the finder of fact.

Courts do not second-guess agencies by requiring them to prove that their administrative decisions should be upheld. The "general working principle" when courts review decisions by government agencies regardless of the particular context is that, "'in the absence of clear

evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties.'" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). Contrary to Plaintiffs' argument, DOI is not required to "demonstrate that [it] rationally and reasonably considered [the Nation's] need for land to be taken into trust," Pls.' Opp. 76—although it certainly did so—nor is it otherwise required to prove that it made the "right" decision or the same decision the court would make. Rather, the burden is on *Plaintiffs* to show that the agency acted arbitrarily and capriciously or contrary to law, regardless of whether Plaintiffs' challenges to the agency's decision are presented in support of Plaintiffs' motion for partial summary judgment or in opposition to Defendants' motions for summary judgment.

As DOI explained, "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." U.S. Statement of Material Facts, 1-2 (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks omitted)); *see also Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("Appellants . . . overlook the character of the question before the district court when an agency action is challenged. The entire case on review is a question of law, and only a question of law."); *Minard Run Oil Co. v. U.S. Forest Serv.*, ___ F.3d ___, Nos. 10-1265, 10-2332, 2011 WL 4389220, at *7 (3d Cir. Sept. 20, 2011) (APA review is a question of law); *Univ. of Iowa Hosp. & Clinics v. Shalala*, 180 F.3d 943, 950 (8th Cir. 1999) (same). Plaintiffs say they disagree, Pls.' Opp. 1, but they cite nothing to contradict DOI's description of the way APA review operates on the administrative record.

There is nothing controversial about DOI's description of APA review as posing a legal question. As one district judge noted, citing *American Bioscience, Inc.*, "Judicial review of

agency action is often accomplished by filing cross-motions for summary judgment. The question whether an agency's decision is arbitrary and capricious, however, is a legal issue whether it is presented as a motion to dismiss or for summary judgment." *Connecticut v. Dep't of Commerce*, No. 3:04cv1271 (SRU), 2007 WL 2349894, at *1 (D. Conn. Aug. 15, 2007); *see also Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 561 (D. Vt. 2005) ("When reviewing agency action, the district court 'sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the Secretary's [action] was factually flawed.'") (citation omitted). *American Bioscience, Inc.* is widely cited as correctly describing APA review as a question of law. *E.g.*, *Nat'l Law Ctr. for Homelessness & Poverty v. U.S. Dep't of Veteran Affairs*, ___ F. Supp. 2d ___, No. 88-cv-2503 (RCL), 2012 WL 336171, at *2 (D.D.C. Feb. 3, 2012) (even when agency fact-finding is at issue, the ultimate question is a question of law); *Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, No. 07-CV-0415, 2008 WL 2746566, at *25 (W.D.N.Y. July 8, 2008); *Genetics & IVF Inst. v. Kappos*, 801 F. Supp. 2d 497, 502 (E.D. Va. 2011); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1200 (D. Or. 2003).

APA cases are resolved on summary judgment, not by trial, because the relevant body of fact is the administrative record compiled by the agency, and the relevant legal test is whether the record as a whole is insufficient to sustain the agency's decision. "[I]n an action brought under the APA, there is no material fact at issue but only a question of law . . . ." *Klock v. Kappos*, 731 F. Supp. 2d 461, 465 (E.D. Va. 2010). Wishful thinking cannot change APA review into a trial with live witnesses and extra-record exhibits, as plaintiffs seemingly envision. *See* Pls.' Opp. 8 n.3 (suggesting that both cross-motions could be denied). "Absent very unusual circumstances, the district court does not take testimony." *Am. Bioscience, Inc.*, 269 F.3d at 1084 (citations omitted). Those unusual circumstances do not exist in this case. This case is no

different from the other cases in which the courts have resolved on summary judgment challenges to DOI's decision to take land into trust for an Indian tribe. *E.g., Cnty. of Charles Mix v. U.S. Dep't of Interior*, 799 F. Supp. 2d 1027 (D.S.D. 2011); *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002).

**B. The Text of the ROD Itself**

Like the rules governing APA review, Plaintiffs largely ignore the text of the ROD, which is the decision under consideration. It is important that the ROD not be obscured by the hundreds of pages of briefing in this case. The ROD speaks for itself as an extraordinarily nuanced and complete document reflecting a significant administrative effort and sensitivity to the review of every conceivable issue. The ROD directly refutes Plaintiffs' arguments that DOI overlooked issues or was unbalanced or unfocused in addressing them. The ROD is the single most important document before the Court, and a reading of the ROD is the best way to assess whether DOI's consideration of the Nation's trust application was arbitrary and capricious.

DOI understood and described the lands that would be taken into trust:

> 80 Nation member residences, the majority of government services, the Turning Stone Resort & Casino, all of the associated golf courses, four SavOn gas stations and convenience stores, 9,789 acres of agricultural lands, 3,076 acres of hunting and fishing lands, and 2,274 acres of wetlands [would be held in trust. This grouping] would place into trust a large part of the Nation's lands containing social and cultural facilities, and 82, or 52%, of the archaeological sites. The Alternative I lands occupy 8,833 acres or 1.1% of the total acreage of Oneida County, and 4,253 acres of 1% of the total acreage of Madison County. ROD, 19; *accord id.*, 37-38, 56.

DOI spoke just as carefully regarding the Oneidas' lands that it excluded from the trust grouping:

> Under Alternative I, 4,284 acres would not be placed into trust. Situated on these lands are 18 Nation member residences and some

> government services, including media relations, a member services department, and security offices. Several cultural and social facilities and resources, including the Cultural Resources Department, Living History Department, festival sites, and living history reenactment sites, in addition to a number of archaeological sites, would not be placed into trust. Nation enterprises in this category include nine SavOn gas stations and convenience stores, a sand and gravel quarry, the Retail Outlet, wholesale distribution and warehouse facilities, three public access marinas, CNY Fiberglass and Boat Repair, and crop rental on some agricultural land holdings. ROD, 19; *accord id.*, 38.

DOI specifically described a thoughtful line-drawing rationale designed to promote the compactness and contiguity of Nation lands while providing an adequate tribal land base:

> The Subject Lands are highly contiguous, however, complete contiguity is neither a practical nor a reasonable expectation considering the process of land reacquisition, *i.e.*, purchases on the open market from willing sellers. The Nation and the State and local governments dispute some of the facts concerning the history and pattern of the Nation's reacquisition of lands. The Nation contends that the local governments preferred that the Nation not buy up lands in a concentrated area, therefore, the Nation acquired reasonably contiguous parcels in several land groupings distributed among Madison and Oneida Counties (*i.e.*, Oneida Lake parcels, Canastota Thruway Exit 33 parcels, Turning Stone Casino & Resort parcels, parcels surrounding the 32-acre territory, and parcels within the Cities of Oneida and Sherrill). The local governments contend that the Nation selected prime properties and that the Nation's lands are not reasonably contiguous or compact.
>
> Most relevant to this determination was the local governments' stress on contiguity, and their request, demonstrated by the County-Proposed Alternative (Alternative H), to focus any trust land acquisition on the Casino-Resort and Government-Cultural areas. Alternative I is responsive to these requests. These areas correlate to the Nation's current and short-term needs for reestablishing a sovereign homeland and are where the Nation's presence is most pronounced. Of the total 234 parcels comprising the Preferred Alternative, 211 parcels or 90% are located adjacent to another Nation parcel and many others are separated by only a few non-Nation properties. ROD, 56.
>
> With respect to the Nation's lands, there is currently an alternating pattern of enforcement of Nation and State and local laws due to ongoing disputes. In the Cities of Sherrill and Oneida, the Nation

> has entered into intergovernmental agreements whereby the Nation follows local requirements. Elsewhere, jurisdictional disputes continue. On one hand, placing all of the Nation's lands into trust would resolve disputes over which government has jurisdiction. On the other hand, the State and local governments contend that the Nation's lands as a whole are not contiguous or compact, and that checkerboard jurisdiction could affect their ability to plan and regulate effectively. Placement of the Subject Lands into trust under this final determination is anticipated to address both of these issues: first, this final decision will settle jurisdiction in favor of the Nation over areas where the Nation's development is focused and its presence is most pronounced, and second, the Subject Lands are highly contiguous and compact, thereby facilitating the Nation's successful governance and minimizing potential impacts to the State and local governments. ROD, 69.

DOI explicitly acknowledged Plaintiffs' jurisdictional objections to trust land and explained how it factored those objections into the formulation of a final trust decision:

> Acquiring land in trust may negatively impact the ability of state and local governments to provide cohesive and consistent governance due to loss of regulatory control and lack of contiguity/compactness among the trust lands. In view of the Nation's past and current management and use of its lands, this effect is not expected to be significant. Prior to the decision in *City of Sherrill*, the Nation managed its lands under Nation laws. Sections 3.9.5 and 4.9.5 of the Final EIS analyzing the Nation's management of its lands show that there have not been significant adverse effects on environmental resources. In addition, Sections 3.2, 3.8.6, 4.2, and 4.8.6 of the Final EIS analyzing land resources and land use show that the permitted uses of Nation lands under Nation law are generally consistent with the uses of surrounding non-Nation lands. The Nation is using most of its re-acquired lands for the same purposes for which the lands were used prior to re-acquisition, with the primary exception being the Turning Stone Resort & Casino.
>
> . . .
>
> The Department developed the Preferred Alternative (Alternative I) to afford a more inclusive yet still highly contiguous and compact trust land configuration to meet the Nation's immediate and short-term needs while minimizing the potential for jurisdictional disruption and balancing other factors. Like Alternative H, Alternative I is comprised of two land clusters, one focused on the Turning Stone Casino & Resort ("Casino-Resort

> Grouping") and the other focused on the 32-acre territory ("Government-Cultural Grouping"). ROD, 21.
>
> . . .
>
> The Preferred Alternative reflects the balance of the Nation's needs against the potential jurisdictional, socioeconomic, and environmental impacts of placing the Nation's lands into trust. The Preferred Alternative addresses the current and short-term needs of the Nation to reestablish a sovereign homeland and responds to the requests of the State and local governments to consider a more contiguous and compact trust land grouping than the Proposed Action, centered around the Turning Stone Resort & Casino ("Casino-Resort Grouping") in Oneida County and the Nation's 32-acre territory in Madison County ("Government-Cultural Grouping"). ROD, 31.

DOI reviewed tax issues in detail, analyzing contingencies that could change based on the outcome of still-pending tax litigation. ROD, 40-55.

> In conclusion, based on the taxes actually assessed and paid, the impact of removing the Subject Lands from the tax rolls is not significant when balanced with the benefits to the Nation of acquiring the Subject Lands in trust. Even assuming, *arguendo*, that the Nation does not ultimately prevail in the tax litigation, the Department has considered the potential fiscal impacts on the State and local governments from placing the Subject Lands into trust. In all of the Departments' analyses of net fiscal impacts under the Preferred Alternative (Alternative I), the overall net economic impacts projected to State and local governments are positive and substantial because of the Nation's direct and indirect economic contributions to the community. The Department considered that individual jurisdictions (e.g., the V.V.S. School District) may experience a net loss of revenues, but determined that the benefits to the Nation of acquiring the Subject Lands in trust outweigh these impacts. ROD, 50.

DOI reviewed Plaintiffs' allegations regarding past environmental disputes: "Sections 3.9.5 and 4.9.5 of the Final EIS analyzing the Nation's past management of its lands show that there have not been significant adverse effects on environmental resources as a result of the Nation's management." ROD, 29. DOI addressed Plaintiffs' arguments and rejected them. ROD, 62 (noting that EPA concluded no permit was needed for co-generation facility and that

the United States Army Corps of Engineers reached same conclusion as to dredging); *see id.* at 61 ("These incidents, individually and collectively, are not substantial.").

In all of these areas, the text of the ROD shows that DOI fully understood Plaintiffs' allegations and points of view and took them into consideration in making a trust land decision. DOI sometimes disagreed with them; sometimes agreed but concluded on balance that it was appropriate for the Oneida Nation to have certain trust land; and sometimes agreed and left land (about 4,000 acres) out of the final trust land grouping. Under the applicable APA standards, Plaintiffs cannot show that these considered judgments by DOI may be set aside.

Instead of the text of the ROD and thus the agency's final decision, Plaintiffs focus most of their arguments on material that is outside the administrative record and on snippets of internal communications within DOI that show how various subordinate individuals analyzed certain issues at particular times. Plaintiffs' voluminous submission of extra-record material on the *Carcieri* issue should be disregarded for the reasons set forth in the Nation's Objections and Response to Plaintiffs' Statement of Material Facts. Plaintiffs chose not to submit such documents to DOI for its consideration when the agency was reviewing the Nation's trust application. Plaintiffs concede that it would be futile to remand to DOI to consider them, because DOI would conclude that the Nation was under federal jurisdiction at the time of the IRA. Plaintiffs cannot avoid the deference that is owed to DOI's determination of an issue by holding back documents and arguments for submission to a court in the first instance. Moreover, Plaintiffs chose not to appeal the Magistrate Judge's ruling denying them permission to expand the record through discovery on the *Carcieri* issue and chose not to disclose the retention of an expert (and his report) as required by Local Rule and the Case Management Plan that they drafted. All of that is telling confirmation that Plaintiffs themselves recognize that nothing they

have presented is actually material to the *Carcieri* question, which is resolved on the basis of formal and definitive assertions of jurisdiction by the United States government—in making treaties, in choosing to sue on behalf of the Nation in *Boylan*, and in calling and supervising a vote by the Nation under the IRA in 1936—not on the basis of letters and memos from DOI archives or anything else that Plaintiffs have collected. *See Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 166-67 (2d Cir. 2003) (distinguishing "informal conclusions" from federal action necessary to withdraw federal protection).

## ARGUMENT

### I. DOI Was Not Required to Follow a 1959 Memorandum That Is Contrary To The Governing Statute And Regulations And Does Not Reflect DOI Policy.

Plaintiffs contend that the Nation is ineligible for trust land because of a supposed 1959 policy denying trust land to "Indians who now have the ability to manage their own affairs." Pls.' Opp. 30 (quoting Baldwin Decl., Ex. CC, a 1959 BIA memorandum); *see also* SASC ¶¶ 159-60. This argument is part of Plaintiffs' fourth cause of action. The ROD makes clear that "ability to manage their own affairs" does not bar the Oneidas from having DOI take land into trust. ROD, 35-39. That point is further explained in prior briefing by the Nation and the United States. Nation Mem. 43-44; U.S. Mem. 48-51; Nation Opp. 20-22; U.S. Opp. 42-43.

There is no poverty or incompetence test. Plaintiffs' contention would disqualify most or all federally-recognized Indian tribes from trust transfers and would nullify the Supreme Court's reference in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005), to DOI trust authority as the "proper avenue" to restore Oneida Nation sovereignty over land. Moreover, if the Nation were not able to manage its affairs, then Plaintiffs undoubtedly would, on that basis, object to trust status.

Plaintiffs cite nothing to show that DOI has ever actually followed a policy of denying trust land to a tribe that can "manage its own affairs" in implementing its statutory trust authority.[1] The ROD explicitly rejected that argument:

> As a threshold matter, the Department finds that the Nation's financial wherewithal and ability to manage its affairs do not render it ineligible for placement of land into trust. Section 5 of the IRA is not limited to landless or impoverished tribes, or to tribes that are incompetent to handle their own affairs. A tribe's casino income does not disqualify it from, and financial difficulties are not a prerequisite for, acquisitions of land in trust.

ROD, 35 (citations omitted). That determination is consistent with prior decisions by the federal courts, and by the IBIA. *United States v. 29 Acres of Land*, 809 F.2d 544, 545 (8th Cir. 1987); *Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir. 1978), *cert. denied*, 439 U.S. 965 (1978);

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[1] Plaintiffs refer to no application by DOI of a policy of disqualifying tribes that can manage their own affairs from obtaining trust land. As Plaintiffs acknowledge, the 1959 memorandum was supplanted by a 1960 memorandum. Pls.' Opp. 30. Plaintiffs make no attempt to demonstrate that even the 1960 memorandum was ever followed or that there is any inconsistency between taking land into trust for the Nation and the 1960 memorandum, which is focused on individuals, not tribes. *Id.* Moreover, the 1959 memorandum is also concerned with trust acquisitions for individuals, not tribes. Baldwin Decl., Ex. CCC. For example, the third paragraph, when discussing taking land into trust for Indians who can "manage their own affairs," refers to "an Indian," "his own affairs," "a farmer," "or cattleman with large holdings." "Competency" is not discussed at all in the section on "tribal lands;" instead, that section states, "When land is being acquired by the tribe without special legislation, if it is within the reservation boundary, the land will be taken in a trust status if the tribe so desires . . . ." *Id.* The competency point then makes its reappearance in the section on "individually owned lands," which again uses the singular language "his" or "him." *Id.* The discussion in the 1984 BIA Manual that reproduces the 1959 memorandum is even more focused on individuals rather than tribes. Baldwin Opp. Decl., Ex. C. at 54 IAM 2.2.1. That section of the manual again draws a distinction between "individual Indians" and a "tribe" before quoting the 1959 memo. *Id.* at 2.2.1(F) ("The [policy] states the general principles and policy which must be observed, in determining under what circumstances, individual Indians or Indian tribes may be permitted to acquire land in trust status."). Then, after noting the discretion the Secretary has in making trust decisions, the section goes on to conclude: "By way of implementing the foregoing, the following criteria are established as guides to assist the field in determining when land may be acquired in trust and when it must be acquired in fee. (1) As outlined in the policy statement approved April 22, 1959, the competency factor is to receive primary consideration in connection with purchases by individual Indians." *Id.*

*City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 162 (D.D.C. 1980); *City of Tacoma v. Andrus*, 457 F. Supp. 342, 345 (D.D.C. 1978); *Kansas v. Acting S. Plains Reg'l Dir.*, 36 IBIA 152, 155 (2001); *Cnty. of Sauk v. Midwest Reg'l Dir.*, 45 IBIA 201, 209-11 (2007); *South Dakota v. Acting Great Plains Reg'l Dir.*, 39 IBIA 283, 290 (2004); *Cnty. of Mille Lacs v. Midwest Reg'l Dir.*, 37 IBIA 169, 173 (2002); *see also Avoyelles Parish v. E. Area Dir.*, 34 IBIA, 149, 153 (1999) ("A financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed."); *Roberts Cnty. v. Acting Great Plains Reg'l Dir.*, 51 IBIA 35, 51 (2009) (rejecting the argument that a Tribe's gaming revenue, financial, security, or economic success disqualifies it from further acquisition of land in trust) (citations omitted); *see Conn. ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 92-94 (2d Cir. 2000) (wealth of Pequots irrelevant to their right to have trust land and to have benefit of ordinary principles of Indian law).

Courts defer to an agency's interpretation of its own duly-promulgated regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 182 (2d Cir. 2009) ("An agency's application of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'") (citations omitted).

Plaintiffs acknowledge that the regulatory standard addresses tribal need for trust land, not tribal "ability to manage their own affairs." Pls.' Opp. 32. Plaintiffs claim the above-cited IBIA decisions can be distinguished because in those instances "there was an actual economic need for land to be taken into trust." *Id.* But a tribe may need land for economic reasons and yet enjoy economic success. "Need" under DOI's regulation also is not limited to *economic* need. 25 C.F.R. § 151.10(b); 25 C.F.R. § 151.3(a)(3) (authorizing trust acquisitions when "necessary to

facilitate tribal self-determination, economic development, or Indian housing"); ROD, 35-37.[2] Tribes are not businesses. They are governments and recognized as such under the constitution and federal law since the United States was founded. A government's need for land cannot be measured strictly by economic benchmarks.

There is nothing in the text of the IRA or in DOI's regulations that imposes a disqualification on tribes that can manage their own affairs. The IRA legislative history excerpts that Plaintiffs cite, Pls.' Opp. 31, do not, in any event, support a disqualification of such tribes. Whether a tribe has "insufficient land" has nothing to do with whether it has the ability to manage its own affairs. *See* Pls.' Opp. 31 (quoting 78 Cong. Rec. 11730 (1934)). DOI could not lawfully enforce a policy refusing trust applications on the ground that the tribe can manage its own affairs even if it needs trust land, because that would be contrary to DOI's regulations. DOI properly made the determination of tribal need called for in 25 C.F.R. § 151.10. ROD, 34-39.[3]

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[2] Even if DOI considered only economic need, there was an economic reason to take land into trust for the Nation in order to quell disputes about the legality of Turning Stone Casino, including challenges raised by *Plaintiffs*. ROD, 36. Additionally, the ROD, in analyzing need, notes: "[T]he 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." *Id.*

[3] Reprinting the 1959 memorandum in the 1984 BIA Manual did not give that memorandum binding legal effect. The BIA Manual does not have the force of law. *Morton v. Ruiz*, 415 U.S. 199, 234-35 (1974) (discussing BIA manual); *Lynch v. U.S. Parole Comm'n*, 768 F.2d 491, 497 (2d Cir. 1985) (collecting cases regarding agency manuals); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 229-30 (5th Cir. 2006) (collecting cases that demonstrate that "[g]enerally, to be legally binding on an agency, its own publications must have been 'promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress'" and holding that "HUD had not acted contrary to law by using methodology different from that contained in [a] Guidebook").

## II. DOI Was Not Required To Obtain Preliminary Title Opinions Or To Eliminate Tax Liens While The Validity Of The Tax Liens Remains in Dispute, And DOI Fully Addressed Other Title Issues By Title Examinations And Title Insurance Policies.

Plaintiffs, as part of their fourth cause of action (SASC ¶ 161), contend that DOI cannot issue a decision partially approving a trust application for the Nation without first requiring the Nation to pay off tax liens, even though (a) the land had been held exempt from property taxes under state law at the time that the ROD was issued and the validity of the taxes and liens remains disputed and undecided today; (b) if the taxes are later determined to be valid, DOI has assured payment by requiring the Nation to post letters of credit; and (c) the Second Circuit actually has already held a portion of the existing liens invalid under federal law. The ROD demonstrates that Plaintiffs are incorrect. ROD, 41-42 & 53-55. The Nation and United States' earlier pleadings do as well. Nation Mem. 53-61; U.S. Mem. 64-70; Nation Opp. 22-27; U.S. Opp. 43-50.

There was nothing arbitrary or capricious about DOI's treatment of the tax liens, whether the question is framed in terms of compliance with DOI's trust regulations or with an informal policy distinct from the regulations.[4] The ROD properly construed DOI's regulation (25 C.F.R. § 151.13) 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, 54. Plaintiffs' New York cases on whether disputed liens affect the marketability of title under

[4] Associate Deputy Secretary Cason's letter referring to how DOI handles liens does not have the force of law independent of DOI's regulations, or stop him from reaching a different conclusion based on the developed administrative record. *See, e.g., Ass'n of Am. R.R. v. Dep't of Transportation*, 198 F.3d 944, 950 (D.C. Cir. 1999) (Treating letters as binding agency decisions would "blur the distinction between definitive agency action and informal, uncoordinated communications, it would seriously hamstring agency efforts to interpret their own policies. The Administrative Procedure Act requires no such result."); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, (D.D.C. 2002) ("Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision.").

state law are irrelevant to the purpose and effect of DOI's regulation. *See* Pls.' Opp. 35. DOI has explained that the regulation is concerned with whether title defects would pose risks for the federal government. DOI addressed those risks by assuring payment of taxes determined to be owed when the dispute over the validity of the liens is resolved. DOI's interpretation of its own regulation as protecting federal interests is correct and is entitled to deference. *Auer*, 519 U.S. at 461; *Brodsky*, 578 F.3d at 182 ("An agency's application of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'") (citations omitted). That interpretation is consistent with government-wide DOJ title standards and with the statute those regulations implement (and with the regulations of other agencies implementing the same scheme). Nation Mem. 55-57.

It follows that Plaintiffs are not "within the zone of interests protected by [the regulation]" (and the statute it implements) and therefore lack standing. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011); *Hollywood Mobile Estates Ltd. v. Seminole Tribe*, 641 F.3d 1259, 1268-71 (11th Cir. 2011) (where a statute existed for the protection of Indian landowners, not non-tribal lessees, the non-tribal lessee lacked prudential standing to sue under the statute); *see also* U.S. Opp. at 43-45; Nation Mem. 19, 55-57; Nation Opp. 26-27.

DOI's decision to provide for the elimination of any liens that prove to be valid, by requiring the posting of letters of credit, ROD, 41-42, 53-55, was completely sensible. Plaintiffs' position, by contrast, would have required the Nation to pay penalties and interest on taxes assessed before the Supreme Court decision in *Sherrill*, even though the Second Circuit recently held those penalties and interest charges unlawful, *Oneida Indian Nation v. Madison Cnty.*, 665 F.3d 408, 419-21 (2d Cir. 2011), and would do the same for taxes that the state courts should

hold, in litigation that is still pending, are not owed. N.Y. Indian Law § 6; N.Y. Real Prop. Tax Law § 454; *see also* page 23-24, *infra*.

DOI also determined that the term "final approval action" in § 151.13 refers to the actual later transfer of the land into trust, not to the earlier issuance of a decision like the one here that is subject to APA review. ROD, 53-54 (citing *Avoyelles Parish*, 34 IBIA at 153-54). That must be so; otherwise—when formal acceptance is delayed by APA review—DOI would risk harm from undetected liens or encumbrances created after the trust decision is made but before the later formal trust transfer. DOI's interpretation of its regulation as requiring liens to be addressed at the time of formal acceptance of a transfer of title, at the end of the process, is also entitled to deference. *Auer*, 519 U.S. at 461; *Brodsky*, 578 F.3d at 182 ("An agency's application of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'") (citations omitted). It is also consistent with DOI's general practice, as confirmed by a GAO report submitted by Plaintiffs, of conducting only a preliminary title examination before issuing a trust decision. *See* Pls.' Opp. 36; Baldwin Decl., Ex. TT at 16.

The administrative record shows that, just as DOI addressed the problem of disputed tax liens for purposes of 25 C.F.R. § 151.13 by requiring the Nation to post letters of credit, it also devised a substitute for preliminary title opinions concerning the disputed liens. DOI, which was already aware of the asserted tax liens, recognized that there would be no purpose in devoting resources to obtaining formal preliminary title opinions from a DOI lawyer because of the dispute over the validity of the well-known liens. *See, e.g.*, Decl. of John H. Harrington ¶¶ 5-7, DE 261-3. Instead, DOI relied on title examinations and title insurance policies resolving all other issues. *See, e.g.*, AR049596-610; AR070291. The existence of an internal practice for the "typical" case did not mean the practice should be followed in a manifestly atypical situation; in

any event, title insurance for all risks other than the known tax liens gave the government more protection than it would have gotten from a preliminary title opinion from a DOI lawyer. Plaintiffs have pointed to no purpose to be served by obtaining preliminary title opinions in this instance, nor any prejudice from their omission, as they could only have identified tax liens of which all were and are aware. The fact that DOI's trust checklist refers to preliminary title opinions is irrelevant because the checklist does not have the force of law. *See Lyng v. Payne*, 476 U.S. 926, 937 (1986) (recognizing that "not all agency publications are of binding force") (citation omitted); *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (per curiam) (failure to follow Social Security claims manual does not invalidate decision); *Coliseum Square Ass'n, Inc.*, 465 F.3d at 229-30. Plaintiffs also lack standing for the reasons explained above.[5]

## III. DOI Properly Construed The Term "Reservation" In Its Regulation, And That Interpretation Is Entitled To Deference.

Plaintiffs assert, in their sixth cause of action, that DOI should have applied the "off-reservation" regulation, 25 C.F.R. § 151.11, to the Nation's application. SASC ¶¶ 177-82. The ROD discusses why DOI properly used the "on-reservation" regulation, and also explains that the result would have been the same under the "off-reservation" regulation. ROD, 32-33. The Oneidas and the United States addressed this contention in their earlier briefing. Nation Mem. 39-42; U.S. Mem. 46-47; Nation Opp. 16-19; U.S. Opp. 37-41.

[5] Plaintiffs rely on *Atchison, Topeka & Sante Fe Railroad Company v. Wichita Board of Trade*, 412 U.S. 800 (1974), but that case is inapposite. There, the policies as to which adherence was being discussed were set forth in precedential agency decisions that had the force of law. Also, even if one accepts Plaintiffs' incorrect contention that DOI has to explain why it did not require the liens to be paid before issuing the ROD, the ROD provides such an explanation. ROD, 53-55; *see also* Pls.' Opp. 29 ("An agency may have reasons for 'following a procedure fairly adapted to the unique circumstances of this case' but 'it must make these reasons known to a reviewing court with sufficient clarity to permit it to do its job.'") (quoting *Atchinson*, 412 U.S. at 833)).

"Reservation" for purposes of DOI's trust regulations includes land that currently is a reservation, as well as land that was reservation land but is no longer because a court has declared a diminishment or disestablishment. 25 C.F.R. § 151.2(f). Plaintiffs contend—notwithstanding the Second Circuit's holding that the Oneida reservation was not disestablished—that the Oneida Nation's land is not reservation land under DOI's regulations because the Supreme Court held in *Sherrill* that the Nation lacks sovereignty over reacquired land. But sovereignty has nothing to do with the meaning of reservation in 25 C.F.R. § 151.2(f). The word "sovereignty" does not appear in the text of the regulation, and it would make no sense to limit on-reservation trust acquisitions to land over which the tribe had sovereignty. A tribe would not seek trust status for already-sovereign land.

DOI's regulation refers instead to "governmental jurisdiction," which is not the same as sovereignty. A tribe exercises governmental jurisdiction (in the sense of self-government involving internal relations) within its own reservation even in the absence of tribal sovereignty that would preempt state and local law. DOI properly determined that the Nation exercises governmental jurisdiction over the Oneida reservation, satisfying the standard for "on-reservation" trust acquisitions, because the reservation is the Oneida Nation's and not that of another tribe. *See* 25 C.F.R. § 151.8; *Aitkin Cnty. v. Acting Midwest Reg'l Dir.*, 47 IBIA 99, 106 (2008) (presumption that the tribe inhabiting the reservation has jurisdiction); Nation Mem. 40. The scope of the on-reservation regulation thus fits the statutory policy of restoring tribal homelands lost through allotment and other policies (such as illegal state transactions). DOI's interpretation of its own regulations is entitled to deference. *Auer*, 519 U.S. at 461; *Brodsky*, 578 F.3d at 182.

Plaintiffs incorrectly argue that the ROD did not address the question of whether the reservation belongs to the Oneida Nation. Pls.' Opp. 67. The ROD discusses that precise point and limits the acquisition to land within or contiguous to the Oneida Nation's reservation. ROD, 32-33 (excluding single parcel claimed by Stockbridge tribe so as to avoid taking sides in that dispute).

DOI also made clear that it would have taken the same land into trust under the "off-reservation" regulation, 25 C.F.R. § 151.11, making it pointless to remand for consideration of that standard anyway. ROD, 33 n.5. When the land to be taken into trust is within reservation boundaries, whether or not it is subject to tribal sovereignty, the distance between the land and the reservation is zero, so no greater scrutiny is given to the tribe's interests under § 151.11 than under § 151.10. *See* 25 C.F.R. § 151.11(b) ("The location of the land relative to state boundaries, and *its distance from the boundaries of the tribe's reservation*, shall be considered as follows: *as the distance between the tribe's reservation and the land to be acquired increases*, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.") (emphasis added). *Sherrill* did not alter the boundaries of the reservation. The ROD adequately explains DOI's decision whether made under § 151.10 or § 151.11.

## IV. DOI's Determination Of The Nation's Need For Land Pursuant To 25 C.F.R. § 151.10(b) Was Not Arbitrary Or Capricious.

Plaintiffs challenge DOI's consideration of the Nation's need for additional land in their seventh cause of action. SASC ¶¶ 185-91. The ROD addressed the Nation's need, pursuant to 25 C.F.R. § 151.10(b), for trust land. ROD, 34-39. The Nation and the United States previously explained why DOI's determination was not arbitrary and capricious. *See* Nation Mem. 43-44; U.S. Mem. 48-51; Nation Opp. 31-35; U.S. Opp. 59-63.

Plaintiffs offer three reasons for claiming that DOI's determination is arbitrary: (1) there is no economic need for trust status and the other needs DOI identified are too malleable; (2) DOI prematurely decided to take at least 10,000 acres into trust; and (3) DOI "used the determination to rectify perceived wrongs." None of those arguments holds water.

Plaintiffs' argument regarding need fails—as a threshold matter—because it does not give deference to DOI's interpretations of its own regulations. *Auer*, 519 U.S. at 461; *Brodsky*, 578 F.3d at 182 ("An agency's application of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'") (citations omitted). DOI explained in the ROD that § 151.10(b) requires a determination of need for additional land only if the tribe does not already own the proposed trust land—in other words, it is a standard applied to DOI's *purchase* of land. That factor is not relevant to the Nation's application, because the Nation already owns the land. ROD, 34. The ROD also noted that a determination of need was not required for land within the tribe's reservation. *Id*.

DOI nonetheless went on to address the Nation's need for land in trust status. DOI devoted four pages of the ROD to a discussion of the tribe's need to support tribal self-determination and to provide housing as well as for economic development. ROD, 36-39. After stating that the Nation's "financial wherewithal and competence to manage its own affairs" did not render the Nation ineligible for placement of land into trust, DOI reiterated that trust status is about more than economic need and concluded that "trust status will promote the Nation's ability to continue its existing use of the Subject lands as the Nation intends, thereby supporting tribal economic development, self-determination, and tribal housing." ROD, 35-36. Further supporting the Nation's need for trust land, DOI noted that: (1) the Nation now has 32 acres of sovereign land; (2) it once had 300,000 acres, much of which was conveyed to the State in

violation of the Non-Intercourse Act, 25 U.S.C. § 177; (3) the Counties have sought to foreclose on the Nation's re-acquired lands; and (4) the State contends the casino is unlawful. ROD, 36. Finally, DOI explained the needs that acquisition would address and support; and provided a description of the lands being taken into trust and how they met the Nation's needs (*e.g.*, "the Subject Lands represent the hub of Nation government, member housing, agriculture, and culture"). ROD, 37.

The ROD's description of the lands not being taken into trust, ROD, 36-39, is telling evidence that DOI not only duly considered the Nation's need for trust land, but also took into account countervailing interests identified by Plaintiffs. ROD, 19. Put simply, DOI declined to take property of clear importance to the Nation into trust when DOI concluded that factors like compactness and contiguity outweighed the Nation's need. ROD, 38-39 (declining to take into trust, among other things, 75 identified archeological sites, Nine Sav-On gas stations and convenience stores, reenactment sites, festival sites, three public access marinas, member services, living history department, and noting that the "lands are not adjacent to the Nation's economic or government/cultural centers at the Turning Stone Resort & Casino and surrounding the 32-acre territory, respectively").

Plaintiffs claim that DOI's assessment of need is "contradictory" because DOI also concludes that the Nation's casino is operating lawfully, so that the Nation will survive economically even if no land is taken into trust. There is no contradiction. As the ROD notes, New York State has contended that the casino is unlawful, and Plaintiffs continue to do so in this litigation. Pls.' Mem. 96-97; ROD, 36. Although DOI rejects the State's position, the State's persistent challenges to the casino's legality create a risk that the casino could be closed if not brought into trust status, with severe consequences for the Nation and the surrounding

community. Moreover, DOI's assessment of need was properly not limited to economic need. *Id.*

Plaintiffs' contention that DOI prejudged the application is contrary to the facts. Plaintiffs continue to hang on to the argument (based on language in an ambiguous email by a DOI staffer) that Jim Cason, one of the signatories on the ROD, predetermined near the start of the trust process that DOI would take 10,000 acres of Oneida land into trust. DOI's internal, predecisional documents disclosed in response to Plaintiffs' discovery request paint a very different picture. Far from setting 10,000 acres as a floor, Cason told the Oneidas that 10,000 acres "would be the most to expect." ARS001352; *accord*, ARS000903-08; ARS001065-66; ARS001351. In fact, DOI's documents show that Cason indicated preliminary support for much less land: only "two small contiguous parcels, one in each county." ARS000903; *see* ARS001352 ("Mr. Cason was originally for just the casino and a few parcels around the 32 acre territory in Madison County."). At one point, Cason supported "only land . . . in tight proximity to the casino." ARS001378. DOI staff's assessment was that more land should be taken into trust. ARS000904 (staff supported "Alternative A, the entire 17,370 acres"); ARS001378 (DOI lawyers advised taking more land than Cason); *see* ARS000905. Late in the process, the documents show that Cason was not yet willing to take 10,000 acres into trust, not even government buildings, and continued to "attempt[] to develop his own alternative." ARS001351; *accord*, ARS001352. Cason predetermined nothing, which is why Plaintiffs, when they deposed Cason, chose not to ask him anything about the allegation that he had predetermined to take 10,000 acres into trust.

Plaintiffs' argument regarding "perceived wrongs" is also contrary to the facts. Nothing in the ROD supports the claim that DOI approved the trust application to redress the State's

illegal purchases of Oneida land. In any event, that would have been a legitimate factor for DOI to consider; one of the primary purposes of the IRA was to mitigate the effects of past policies that had stripped tribes of their land. *See* Felix S. Cohen, Federal Indian Law § 15.07[1][a], at 1009 (2005 ed.) ("The IRA was adopted as part of the repudiation of the allotment policy . . . , which had resulted in the large-scale transfer of land out of Indian ownership . . . ."). And the Supreme Court pointed to trust as the "proper avenue" to restore tribal sovereignty lost to illegal transactions and the passage of time. *City of Sherrill*, 544 U.S. at 221.

Finding no evidence of arbitrariness in the ROD, Plaintiffs point to a 2008 e-mail to the Eastern Regional Director and a 2006 fax to a Malcolm Pirnie employee, both authored by Kurt Chandler, an environmental specialist in the Eastern Regional office in Nashville, Tennessee. Neither document was written by or even addressed to Associate Deputy Secretary Cason or Deputy Secretary Scarlett, who issued the ROD. Those officials in Washington, D.C., who actually made the decision under review, may not even have been aware of Chandler's view that DOI should have taken all of the Nation's land into trust. ARS000903-05; ARS005037-42. If they were aware of his view, they disagreed, deciding against taking some 4,000 acres into trust.

A decision by the Deputy Secretary and Associate Deputy Secretary of DOI, exercising authority delegated by the Secretary, cannot be challenged on the basis of a subordinate's views expressed in internal communications to other people. APA review is based on agency action, not the staff deliberations that may have led to the decision. *See, e.g.*, *Ad Hoc Metals Coalition*, 227 F. Supp. 2d at 143 ("Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision.").

The difference between the *agency's* decision in the ROD and the views of individuals within an agency is particularly important here. The email that Chandler, the regional

environmental specialist, wrote did not purport to be explaining Cason's rationale for making the trust decision. Chandler was actually criticizing Cason for placing too much emphasis on avoiding checkerboarding and too little value on the restoration of tribal lands lost through illegal transactions. ARS00903-05. Plaintiffs point to nothing in the ROD or even the EIS that relies on Chandler's perception of racial prejudice against Native Americans, so his fax is irrelevant to APA review of the ROD, and it was entirely proper for the United States to take note of the history of jurisdictional conflict between the Nation and local governments in its memorandum supporting summary judgment, as a reason for DOI to seek to resolve the conflict by taking some of the Nation's land into trust. *See* U.S. Mem. 49.

## V. DOI's Evaluation Of The Tax Impact Of The Trust Acquisition Pursuant To 25 C.F.R. § 151.10(e) Was Not Arbitrary Or Capricious.

Plaintiffs' eighth cause of action claims that DOI's assessment of the impact of the trust decision on local taxing authorities was illogical. SASC ¶¶ 192-209. The ROD, however, provides a careful and well-reasoned analysis of the tax impacts of the trust decision that demonstrates that DOI's evaluation was not arbitrary and capricious. ROD, 40-53. The Nation and the United States refuted Plaintiffs' argument in their earlier papers. Nation Mem. 44-47, 57-61; U.S. Mem. 51-57, 66-67; Nation Opp. 35-39; U.S. Opp. 63-70.

DOI's policy judgment, based upon a comprehensive record including comments from Plaintiffs and local governments, "that the impacts of removing the Subject Lands from the tax rolls are not significant when balanced with the benefits to the Nation of placing the Subject Lands into trust," ROD, 40, is entitled to deference. The threshold question, which still remains to be addressed by the state courts, is whether the Oneida Nation's land is actually taxable at all. State law exempts reservation land owned and occupied by the tribe. N.Y. Indian Law § 6; N.Y. Real Prop. Tax Law § 454. The Counties have acknowledged that the state courts "would likely

'look[] to federal law to resolve the reservation issue." *Oneida Indian Nation*, 665 F.3d at 438 n.25 (noting that state courts will resolve state tax exemption issue). The Second Circuit has held and twice reaffirmed that the Oneida reservation was not disestablished. *Id.* at 443-44. If—consistent with the Counties' prediction—the state courts hold that the land at issue in this case is exempt from property taxes, acquisition of the land in trust status will have *no* impact on property taxes.

Despite the uncertainty about whether *any* taxes are owed, DOI assumed, for purposes of its analysis under § 151.10(e), that the Nation's land can be taxed. ROD, 45. DOI examined not only the aggregate effect of a trust acquisition on tax collections, but also the impact on particular local governments. ROD, 41-44, 46. DOI concluded that the benefits to the Nation from the trust acquisition outweighed adverse tax impacts. ROD, 50. Congress entrusted that balance of interests to DOI, and DOI's judgment is subject to deferential review. *See Wasser v. N.Y. State Office of Vocational Educ. Servs. for Individuals with Disabilities*, 602 F.3d 476, 479-80 (2d Cir. 2010) (review of state agency determination under IDEA or Rehabilitation Act); *Furlong v. Shalala*, 238 F.3d 227, 237-38 (2d Cir. 2001) (noting deference to agency on policy matters); *Cnty. Produce, Inc. v. U.S. Dep't of Agric.*, 103 F.3d 263, 267 (2d Cir. 1997) (deferring to agency about sanction that best advances statutory goal); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) ("An agency's 'policy decisions are entitled to deference so long as they are reasonably explained.'") (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 539 n.6 (D.C. Cir. 2006)).

Plaintiffs make three arguments: (a) that DOI should not have found that the Nation will continue to make payments to local governments for services, Pls.' Opp. 78-79; (b) that DOI should have counted property taxes it determined to be contrary to and preempted by federal law

when it calculated the tax impact, Pls.' Opp. 80-83; and (c) that DOI should have disregarded tax revenues flowing to the State and local governments from Nation employment when it weighed the pros and cons of trust status, Pls.' Opp. 83-85. None of these arguments provides a basis for setting aside DOI's decision as arbitrary and capricious.

DOI had good reason to find that "[i]t can reasonably be expected that the Nation will continue to pay local governments for services provided." ROD, 47. The Nation made millions of dollars in Silver Covenant payments to the local governments even though the courts prior to *City of Sherrill* had agreed that the Nation's land was immune under federal law from property taxation, the Nation has faithfully carried out its agreements with the City of Sherrill and the City of Oneida to pay taxes, and the Nation has entered into and carried out agreements with many local governments to pay for services. ROD, 22, 31, 47; FEIS 3-344-55; AR004332-35. Substantial evidence—and more—supports the ROD. *Id.*; *see also Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008) ("An agency's factual findings must be supported by 'substantial evidence,' *i.e.*, 'less than a preponderance, but more than a scintilla.' Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'") (citations omitted).

Plaintiffs base their challenge on the following: (1) that the Nation's promise to support local governments referred to making "very significant grants, donations and other payments," ROD, 31 & 50; (2) that the Nation changed the formula it used to reimburse the Verona Volunteer Fire Department for fire services; (3) that the Nation withdrew a Silver Covenant grant from a school district because of a dispute; and (4) that the Nation stopped making Silver Covenant grants when it became clear that the Counties would not give the Nation any credit for such payments towards asserted tax arrears or future tax obligations. None of this evidence casts

doubt on the sincerity of the Nation's pledge to continue to support local governments. Moreover, the existence of contrary evidence in the administrative record does not preclude an agency from making a factual finding as long as the finding is supported by substantial evidence. *See Fund for Animals*, 538 F.3d at 132 ("'The reviewing court must take into account contradictory evidence in the record, but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.'") (citation omitted); *see also 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.") (citation omitted).

The Nation's reference to "grants" and "donations" as well as "other payments" does not suggest that the Nation will not pay for future services. The Nation made Silver Covenant grants to local governments in amounts equal to or greater than its property tax bills during a time when the courts agreed that the Nation had no obligation to pay property taxes, so that the Silver Covenant payments were entirely voluntary. That is strong evidence that the Nation will make voluntary payments in the future, as it has committed to do. ROD, 31 & 50. The Nation's decision to end the Silver Covenant grants came only after the Counties sought to foreclose on land even when the Nation had paid more in Silver Covenant grants than the amount of the taxes and the Counties refused to credit Silver Covenant grants against future taxes. The Nation's decision to discontinue Silver Covenant grants in those circumstances is not evidence that the Nation would not provide support to local governments once the land is in federal trust status and is not threatened with foreclosure. Nor is an isolated dispute between the Nation and the Stockbridge Valley School District over the administration of a particular Nation-sponsored program a reason to doubt that the Nation will assist local governments. Likewise, the

renegotiation of the Nation's voluntary payment to the Verona Volunteer Fire Department after the construction of additional hotel facilities at Turning Stone does not cast doubt on the Nation's willingness to pay for services. *See* FEIS, 3-353 (Nation fire protection agreement with the Village of Canastota). Before 2004 the Nation's payment was based on the square footage of the Turning Stone facilities. In 2004, the Nation *increased* its payment to the Verona Volunteer Fire Department, but began paying a fixed amount rather than one based on square footage, because the old formula would have resulted in an annual payment disproportionate to the services provided. The new payment was negotiated by the parties, not unilaterally imposed by the Nation. FEIS, 3-353-4.

As to the casino taxes, the ROD is explicit that the exclusion of the casino improvements made no difference in DOI's determination that the benefits of taking land into trust outweighed the tax impacts. ROD, 50 ("Based on the overall effects of placing the Nation's lands into trust and the benefits to the Nation, the Department would reach the same final determination even if taxes are due and owing to the full extent that they have been assessed. As the Department has determined, however, the . . . tax assessment of the Turning Stone Casino tax lot improvements violates IGRA."). Plaintiffs overlook that determination, which defeats their argument.

Plaintiffs weakly contest, Pls.' Opp. 80-83, DOI's determination that IGRA preempts taxation of state and local gaming, as the Town of Verona has done with respect to the Nation by basing its assessment of the improvements on the Turning Stone parcels on their value as a casino resort. The administrative record shows, and Plaintiffs do not dispute, that Verona's assessment is based on the income-generating value of the property as a casino resort. AR48951-52; AR68396-97; AR68394-45; *see also* ROD, 52-53. Property taxation that is based on tribal gaming revenue is preempted by IGRA for the same reason as the licensing fee on

wagers was invalidated in *Cabazon Band v. Wilson*, 37 F.3d 430 (9th Cir. 1994).[6] In both instances, the tax conflicts with the purpose and text of IGRA, which does not allow state and local taxation of tribal gaming, or even a demand for a share of revenue as a condition for entering into a gaming compact. *See* 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). As explained in the Nation's memorandum of law and the ROD, IGRA creates a comprehensive federal regulatory scheme that leaves no room for state taxation. Nation Mem. 57-61; ROD, 50-51; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (invalidating state licensing and fuel taxes on logging operation); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (invalidating gross-receipts tax on tribal school construction). IGRA preemption is based on the supremacy of federal law that comprehensively regulates tribal gaming, not on tribal sovereignty, and so *City of Sherrill* has no relevance.[7] *See, e.g.*, ROD, 51 ("The *City of Sherrill* decision did not change Federal Indian law and policy embodied in IGRA barring the assessment of taxes on the Nation's gaming and gaming-related improvements.").

Plaintiffs argue that, in weighing the impact of trust land on the tax rolls, DOI should not have considered property, sales and income tax revenues attributable to employment in Nation

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[6] Plaintiffs complain that the Nation framed the issue in its moving papers as involving the validity of tax liens under 25 C.F.R. § 151.13. Pls.' Opp. 80 n.54. The Nation did so because that is how Plaintiffs framed the point in their complaint. *Compare* SASC ¶¶ 248-49 *with* SASC ¶¶ 192-209. As Plaintiffs no longer press the argument that DOI violated § 151.13 by declining to require elimination of liens based on invalid tax assessments tied to gaming revenue, the Nation will instead address the argument as reframed by Plaintiffs.

[7] Plaintiffs cite *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481 (9th Cir. 1998). Pls.' Opp. 81 n.55 & 82. That case involved access to records created under a gaming compact under Oregon public records laws, not taxation. The court decided the case on the basis of explicit language in the compact. The court went on to discuss preemption in *dicta*, but Plaintiffs have not explained the relevance of the preemption analysis there to this case. Nothing in *Confederated Tribes of Siletz Indians* concerns taxation of tribal gaming, including footnote 7.

businesses, particularly Turning Stone Casino and Resort, because—say Plaintiffs—the Nation's "enterprises do not need trust status to continue operating" so that tax revenue will be collected anyway. Pls.' Opp. 84. That position ignores the State's insistence, including in its summary judgment papers in this case, that gaming at Turning Stone is not lawful under IGRA because of land status disputes. Pls.' SJ Mem. 96-97; ROD, 36. DOI disagrees with the State's position, ROD, 8-9, 12, 14, but it was not obligated, in analyzing the pros and cons of trust status, to ignore the risk that the State's own position poses to the continued operation of Turning Stone and to employment at the casino resort. Closing the casino would have dramatic and adverse fiscal consequences for local governments, just as the ROD explains. *See, e.g.*, ROD 24 & 28.

## VI. DOI's Evaluation Of The Jurisdictional Impact Of The Trust Decision Was Not Arbitrary Or Capricious.

Plaintiffs maintain, in their ninth cause of action, that DOI "did not rationally consider" the jurisdictional consequences of the trust acquisition. SASC ¶¶ 210-25. However, the ROD demonstrates that DOI gave thorough and careful consideration to jurisdictional issues, concluding that the displacement of state and local regulation by federal and tribal regulation would not create future environmental, land use, or other problems in light of the Nation's plans to continue present land uses and the Nation's history of environmental stewardship. ROD, 20-22, 27-28, 29, 55-69. The Nation and the United States have previously addressed this claim. Nation Mem. 47-50; U.S. Mem. 57-62; Nation Opp. 40-45; U.S. Opp. 71-78.

Plaintiffs do not identify any error in DOI's analysis. Nor do they claim that the acquisition of particular parcels would cause problems that DOI overlooked. Instead, Plaintiffs mount a frontal attack on DOI's decision to take any land into trust for the Nation, waving the banner of "checkerboarding" as if Plaintiffs were relitigating the *Sherrill* case rather than involved in deferential review of an agency process that the Supreme Court pointed to as the

"proper avenue" for restoring tribal sovereignty. *City of Sherrill*, 544 U.S. at 221. DOI limited the trust acquisitions to parcels that were close to each other so as to limit the jurisdictional impact, even though that meant excluding parcels of economic, governmental or cultural importance to the Nation. ROD, 19, 21, 30, 38-39. DOI thoroughly investigated and carefully weighed the impact of removing state and local regulatory jurisdiction over the land to be taken into trust. The trust process was thus duly "sensitive to the complex interjurisdictional concerns[,]" *Sherrill*, 544 U.S. at 220, presented by Plaintiffs and others during DOI's three-year review of the Nation's application. DOI's evaluation of competing interests is entitled to deference. *See Furlong*, 238 F.3d at 237-38 (noting deference to agency on policy matters); *Cnty. Produce, Inc.*, 103 F.3d at 267 (deferring to agency about sanction that best advances statutory goal); *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 839 ("An agency's 'policy decisions are entitled to deference so long as they are reasonably explained.'") (citation omitted).

*Any* trust acquisition displaces state environmental law as to the trust land, so that general proposition cannot be a ground for setting aside a trust decision as arbitrary and capricious. Plaintiffs made, and DOI considered, arguments about the Nation's record of environmental compliance, but neither DOI nor the EPA saw any threat of environmental harm. Nation Opp. 40, 42-44; ROD, 29, 55, 60-69. The administrative record shows that DOI balanced the Nation's need for sovereign land against the disruption of state and local regulation by limiting the Nation to a more compact and contiguous trust acquisition.

## VII. DOI Considered Its Ability To Discharge Its Responsibilities Under 25 C.F.R. § 151.10(g).

Plaintiffs' tenth cause of action complains about DOI's finding that it is able to carry out its responsibilities with regard to the Nation's trust land. *See* SASC ¶¶ 226-31. This finding is

made on page 69 of the ROD. The Nation and United States have previously responded to this argument. Nation Mem. 50; U.S. Mem. 63-64; Nation Opp. 45-46; U.S. Opp. 79-80.

Plaintiffs' argument attempts to shift the burden to DOI on this claim. Pls.' Opp. 93 (summary judgment should be denied if DOI and the Nation fail to "produce[] or cite[] any evidence that DOI appropriately considered" whether DOI can discharge its responsibilities). However, it is Plaintiffs' burden to show that DOI's determination is arbitrary and capricious. Because they cannot do so (and, indeed, never identify the responsibility they think DOI cannot meet let alone any evidence supporting that supposition), their APA challenge fails as a matter of law, and DOI and the Nation are entitled to summary judgment. *Roberts Cnty.*, 51 IBIA at 53; *Iowa v. Great Plains Reg'l Dir.*, 38 IBIA 42, 55 (2002) ("BIA is uniquely qualified to know what additional responsibilities it will have to assume in relation to land acquired in trust. Here, the Regional Director noted that there would be few additional responsibilities . . . . She found the BIA was capable of absorbing these minimal additional responsibilities. Appellants have failed to show any way in which the Regional Director did not properly exercise her discretion in considering this criterion.").

The ROD shows that DOI did consider section 151.10(g) and concluded that it could discharge the minimal responsibilities that the trust acquisition would add. ROD, 69. The ROD notes that DOI would not be required to provide municipal services and that the Nation does not plan to enter into leases requiring DOI evaluation and approval. *Id.* The ROD also notes that the burden of site visits is reduced because the trust acquisition covers a limited area. *Id.*

## VIII. DOI's Evaluation Of The Impact On Existing Easements Was Not Arbitrary Or Capricious.

In their eleventh cause of action, Plaintiffs alleged that DOI "failed to take into account existing easements and leases and rights of way." *See* SASC ¶¶ 232-40. The ROD shows the

contrary. ROD, 65-66; *see also* Nation Mem. 51-53; U.S. Mem. 61-63; Nation Opp. 43 n.24; U.S. Opp. 77-78.

**A. Plaintiffs Do Not Have Standing To Raise Claims About Property Rights Of Others.**

Plaintiffs misunderstand or mischaracterize the standing issue. Pls.' Opp. 94. There is no dispute that the State and Counties have standing to raise certain challenges to a trust acquisition that relate to their *governmental* interests. That is the point the Solicitor General makes in the *Patchak* brief. *See* Pls.' Opp. 94 n.63. However, "[s]tanding is not dispensed in gross." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citation omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); Nation Mem. 51. Plaintiffs' standing to raise other claims concerned with their own governmental interests does not give them standing to raise claims concerned with *property rights* (such as easements) belonging to third parties. Those parties can pursue such claims, as the City of Oneida has done in its complaint,[8] and can settle them, as National Grid has done. *See* Pls.' Opp. 95 n.64.

**B. The Trust Acquisition Does Not Impair Easements.**

The ROD is unequivocal. The trust acquisition will not alter or destroy existing easements. ROD, 65-66. Plaintiffs identify nothing in the record to the contrary.

Plaintiffs' complaint now seems to be that the State will lose jurisdiction with regard to a particular regulation that requires notice of proposed excavation near underground utility lines.

[8] The City of Oneida's Memorandum of Law in opposition to DOI's summary judgment motion devotes just over a page to its easement claim. City of Oneida Opp. 24-25. The City says that its water and sewer easements should be protected. They are protected. The ROD notes that the United States will take title subject to existing utility easements. ROD, 65-66. The City's concern that DOI "ignores the issue of enforcement of easements and rights of way in the face of [the Nation's] sovereign immunity" misses the point that the trust acquisition has no effect on the Nation's already-existing sovereign immunity, so there is no loss of enforcement against the Nation as a result of the transfer. Moreover, the trust decision will move title from the Nation to the United States, and the City makes no factual or legal showing that the United States cannot and will not protect utility easements.

Pls.' Opp. at 95-96 (citing 16 N.Y.C.R.R. part 753). That is not an easement or property issue. DOI fully considered the jurisdictional impact of the trust acquisition, including the impact on utilities. ROD, 65-66; *see also* Section VI, *supra*.

## IX. Plaintiffs' NEPA Claims Have No Merit.

Plaintiffs challenge, in their thirteenth cause of action, DOI's consideration of various taxation/jurisdiction scenarios in the Environmental Impact Statement (EIS), and dispute DOI's finding in the ROD and EIS that the trust acquisition will not cause harm to the physical environment. *See* SASC ¶¶ 251-67. These issues are addressed on pages 9-31 and 60-69 of the ROD, and in the EIS, FEIS 2-1-77, 4-13-374. Plaintiffs' arguments also have been confronted in the Nation and United States' earlier pleadings. Nation Mem. 62-70; U.S. Mem. 70-75; Nation Opp. 27-29; U.S. Opp. 51-59. DOI's analysis of tax and environmental issues was thorough and is not a basis for setting aside DOI's trust decision as arbitrary and capricious.

### A. NEPA Did Not Require Preparation Of An EIS.

Plaintiffs principally complain about aspects of the EIS, rather than identifying any actual environmental harm that they claim DOI failed to consider. However, DOI was explicit, and correct, that no EIS was even required because no change in existing use is contemplated, which means that a categorical exclusion applies. ROD, 21. Plaintiffs make no serious effort to show that DOI was actually required to perform an EIS regarding acquisition of Oneida land where no change in existing use is contemplated. *See* Pls.' Opp. 100 n.72 (citing "extraordinary circumstances" that Plaintiffs maintain "could have applied here" but without attempting to demonstrate that any do apply). Plaintiffs acknowledge that courts have upheld trust acquisitions including even those involving new casino developments without an EIS. Pls.' Opp. 99 n.70. Plaintiffs' NEPA claims, which concern the contents of the EIS, thus fail at the threshold because no EIS was required. ROD, 21.

Plaintiffs advance an illegitimate estoppel theory—that, just because DOI decided to perform a full EIS, the Court can skip over whether an EIS was actually required, or whether the categorical exclusion for trust acquisitions not expected to change land use applies. Pls.' Opp. 99. Plaintiffs are wrong that any EIS that has been prepared (required or not) is necessarily subject to judicial review. *Id.* Any error in a gratuitous EIS necessarily is harmless. *Nat'l Resources Def. Council, Inc. v. FAA*, 564 F.3d 549, 556 (2d Cir. 2009), says nothing to the contrary. The legal question posed in plaintiffs' complaint (SASC ¶¶ 251-67) and discussed by the Second Circuit in *National Resources* is whether the agency violated NEPA in making its decision, not whether it made a mistake in an EIS that it did not need to prepare.

**B. Tax Issues Are Not Relevant Under NEPA.**

Plaintiffs do not dispute that NEPA is concerned only with the physical environment, not with taxes or other economic effects of trust status. Pls.' Opp. 102 ("economic injuries alone are outside the zone of interests protected by NEPA"). Thus, Plaintiffs' arguments about the tax analysis of alternatives in the EIS are irrelevant to the soundness of the EIS.[9]

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[9] Plaintiffs also argue that DOI relied on the EIS in the ROD. Pls.' Opp. 99. That is not a NEPA claim. The consideration of taxation/jurisdiction scenarios had no prejudicial effect on DOI's decision, as it considered the scenarios Plaintiffs believe to be reasonable. Nation Opp. 27-29. The ROD proves this point:

> Also, the Department emphasizes that this decision is to implement the Preferred Alternative, as modified, regardless of whichever taxation/jurisdiction scenario(s) ultimately would occur with respect to lands not acquired into trust. Put another way, while this decision was made after consideration of all of the possible scenarios, this decision neither assumes nor is dependent upon the future occurrence or non-occurrence of any particular scenario(s).

ROD, 31; *see also* ROD, 50.

### C. DOI Considered And Rejected Plaintiffs' Speculative Claims Of Future Environmental Harm.

Plaintiffs argue in substance that DOI should have disqualified the Nation from any trust land because the Nation will harm the environment if subject only to federal and tribal regulation. But Plaintiffs make no showing that trust status will produce any environmental harm. Plaintiffs point to no contemplated development or land use that is problematic.

DOI explicitly rejected Plaintiffs' forecast of future environmental harm if the Nation's land is taken into trust. ROD, 21 ("[T]he Nation is proposing no change in land use or ground-disturbing activity as part of the Proposed Act, resource categories related to the physical environment (*e.g.*, soils, groundwater, air, noise, wildlife, vegetation, wetlands, etc.) . . . ."); *id.*, 29, 60-69. As Plaintiffs acknowledge, DOI considered Plaintiffs' submissions alleging past environmental harms, but saw the facts differently. Pls.' Opp. at 104 n.75. DOI's factual determination, supported by the EPA, that the Nation's past conduct does not suggest a threat to the environment if it is subject to federal but not state regulation is entitled to deference. ROD, 21, 29, 60-69; *id.* at App. B, 117. *Fund for Animals*, 538 F.3d at 131-32. Plaintiffs cannot, and do not even attempt to, show that DOI's determination was not supported by substantial evidence.[10]

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[10] Plaintiffs' "cumulative impact" argument based on past harm and on assumption of future harm, which is their fourteenth cause of action, is simply a restatement of the same speculation about future environmental damage that DOI rejected. The EIS examined the cumulative impact of the trust decision. FEIS, 4-78-93, 4-113-23, 4-150-251, 4-338-41; ROD, 28. Plaintiffs disagree with DOI's findings, but they have not shown that DOI failed to consider the cumulative impact. Nor have they refuted DOI's conclusion that many of the past environmental "incidents" that Plaintiffs tout as significant were not. *Compare* Pls.' Opp. 104 (reiterating co-generation plant argument) *with* ROD, 62 ("According to the EPA, the Nation 'applied for a [Clean Air Act] Title V permit as soon as it decided to construct a Central Utility Plant making it a major NOx facility,' and the facility is in compliance with all applicable requirements."); AR004373-74. *See also* ROD, 60-69 (addressing comments expressing environmental concerns); Nation Mem. 65-68; Nation Opp. 40-45. Plaintiffs' hyperbolic accusations aside, *see*,

### D. NEPA Did Not Give Plaintiffs A Right To Review The Entire Administrative Record Before A Trust Decision Was Made.

Plaintiffs chose not to seek summary judgment on their sixteenth cause of action, which alleges that DOI failed to disclose documents underlying the EIS, but nevertheless oppose summary judgment in favor of DOI on that claim. Pls.' Mem. 4 n.2. The United States previously demonstrated that it is entitled to summary judgment on this claim. U.S. Mem. 78-79.

DOI complied with 40 C.F.R. § 1506.6, authorizing access through FOIA to the EIS and underlying documents. Plaintiffs had access to the draft EIS and commented on it. AR000001-2453. DOI also made public comments on the EIS including any submissions to DOI in support of the comments (*i.e.*, the "underlying documents"). Plaintiffs cite no case holding that a CEQ regulation creates a right of pre-decisional access to internal agency records. Their right and remedy for delay is under FOIA. Any delay in producing documents was harmless in any event.

Plaintiffs claim that the disclosure of the administrative record and production of the FOIA response do not moot the claim because they could not use the documents while DOI was considering the EIS. Plaintiffs have had the responses to their FOIA requests for more than two years now, and they have not identified anything that would have made any difference. Indeed, they also have deliberative process documents that they were not entitled to obtain through FOIA. Even if Plaintiffs' strained reading of the CEQ regulation were correct, courts do not overturn federal agency decisions for harmless procedural errors like the belated disclosure of FOIA documents, when nothing in the documents would change the agency's decision.

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*e.g.*, Pls.' Opp. 106, nothing suggests that the Oneida Nation has not and will not continue to be appropriately protective of the environment. *See, e.g.*, ROD 60-69.

## X. Plaintiffs' Bias Claim Is Insubstantial And Raises No Factual Issue Precluding Summary Judgment.

Plaintiffs alleged biased decision-making in their fifth cause of action, SASC ¶¶ 163-76, and obtained discovery on that basis. *New York v. Salazar*, No. 6:08-CV-644 (LEK/DEP), 2011 WL 1938232, at *6-7 (N.D.N.Y Mar. 8, 2011). Plaintiffs declined to seek summary judgment on their bias claim. Pls.' Mem. 4 n.2. The Nation and the United States, however, seek and are entitled to summary judgment on this claim. Nation Mem. 20-38; U.S. Mem. 31-45.

Although Plaintiffs recognize (by declining to seek further discovery or summary judgment on the bias claim) that they do not have enough evidence even to seek discovery beyond that granted by Magistrate Judge Peebles, much less enough for summary judgment in their favor, they nevertheless maintain that the Court should not enter summary judgment in favor of DOI and the Nation on their bias claim. Plaintiffs do not explain how they envision resolving the bias claim if not on summary judgment. As is true of other APA issues, whether a sufficiently strong showing of bias has been made to invalidate an agency decision is a question of law resolved on summary judgment, not a matter for live witnesses and trial.[11]

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[11] Plaintiffs pleaded a due process claim, but they have not made an effort to develop a legal basis for a constitutional (as opposed to an APA) claim. Presumably that is because Plaintiffs recognize that they cannot pursue a constitutional claim. Plaintiffs do not dispute the Nation's argument that the State is not a "person" protected by the Fifth Amendment. Pls.' Opp. 43-44; *see also South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 990 (8th Cir. 2012) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)). Decisions of a district court applying a due process analysis to county trust challenges without even considering whether such a claim is viable are unpersuasive. *See* Pls.' Opp. 46-47. The Eighth Circuit, the Circuit with jurisdiction over that district court, recently expressed "some doubt political subdivisions of the state are afforded constitutional rights apart from those which derive from the state itself," but did not decide the issue. *South Dakota*, 665 F.3d at 990 n.4. *But cf. Twp. of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968) (municipality is a "person" for purposes of Fourteenth Amendment Due Process Clause).

This Court need not decide whether the Counties are "persons" with claims against the federal government under the Fifth Amendment because the Counties here do not claim a deprivation of property cognizable under the Fifth Amendment. The Counties' interest in *future*

Remarkably, Plaintiffs do not cite the Second Circuit's recent opinion on agency bias claims, *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009), even though they previously relied on the district court's discovery opinion in that case. *See* Pls.' Opp. 48-49. In *Schaghticoke*, the Court upheld DOI's decision to *reverse* its previous final determination to recognize a Connecticut tribe in the face of heavy criticism from members of Congress and state and local officials. "'To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.'" 587 F.3d at 134 (quoting *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984)). The court rejected the tribe's contention that it could prevail without showing an actual effect on the agency's decision. 587 F.3d at 134 n.1 ("Our standard for a claim of 'improper political influence' is clear, and we reject the Schaghticoke's argument that we should apply a broader 'appearance of bias' standard in this action.") (internal citations omitted). The Second Circuit saw "no evidence that [the elected officials] 'did cause the agency's action to be influenced by factors not relevant under the controlling statute.'" *Id.* at 134 (quoting *Town of Orangetown*, 740 F.2d at 188). Plaintiffs' embrace of a watered-down "risk" or appearance standard, Pls.' Opp. 48-49, rather than the standard recently articulated by the Second Circuit, is further acknowledgment that they cannot make the necessary showing.

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*governmental power* over Nation land—both as to regulation and taxation—is not property. Future governmental jurisdiction is properly considered under the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000), not *Pasquantino v. United States*, 544 U.S. 349 (2005), which involved the collection of past taxes due—*i.e.*, a specific monetary obligation—not the power to impose future taxes. Plaintiffs have not bothered to analyze the process that would be due under a Fifth Amendment analysis because they do not have a cognizable property interest and if they did, the process afforded by the APA would be sufficient. Accordingly, the due process allegation in the Complaint can be disregarded.

The facts of *Schaghticoke* confirm that the Second Circuit bias standard is demanding. Unlike the review of a trust application, the tribal acknowledgment determination at issue in *Schaghticoke* is a "quasi-judicial proceeding" subject to especially rigorous standards of impartiality. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 409 (D. Conn. 2008). There was "no question" that heavy political pressure was placed on DOI from Capitol Hill and from state and local officials. *Id.* at 410. That pressure was intensive and took the form of congressional hearings, a "threat" to the Secretary of DOI, meetings, and letters. There was also no question that the agency did an about face and changed a determination it had made. Even so, the district court reviewed depositions by agency officials, including one of the decision-makers here, Associate Deputy Secretary James Cason, and found no evidence of any actual influence on the decision. *Id.* at 411-12. The Second Circuit affirmed.

Plaintiffs cannot point to any pressure or undue influence on DOI in making the trust decision. Nor has there been any reversal of an agency decision as there was in *Schaghticoke*. And Plaintiffs did not even bother to question former Associate Deputy Secretary Cason at his deposition about whether his decision had been influenced by any improper consideration and did not seek to add the deposition to the administrative record for review by this Court.

Plaintiffs devote less than one and one-half pages of a 109-page memorandum to the once-prominent claim that the Oneidas' attorney Thomas Sansonetti "unduly influenced the DOI." Pls.' Opp. 63-64. Despite having been authorized to depose Cason and to review deliberative process privileged documents, the only things Plaintiffs point to as creating "a substantial fact issue as to bias" (Pls.' Opp. 63) are that: (1) Sansonetti urged DOI to expedite the process and Cason expressed interest in making the application process go smoothly; (2) a purported decision to "target[] 10,000 acres" before "the affected state and counties were notified

of the application;" and (3) Cason's decision to review the application at BIA headquarters in Washington rather than have the Eastern Regional Director in Tennessee make the decision, followed inevitably by IBIA and secretarial level review back in Washington.

The record does not support Plaintiffs' arguments. The administrative review of the Nation's application took more than three years and—as evidenced by the administrative record—was thorough and complete. Even if Cason expedited the review of the Nation's trust application, that would not be evidence of any bias in DOI's actual decision. And the administrative record shows that Cason discussed 10,000 acres as a maximum for trust acquisition, which required the Nation to prioritize its application—a ceiling not a floor.[12] *See* pp. 20-21, *supra* (addressing the administrative record in detail regarding the 10,000 acre point). The record shows no prejudgment, much less the kind of "unalterably closed mind," *Air Transport Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (APA rulemaking), or "irreversible and irretrievable commitment," *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1263-66 (10th Cir. 2011) (NEPA), that is required to upset an administrative decision.

[12] There is no truth to the insinuation that DOI made up its mind before Plaintiffs had a chance to be heard. The State and Counties had actual notice of the Nation's trust application soon after the Nation filed it and made their opposition known to DOI long before DOI completed the bureaucratic step of formally issuing notice that the April 2005 application had been filed. *See, e.g.*, AR07369-73 (memorandum summarizing April 22, 2005 meeting Department of Interior officials had with state and county officials and Nixon Peabody attorney Dave Schraver regarding Nation's trust application); AR049434-37 (letter from Madison County Board of Supervisors Chairman to Secretary Norton (Apr. 11, 2005) opposing Nation's trust application); AR049431 (letter from Oneida County Board of Legislators to Congressman McHugh (Apr. 11, 2005) opposing Nation's trust application); AR049426-27 (letter from Congressman McHugh to Secretary Norton (Apr. 13, 2005) opposing Nation's trust application); AR049422 (letter from Congressman Boehlert to Secretary Norton (Apr. 21, 2005) asking her to suspend all action on Nation's trust application); AR049393-95 (letter from Governor Pataki's office to Secretary Norton (May 13, 2005) opposing trust application).

The choice to make the trust decision in Washington rather than at the Eastern Regional office in Nashville reflected the high level of congressional interest and the inevitability of internal agency appellate review. *See* AR007198 ("Due to the heightened public interest, a final determination regarding the approval of this fee-to-trust application will be made at the Central Office."); ARS001065 (discussing that the NEPA decision for the ROD would be made at the Secretary/Assistant Secretary level, so the expected challenge would go directly to the courts); Nation Mem. 36-38 (discussing the high level of involvement of government officials in the trust process). Moreover, as Plaintiffs elsewhere acknowledge, the Eastern Regional staff supported taking all of the Nation's land into trust, so shifting the decision to Washington officials could not have adversely affected Plaintiffs. ARS000904; ARS001345.

Plaintiffs' other bias arguments are also insubstantial. Plaintiffs identify a number of decisions DOI made with which they disagree and hold them up as evidence of bias. Pls.' Opp. 50-57. None of DOI's decisions was erroneous for reasons discussed elsewhere in this reply and in the Nation's opening memorandum.

Plaintiffs contend that Malcolm Pirnie, the contractor that assisted in preparing the EIS was improperly selected by the Nation, not by DOI (Pls.' Opp. 57-58), and that Malcolm Pirnie made certain assumptions in its work for DOI (Pls.' Opp. 59). Plaintiffs disregard the abundant record evidence presented in the Nation's opening memorandum that DOI selected and supervised Malcolm Pirnie. *See* Nation Mem. 24-30. Nor, despite unusual access to deliberative process documents, do Plaintiffs point to anything demonstrating any actual bias in DOI's decision-making that is tied to Malcolm Pirnie.

Plaintiffs argue that delays in producing documents pursuant to FOIA precluded them "from commenting on materials underlying the application." However, even if that were true,

that would not prove a biased decision. The argument also fails because Plaintiffs did not have any right to review the record of the trust application while the matter was before the agency and because they have the documents and can make all of their arguments to this Court. Nation Mem. 30-31. Plaintiffs chose not to pursue their FOIA claims before DOI issued the trust decision, indicating that they placed a higher value on being able to include their grievance in the APA complaint than they did on actually obtaining the documents before DOI made its decision.

Agency decisions enjoy a presumption of regularity, *USPS v. Gregory*, 534 U.S. 1, 10 (2001), and Plaintiffs have not overcome that rule of APA review. *See Schaghticoke*, 587 F.3d 132; *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 16 (2d Cir. 1997) (district court correctly did not consider extra-record evidence where no "strong showing" of bad faith).

## XI. Plaintiffs' Extra-Record Documents Concerning the Oneidas' Tribal Status Should Not Be Considered And Do Not Preclude Summary Judgment On Their *Carcieri* Claim.

Relying on documents that are neither in the administrative record nor properly included in the summary judgment record to support their third cause of action, Plaintiffs urge this Court to rule that the Oneida Nation was not a tribe under federal jurisdiction at the time of the IRA, and is therefore ineligible for any trust land, notwithstanding DOI's determination that the Oneida Nation was entitled to vote on whether to reorganize under the IRA under the exact same statutory standard. *See* ROD, 33-34; SASC ¶ 147 (Oneidas voted on reorganization under section 18 of the IRA); SASC ¶ 153 ("Upon information and belief, [the Nation] does not meet this requirement as the [Nation] was not a 'recognized tribe *now* under federal jurisdiction" as of the date of the IRA's enactment in 1934"); Nation Mem. 14-15, 18; U.S. Mem. 18-20; Nation Opp. 4, 8, 10-11, 15; U.S. Opp. 19.

Plaintiffs concede that remand is futile because DOI would find that the Nation is eligible for trust land under *Carcieri*. Pls.' Opp. 28. That is the only determination possible in light of

the undisputed fact of an IRA vote and the commitment of decisions about tribal status and recognition to the political branches.

Plaintiffs are no more entitled to disregard the record rule in defending against summary judgment than they are in pursuing their own summary judgment motion. The documents, expert report, and attorney declaration on which Plaintiffs rely, Pls.' Opp. 8-9, are not part of the administrative record. They should play no role in review of the trust decision pursuant to the APA. Indeed, even if this were not an APA case, Plaintiffs' submissions should be disregarded. As more fully explained in the Nation's Objections and Responses to Plaintiffs' Statement of Material Facts, Plaintiffs' expert was not identified and his report was not disclosed, in clear violation of Local Rule 26.3. Yet Plaintiffs drafted a pretrial order, subsequently approved by the Magistrate Judge, noting that they had not retained experts and did not expect to, and promising to disclose experts if they were retained. (DE 40 & 50). A party cannot avoid the gate-keeping requirements of Federal Rule of Evidence 702 by refusing to disclose an expert and then dropping a report into the summary judgment record. Plaintiffs' report would have failed the *Daubert* standard on multiple grounds, as explained in the Nation's objection. *See* Nation Objections and Responses to Pls.' Statement of Material Fact, 9-16.

Also, Plaintiffs sought to conduct discovery to expand the record on the *Carcieri* issue but did not appeal the Magistrate Judge's denial of their request, so they cannot rely on extra-record material. *See* DE 174 at 32-34; *New York v. Salazar*, 701 F. Supp. 2d 224, 243-44 (N.D.N.Y. 2010). Attorney affidavits on which Plaintiffs also rely are not part of the summary judgment record either. L.R. 7.1(a)(3).

It would be futile to remand to DOI to consider the *Carcieri* issue, not—as Plaintiffs claim—because DOI is defying the Supreme Court's decision, but rather because DOI would

rightly deem the material irrelevant to the question. DOI has explained that every tribe that was asked to vote on whether to reorganize under the IRA pursuant to 25 U.S.C. § 478 was necessarily "under federal jurisdiction" for purposes of the definition of Indians in 25 U.S.C. § 479. The decision in *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62 (2011) is based on the obvious point that the statutory qualification for voting on IRA reorganization is identical to the statutory qualification for trust land. DOI made a contemporaneous determination that the Oneidas were a tribe under federal jurisdiction, satisfying that standard, and so the *Carcieri* inquiry is at an end. *See* 25 U.S.C. §§ 465, 478, 479; ROD, 33-34 (citing § 478). Moreover, even without an IRA vote, there cannot be a material factual dispute about whether the Oneida Nation qualifies as an Indian tribe under the IRA because the federal government entered into several treaties with the Oneida Nation and there is no claim that the federal government's relationship with the tribe was ever terminated by the political branches.[13] *See, e.g.*, Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794); *see also* Nation Mem. 13-18. Because remand would be futile, Plaintiffs cannot rely on the narrow exception to the record rule permitting consideration of material to show that an agency failed to consider an issue, so that the agency can consider it on remand.

Another reason why Plaintiffs' submissions to this Court cannot be considered as a basis for remand is that Plaintiffs could have submitted the material to DOI to review when it was

[13] Plaintiffs agree that in this situation, federal recognition of the tribe is really the same thing as being under federal jurisdiction. Pls.' Opp. 17-18. Courts defer to the political branches to make decisions about tribal recognition. *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."); Felix S. Cohen, Federal Indian Law § 3.02[5], at 143 (2005 ed.) ("Courts have invariably deferred to such acts of recognition by the political branches.").

considering the Nation's trust application, but they chose not to do so. Plaintiffs maintain that they flagged the *Carcieri* issue for DOI by asserting in a footnote in a lengthy 2006 document that there were "serious questions" about whether the Oneidas were a *recognized tribe* at the time of the IRA. *See* Baldwin Decl., Ex. O at AR000286 n.2; Ex. P at AR0001113 n.2. Supposing that this indirect footnote reference is enough to preserve the issue for APA review, Plaintiffs chose not to present documents or a historian's report to DOI, then or at any time in the process. The only thing Plaintiffs cited in their footnote was the 1914 Reeves report, which has no significance because it is at odds with the subsequent determination of the United States, this Court and the Second Circuit in the *Boylan* case that the Oneida tribe remained under federal guardianship as well as DOI's determination regarding the IRA vote. There was no reason for DOI to respond in the ROD to plaintiffs' footnote.

Plaintiffs could have submitted to DOI the documents that they have submitted to this Court. They had them as a result of discovery in the Oneida land claim case, as well as many other documents that they chose not to offer nor to give to their expert. [14] *See, e.g.*, Nation's Objections and Responses to Pls.' Statement of Material Facts, 13-15. Plaintiffs could also have hired a historian to submit a report to DOI, just as they hired an economist to submit a report on the Nation's ability to pay property taxes. Plaintiffs cannot avoid the deference that the Court would have given to DOI's application of the "under federal jurisdiction" standard to the facts by withholding material from the agency so that it can be used for the first time in an APA challenge. Moreover, Plaintiffs (or their expert) cannot cherry-pick extra-record documents, disregarding everything that contradicts their claim, and then assert that their customized record

[14] For example, with the exception of a few public documents and documents of little relevance to the Oneidas (Tennant Decl., Exs. A, B, H, BB, CC, JJ, QQ, RR, CCC, HHH, III, JJJ), the exhibits to the Tennant Declaration were all produced in discovery in the Oneida land claim.

supports their claim. *See, e.g.*, *id.* at 13-15 (discussing evidence in Plaintiffs' possession, but omitted from their expert report); Nation Mem. 7 n.5 (same).

Plaintiffs admit in the complaint that the Oneida Nation voted on IRA reorganization.[15] SASC ¶ 147. That fact alone is sufficient to decide the *Carcieri* question without any need to gather or to consider any other information. Plaintiffs allege no contrary facts, only a legal conclusion, and that only on "information and belief." Plaintiffs' "information and belief" allegation cannot be explained away on the ground that "the facts are peculiarly within the possession and control" of DOI, Pls.' Opp. 11. That rationale may apply when facts can only be developed through post-complaint discovery. But here, Plaintiffs actually obtained the material years ago in land claim discovery and/or from archives open to the public.

Plaintiffs' documentary submission would raise no material factual dispute anyway. The fallacy that pervades Plaintiffs' arguments about federal jurisdiction over the Oneidas in the early 20th century also pervades their arguments about the DOI's decision-making on the Oneidas' trust application between 2005 and 2008—that any statement by a DOI employee is legally equivalent to an agency's formal action. Plaintiffs equate letters and even internal

[15] In their Response to DOI's Statement of Material Facts, Plaintiffs now attempt to deny that "applicant tribe and Defendant-Intervenor in this action" voted on the IRA. DE-259-23, ¶ 2. That position is contrary to Plaintiffs' contention in their complaint and earlier motion for summary judgment that the "applicant and defendant-Intervenor" was ineligible for trust land *because it voted against reorganization under the IRA.* SASC ¶¶ 147-48; Mem. of Law in Supp. of Mot. for Summ. J., DE 57-2, at 3-4. It is also contrary to Plaintiffs' own submission of an extra-record affidavit stating, among other things that, "[t[he Secretary of the Interior recognizes the Oneida Nation of New York as the Indian tribe that remained on the New York Oneida Reservation, as surveyed by Nathan Burchard, following the Treaty of May 23, 1842 between the State of New York and the First and Second Christian Parties of the Oneida Indians." Baldwin Decl., Ex. M ¶ 3. That affidavit confirms that the Nation is the tribe involved in the *Boylan* litigation as well as the IRA vote. Whether the Nation is recognized as the tribe that voted on the IRA is, in any event, an issue committed to the political branches. The Nation is so recognized by DOI, ending the matter. The related contention that the Oneidas were voting on whether to form a tribe, *see* Pls.' Opp. 23 & n.13, is flatly contrary to the text of the IRA. Only tribes could vote on reorganization. 25 U.S.C. § 478.

memoranda by DOI employees with authoritative decisions by the United States, disregarding the distinction the Second Circuit drew between the two. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003) ("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*.")); *see also Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008) ("At the very least, a definitive and binding statement on behalf of the agency must come from a source with the authority to bind the agency.") (collecting cases); *Almy v. Sebelius*, 749 F. Supp. 2d 315, 328 (D. Md. 2010) ("[I]t is well-established that lower-level contractors and ALJs cannot speak on behalf of the Secretary.") (citation omitted). *Cf. Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 429 (1990) ("Judicial adoption of estoppel based on agency misinformation would, on the other hand, vest authority in these agents that Congress would be powerless to constrain."); *Goldberg v. Weinberger*, 546 F.2d 477, 480-81 (2d Cir. 1976) ("It is well established that 'estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government.' . . . Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations.") (internal citations omitted).

Plaintiffs' other arguments are also legally insubstantial. Doubts within DOI about the legal status of the Oneida reservation before DOI finally determined that the Oneidas should vote on IRA reorganization have nothing to do with continued federal recognition of and jurisdiction over the tribe. New York State's assertion of jurisdiction over tribes within its borders (the Senecas, Mohawks and Onondagas as well as the Oneidas) could not displace the federal

government's own jurisdiction, given federal supremacy and the federal government's exclusive authority under the Indian Commerce Clause. *See* U.S. Const., art.VI, cl. 2; U.S. Const. art. I, § 8, cl. 3; *N.Y. SMSA Ltd. P'ship v. Town of Clarkson*, 612 F.3d 97, 103-04 (2d Cir. 2010) ("Under the Supremacy Clause of the Constitution, state and local laws that conflict with federal law are 'without effect.'") (citations omitted).

Plaintiffs' claim that the Oneida vote against IRA reorganization proves "the absence of federal jurisdiction," Pls.' Opp. 23, is absurd. The plain language of the IRA makes federal jurisdiction a prerequisite for the vote, not a consequence of reorganization. The attempt to sever the Oneida Nation from the Treaty of Canandaigua and *Boylan* on the theory that *Boylan* was concerned only with "the Rockwell family," Pls.' Opp. 24, is flatly inconsistent with *Boylan*, which establishes the unaltered land rights and status of the tribe, not the rights of particular individuals based on inconsistent land titles created under state law. *United States v. Boylan*, 256 F. 468, 494-95 (N.D.N.Y. 1919) (tribe's land held in severalty and tribe remains subject to treaty); *United States v. Boylan*, 265 F. 165, 174 (2d Cir. 1920) ("the Oneida Indians hold as tenants in common") *see also id.* at 171 (record shows Indians held the land from the 1794 treaty to the eviction). As DOI stated in a formal response to comments: "In *United States v. Boylan* the Oneida Nation was firmly established as a federally recognized tribe, not a tribal remnant." AR010879.

## CONCLUSION

The Nation's motion for summary judgment should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on March 15, 2012, I caused to be filed with the Clerk of Court via the CM/ECF system the foregoing Defendant-Intervenor's Reply in Support of Its Motion for Summary Judgment. The Clerk will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

*/s/ Michael R. Smith*
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