UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION, CITIZENS EQUAL RIGHTS ALLIANCE, DAVID R. TOWNSEND, New York State Assemblyman, MICHAEL J. HENNESSY, Oneida County Legislator, D. CHAD DAVIS, Oneida County Legislator, and MELVIN L. PHILLIPS,

Plaintiffs,

v.

S.M.R. JEWELL, individually and in her official capacity as Secretary of the U.S. Department of the Interior, MICHAEL L. CONNOR, in his official capacity as Deputy Secretary of the U.S. Department of the Interior, ELIZABETH J. KLEIN, Associate Deputy Secretary of the Interior; FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs; and CHESTER MCGHEE, Eastern Regional Environmental Scientist,

Defendants.

CIVIL ACTION NO.
6:08-cv-00660-LEK-DEP

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In May 2008, the Department of the Interior ("DOI" or "Interior") determined to take 13,003.89 acres of land into trust for the Oneida Nation of New York ("Oneidas" or "Nation"). That decision occurred prior to the issuance of Carcieri v. Salazar, 555 U.S. 379, 381 (2009). On September 24, 2012, this Court remanded this case to Interior for further proceedings to determine, in accord with Carcieri, whether the Nation was under federal jurisdiction in 1934 and therefore eligible to have land taken into trust pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 et seq. ("IRA"). Dkt. No. 65. Interior has concluded that the Nation was under federal jurisdiction in 1934. Dkt. No. 76-1 Amendment to the May 20, 2008 Record of Decision for Oneida Indian Nation of New York Fee-to-Trust Request (adopting Determination of Whether the Oneida Indian Nation was Under Federal Jurisdiction in 1934) ("Opinion").

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants S.M.R. Jewell,[1] Secretary, United States Department of the Interior ("Secretary"); Michael L. Connor, in his official capacity as Deputy Secretary of the Department of the Interior; Elizabeth J. Klein, Associate Deputy Secretary of the Interior; Franklin Keel, Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs ("BIA"); and Chester McGhee, Eastern Regional Environmental Scientist, by undersigned counsel, submit this Memorandum in Support of Summary Judgment against Plaintiffs.[2] For the reasons described below, and based on the May

[1] Pursuant to Federal Rule of Civil Procedure 25(d), S.M.R. Jewell is substituted as Secretary of the Interior, Michael L. Connor is substituted as Deputy Secretary, Elizabeth J. Klein is substituted as Associate Deputy Secretary, and Chester McGhee is substituted as Eastern Regional Environmental Scientist.

[2] Plaintiffs in this action, until March 25, had split into two groups. One group, consisting of David R. Townsend, D. Chad Davis, and Melvin L. Phillips, proceeded under the Complaint originally filed in this action and are referred to as "Phillips." The second group, consisting of

2008 Record of Decision as well as the December 2013 Amendment to that Record of Decision and their accompanying administrative records, Plaintiffs' surviving claims challenging this administrative action should be denied and their complaint dismissed.[3]

II. BACKGROUND

A. Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." Section 5 further provides that any such lands acquired by the Secretary "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian," and "shall be exempt from State and local taxation." Id. Congress enacted the IRA in 1934 in large part to reverse the "failure" of its earlier allotment policy, reflected in the General Allotment Act, 24 Stat. 388 (1887), Hodel v. Irving, 481 U.S. 704, 708 (1987), and similar policies that stripped tribes of their lands. "The objectives of allotment were simple and

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Central New York Business Association, Citizens for Equal Rights Alliance and Michael J. Hennessy elected to amend the original complaint, see Dkt. No. 58, and are referred to as "CNYFBA." A March 25, 2014 filing, Dkt. No. 112, indicates that the Plaintiffs are again represented by one counsel. Plaintiffs have failed to indicate whether they intend to proceed under two complaints or whether they plan to revert to a single complaint. In light of this, the United States has no choice but to assume that both complaints remain extant.

[3] For this brief, Interior's May 20, 2008 Record of Decision is "ROD" and may be found at Dkt. No. 90-4. Citations to the administrative record supporting that decision occur in the form "AR000000." The administrative record was filed with the court on disks, as noted at Dkt. No. 86. The Carcieri Opinion adopted by the Amendment is "Opinion" and may be found at Dkt. No. 109-1. Page references correspond to the pagination of the Opinion, not the ECF pagination. References to documents in the administrative record supporting the Amendment and Opinion are by document number ("Doc.") and then by page number in the form "Amended Rod 000000." The administrative record for the Amendment and Opinion was provided to the Court on a disk which contains an index identifying documents by number with hyperlinks to the document. The filing of the administrative record is acknowledged at Dkt. No. 106.

clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 254 (1992).

The allotment policy and similar policies designed to strip tribes of their lands "proved disastrous for the Indians." Hodel, 481 U.S. at 707; see Hagen v. Utah, 510 U.S. 399, 425 n.5 (1994) (Blackmun, J., dissenting) (noting that "[t]he 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934"). That policy came to an "abrupt end" in 1934 with the passage of the IRA, which marked a return to "the principles of tribal self-determination and self-governance" that had characterized the pre-General Allotment Act era. County of Yakima, 502 U.S. at 255.

The "overriding purpose" of the IRA is to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Morton v. Mancari, 417 U.S. 535, 542 (1974). The IRA seeks "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 73-1804, at 6 (1934)).

The IRA has two central goals: (1) "to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains"; and (2) "to enable the tribe to interact with and adapt to modern society as a governmental unit." F. Cohen, Handbook of Federal Indian Law § 1.05, at 81 (Newton ed., 2012). Accordingly, among other things, the IRA expressly discontinued the allotment program (IRA § 1, 25 U.S.C. § 461), and extended indefinitely the periods of the federal government's trust with respect to Indian lands (IRA § 2, 25 U.S.C. § 462). See Chase v.

McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978). As noted above, section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary, in her discretion, to acquire land in trust on behalf of Indian tribes or individual Indians. By authorizing new trust acquisitions, section 5 allows the Secretary to restore or replace the lands and related economic opportunities that were lost through the allotment and other governmental policies that sought to dispossess tribes of their ancestral lands. See Mescalero Apache Tribe, 411 U.S. at 151; South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 798 (8th Cir. 2005).

To be eligible to have land taken into trust pursuant to the IRA, a tribe must meet one of the IRA's definitions of Indian. The first definition of "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. In 2009, after Interior issued the ROD challenged here, the Supreme Court held that the first definition of "Indians" in the IRA, "refers to a tribe that was under federal jurisdiction at the time of the statute's enactment," which is to say in 1934. Carcieri v. Salazar, 555 U.S. 379, 381 (2009).

DOI's regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's exercise of discretionary authority to acquire land in trust for Indian tribes and individual Indians. 25 C.F.R. § 151.1. A tribe wishing to have land taken into trust must file a written request with the Secretary that sets forth certain information. Id. § 151.9. The Secretary then notifies the state and local governments having regulatory jurisdiction over the land proposed to be acquired in trust and provides them with a thirty-day comment period. Id. § 151.10.

The Part 151 regulations state a general policy regarding trust acquisitions (id. § 151.3) and specify particular factors that guide the Secretary's review of land acquisition requests (id. §

151.10(a)-(h)). Those factors include: "the need . . . for additional land"; "the purposes for which the land will be used"; "the impact on the state and its political subdivisions resulting from removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." Id. § 151.10(b), (c), (e), (f).

B. The Challenged Action

Plaintiffs, CNYFBA and Phillips, have brought an Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, challenge to the Department's May 20, 2008 decision to accept 13,003.89 acres of land into trust for the benefit of the Nation.

The administrative process leading to the 2008 decision began with the April 4, 2005, request by the Oneidas that the United States take approximately 17,370 acres of land in Madison and Oneida Counties, New York, into trust on behalf of the Nation. Record of Decision, Oneida Indian Nation of New York Fee-to-Trust Request ("ROD") at 6. See Dkt. No. 90-4. An Environmental Impact Statement ("EIS") was not mandated under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370, because the Nation planned no change in the use of its lands and the expected environmental impacts of the acquisition would therefore be negligible.[4] Nevertheless, Interior opted to undertake an EIS addressing environmental and other impacts of the proposed trust acquisition "to ensure that the Nation's fee-to-trust request received the most thorough environmental review available under

[4] Where environmental impacts of a federal action are likely to be minimal, that action is typically subject to a "categorical exclusion." As defined in the Council on Environmental Quality's NEPA regulations, a categorical exclusion "means a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. The ROD explains that a "land-into-trust request that proposes no change in land use is typically subject to 'categorical exclusion' under BIA policies and procedures." ROD at 9.

NEPA." ROD at 9. The BIA issued a Notice of Intent to prepare an EIS on December 23, 2005 in the Federal Register. 70 Fed. Reg. 76325. Scoping meetings were held on January 10 and 11, 2006, and comments were received from cooperating agencies, government agencies, the public, tribal entities, and other interested parties through January 23, 2006. ROD at 9. On March 2, 2006, the BIA held a public meeting in the City of Utica, New York, to describe the land-to-trust process and NEPA. Id. The Scoping Report was issued on July 28, 2006. Final Environmental Impact Statement ("FEIS") at ES-2, AR020152.

The Nation, the New York State Department of Environmental Conservation, Madison County, and Oneida County participated in the NEPA process as cooperating agencies. ROD at 9. The cooperating agencies received a pre-publication version of the Draft Environmental Impact Statement ("DEIS") in August 2006, and were encouraged to provide comments. Their comments were received and considered by Interior prior to the release of the DEIS to the public. Id. at 10.

DOI announced the issuance of a DEIS on November 24, 2006 through a Federal Register notice along with notices in local newspapers and accepted comments through February 22, 2007. Id. Interior held a public hearing in Utica, New York on December 14, 2006, as well as another in the Town of Verona on February 6, 2008. Id. at 7. After considering all public comments provided on the DEIS, Interior issued a FEIS on February 22, 2008. The release prompted another comment period of thirty days during which additional comments were accepted. Id. at 10.

In the FEIS, Interior considered nine reasonable alternatives, ranging from accepting the full 17,370 acres to accepting no land at all. Id. at 7. On May 20, 2008, DOI issued a ROD in which it determined to accept 13,003.89 of the proposed 17,370 acres into trust. Interior

explained that prior to issuing its decision, it had conducted a parcel-by-parcel review of the land proposed for trust acquisition, and had considered the DEIS and FEIS, as well as comments received from the public, federal agencies, State agencies, local governmental entities, and other potentially affected Indian tribes. Id. The ROD reflects Interior's consideration of these materials and its analysis of the Nation's application under section 5 of the IRA, 25 U.S.C. § 465, and the land acquisition regulations, 25 C.F.R. Part 151. Id.

Interior explained that the Oneidas' need the land "for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth by providing a tribal land base and homeland." Id. at 8. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping than the Proposed Action." Id. at 19. Interior chose parcels located around the Nation's Turning Stone Resort & Casino and around the thirty-two acre territory that the Nation never lost to New York.[5] Id. Interior determined to acquire in trust two highly contiguous clusters of land in order to minimize jurisdictional and other problems, but recognized that complete contiguity was neither practical nor reasonable. Id. at 56. DOI's focus on contiguity and the minimization of governmental and jurisdictional problems resulted in the rejection of over 4,000 acres originally proposed by the Oneidas for trust acquisition. The land to be taken in trust comprises only 1% of the land in Madison County and 1.1% of the land in Oneida County.

[5] As noted by the Supreme Court, the Oneidas originally had a 300,000 acre Reservation, but New York pursued an unlawful policy of purchasing their lands without the consent of the United States and in violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, until, by 1920, "the New York Oneidas retained only 32 acres in the State." City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203-07 (2005).

Id. Madison and Oneida Counties, along with the State of New York, recently entered a settlement withdrawing their objections to the trust acquisition at issue here. This Court approved the settlement on March 4, 2014. New York v. Jewell, 6:08CV644-LEK-DEP Dkt. No. 341.

C. Prior Proceedings

Plaintiffs filed their complaint challenging this action on June 21, 2008. Some, but not all, of the Plaintiffs opted to amend their complaint and elected to be represented by different lawyers. See Stipulation of Sept. 18, 2008, Dkt. No. 20; Amended Complaint, Dkt. No. 58 (hereinafter "Compl."). On September 22, 2008, the United States moved for partial dismissal of Phillips Plaintiffs' original complaint. Dkt. No. 21. On July 7, 2009, the United States moved for partial dismissal of claims in CNYFBA's Amended Complaint. Dkt. No. 67. The Court granted both motions in a Memorandum-Decision and Order dated March 1, 2010. Dkt. No. 74. That Order dismissed several claims from Plaintiffs' original complaint, including constitutional challenges to the IRA, their NEPA claim (for lack of standing), as well as a number of claims alleging that DOI's proposed action violated the civil rights of Plaintiffs and others. Dkt. No. 74 at 27. In that Order, the Court also dismissed a claim alleging the Turning Stone Casino operates in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. Id. The Court dismissed the civil rights and NEPA claims alleged in CNYFBA's Amended Complaint, as well as a separation of powers claim. Id. Finally, the Court dismissed a claim challenging Interior's December 30, 2008 acknowledgment of administrative custody over an 18 acre parcel transferred to it by the General Services Administration to be held in trust for the Oneidas. Id. at 25.

On November 15, 2011, the Phillips Plaintiffs and the Federal Defendants both moved for summary judgment on the remaining claims in the complaints. Dkt. No. 92 (Phillips motion); 90-91 (Defendant motions). By Order dated September 24, 2012, this Court denied both motions and remanded to Interior to determine in the first instance whether the Oneidas were under federal jurisdiction in 1934 and therefore eligible to have land placed in trust under the IRA. Dkt. No. 103. In declining to address that issue *de novo* and remanding to the agency tasked by Congress with implementing the IRA, the Court recognized that DOI "has specific expertise that the Court lacks." Id. at 31. The Court further explained that "one of the primary reasons that courts defer to and that so much responsibility is delegated to agencies is that agencies possess unique expertise and a special set of skills that allows them to address certain statutory claims both accurately and efficiently." Id. at 32.

D. Interior's Carcieri Opinion

On December 23, 2013, Interior issued an Amendment to the 2008 ROD that adopted, as the agency's decision, a Carcieri Opinion ("Opinion") prepared by the Office of the Solicitor to determine whether the Oneidas were a recognized tribe under federal jurisdiction in 1934. Opinion, Dkt. No. 109-1. Prior to making a decision on this issue, Interior afforded the parties to all the related cases an opportunity to submit materials – whether historical or argumentative – to the record and to respond to the submissions of other parties. Opinion at 2. CNYFBA submitted materials, Docs. 1-5, but Phillips did not. Interior reviewed and considered all submissions prior to issuing its Carcieri decision.

Interior concluded that the Oneidas were under federal jurisdiction in 1934 because "the Oneidas voted in an election called and conducted by the Secretary . . . pursuant to Section 18 of the IRA on June 18, 1936." Opinion at 3. That fact alone, Interior concluded, was dispositive.

Nevertheless, given the unique posture of the remand and arguments raised during that process, Interior went beyond that fact, explaining, "notwithstanding the IRA vote, additional federal actions, either in themselves or taken together, establish that the Nation was under federal jurisdiction prior to 1934 and retained this status in 1934." Id. These actions include: federal treaties with the Oneidas, including the Treaty of Canandaigua, 7 Stat. 44, which placed the Oneida Reservation under federal protection; the ongoing distribution of cloth to the Oneidas pursuant to the Treaty of Canandaigua, as well as affirmative litigation brought by the United States on behalf of the Nation to protect Nation land in the years immediately preceding enactment of the IRA. Id.

III. STANDARD FOR SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." As explained by the Second Circuit, "Summary judgment is appropriate only if, after drawing all permissible factual inferences in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." O'Hara v. Nat'l Union Fire Ins. Co., 642 F.3d 110, 116 (2d Cir. 2011); see also Miller v. Wolpoff & Abramson, LLP, 321 F.3d 292, 300 (2d Cir. 2003) (same).

IV. REVIEW OF AGENCY ACTION UNDER THE APA

Section 706(2)(A) of the APA permits a court to set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." This standard encompasses a presumption in favor of the validity of agency action. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 ("Certainly, the Secretary's decision is entitled to a presumption of regularity."). Typically in APA cases, judicial review is

guided by the "record rule": a requirement deriving from the APA itself that limits judicial review to the administrative record prepared by the federal agency in connection with the agency action challenged. See 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party."); see also Camp v. Pitts, 411 U.S. 138, 142 (1973); Overton Park, 401 U.S. at 420; Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Protection, 482 F.3d 79, 107 (2d Cir. 2006) (same).

Thus, "the ultimate standard of review is a narrow one." Overton Park, 401 U.S. at 416. Review of an administrative record should "be careful, thorough and probing." Ward v. Brown, 22 F.3d 516, 521 (2d Cir. 1994). However, "[t]he court is not empowered to substitute its judgment for that of the agency." Overton Park, 401 U.S. at 416; see also City of New York v. Shalala, 34 F.3d 1161, 1167 (2d Cir. 1994) (same); Friends of Ompompanoosuc v. FERC, 968 F.2d 1549, 1554 (2d Cir. 1994) (same). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (same); Shalala, 34 F.3d at 1167 (same).

V. SUMMARY OF ARGUMENT

This Court directed Interior to amend the Record of Decision and supplement the Administrative Record with findings and conclusions regarding whether the Oneidas were under federal jurisdiction at the time of the IRA's enactment. Dkt. No. 103 at 36; 44-45. Interior has done so, and its Carcieri decision is entitled to Chevron deference from this Court. That decision concludes that the Oneidas were under federal jurisdiction in 1934 by virtue of the federal government conducting an IRA vote, which makes the fact of federal jurisdiction incontrovertible. Because Plaintiffs cannot show, as they must under the APA, that Interior's

conclusion is either arbitrary or capricious, that Opinion should be upheld. As DOI explained, the fact that the Secretary called a vote by the Oneidas on whether the IRA would apply to them in 1936, two years after the IRA was enacted and within the statutorily allotted time-frame for holding votes among tribes eligible for the Act's benefits, is dispositive of the question. That shows the Secretary regarded the Oneidas as under federal jurisdiction and moreover makes Plaintiffs' effort to reopen the question untimely. Even if that vote were ignored, there can be no real question that the Oneidas were under federal jurisdiction in 1934. In response to a number of arguments raised by parties that participated in the remand and challenged the Nation's under federal jurisdiction status, Interior confirmed that the Oneidas are a successor tribe to the historic Oneida Nation that signed the Treaty of Canandaigua with the United States in 1794, as well as earlier treaties with the United States. Their Reservation has never been disestablished, as confirmed by the Second Circuit Court of Appeals, and their rights to that land, and the federal supervision of that land, were affirmed in litigation brought by the United States on the Nation's behalf in the years preceding the IRA's enactment.

CNYFBA and Phillips' remaining claims challenging the ROD should all be dismissed as a matter of law based on the administrative record before the Court. CNYFBA and Phillips' claim that DOI cannot remove land from New York's jurisdiction fails because placing land in trust does not completely oust State jurisdiction. Phillips' claim that the IRA was only meant to apply to lands that had been previously allotted has already been rejected by this Court. As to the claim that the Oneidas rejected the IRA, the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 ("ILCA"), extended the benefits of the IRA to all tribes regardless of whether they originally voted to reject application of the Act.

CNYFBA and Phillips also contend that Interior improperly applied "on-reservation" criteria to the trust application, even though the Second Circuit has made clear that the Nation possesses a federal Reservation, which has never been disestablished. CNYFBA and Phillips allege that Interior failed to consider jurisdictional impacts; and Phillips further alleges that DOI did not adequately consider (1) impacts of removing the land from local government tax rolls; (2) the Nation's need for the land; and (3) the creation of a State reservation as an alternative to placing land in trust. DOI's ROD shows otherwise: Interior provided careful and thorough discussion of each of these considerations.

For these reasons, the Federal Defendants should be granted summary judgment on all of CNYFBA and Phillips' remaining claims.

VI. ARGUMENT

A. The Nation was "under Federal jurisdiction" in 1934

Section 5 of the IRA provides that the "Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians." 25 U.S.C. § 465. In turn, the IRA defines Indians, in pertinent part, as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. CNYFBA alleges that the IRA does not apply to the Oneidas because the Nation "was not an Indian tribe 'now under jurisdiction in 1934.'" Amd. Compl. ¶ 128. In effect, CNYFBA states a claim premised upon Carcieri v. Salazar, 555 U.S. 379 (2009). Interior has determined that the phrase "under Federal jurisdiction" requires a two-part inquiry and the Oneidas meet the requirements of that inquiry. DOI's reasonable interpretation of the IRA is consistent with the Carcieri decision and the statutory text and is entitled to Chevron deference. Further, Interior's application of its test to the Oneidas and resulting conclusion that the Nation

was "now under Federal jurisdiction" at the time of the IRA's enactment is factually and legally correct, entitling the Federal Defendants to summary judgment.

1. The Secretary's Interpretation of the Phrase "under Federal jurisdiction" is Reasonable and Entitled to Chevron Deference

a. The Chevron Standard Applies to Interior's Determination

In Carcieri the Supreme Court interpreted the word "now" in the phrase "now under Federal jurisdiction" to mean under federal jurisdiction in 1934. The majority did not elaborate on how a tribe might show that it "was under federal jurisdiction" at the time of the IRA's enactment because it concluded that the parties in effect had conceded that the Narragansett were under state, not federal, jurisdiction in 1934. Id. at 395-96.[6]

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction," nor does the legislative history clarify the meaning of the phrase.[7] Opinion at 4. Because the phrase is ambiguous and the statute does not define its meaning, Interior appropriately applied the rule of statutory construction articulated in Chevron v. Natural

[6] The majority also does not address the term, "any recognized Indian tribe" that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian."

[7] Interior's approach here is consistent with its past practice. As Interior explained, its analysis of the meaning of "under federal jurisdiction" here derives from a much more thorough treatment of the question in a previous ROD. Opinion at 4 n.22 (citing Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87 acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe ("Cowlitz ROD"), Doc. No. 736.). In Cowlitz, Interior considered the history of the IRA, the statutory language, and the legislative history, Doc. No. 736 at Amended ROD 011717- 011721, before concluding the phrase "under federal jurisdiction" was ambiguous. The Cowlitz ROD noted that former Assistant Solicitor Felix Cohen, a drafter of the initial version of the legislation, recommended removal of the phrase "under federal jurisdiction" after it had been added to a later version of the legislation, explaining that "whatever that may mean," it was bound to "provoke interminable questions of interpretation." Id. at Amended ROD 011720-011721.

Resources Defense Council, 467 U.S. 837 (1984), and interpreted the phrase "under federal jurisdiction." Under Chevron, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." Chevron, 467 U. S., at 842.[8] First, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

As the Supreme Court recently confirmed, courts must give Chevron deference to an agency's interpretation of a statutory ambiguity concerning the scope of the agency's statutory authority. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1866 (2013). The Court noted that "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." Id. at 1868. The Court stressed that there is no difference between the question of whether an agency exceeded the authorized application of authority and the exercise of that authority. Id. at 1870-71. Therefore, the Court reaffirmed that it has "consistently held 'that Chevron applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'" Id. at 1871 (citation omitted). Under the

[8] The Chevron analysis is frequently described as a two-step inquiry. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) ("If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'").

longstanding principles of Chevron deference, this Court should defer to the Secretary's determination of her jurisdiction and her interpretation of an ambiguous statutory provision.[9]

b. Interior's Interpretation of the Ambiguous Phrase "under federal jurisdiction" under Chevron Step Two is Entitled to Deference

In exercising the Secretary's delegated authority to interpret and implement the IRA, and having closely considered the text of the IRA, its remedial purposes, legislative history, the Carcieri decision, and DOI's early practices, as well as the Indian canons of construction, the Secretary construed the phrase "now under federal jurisdiction" as entailing a two-part inquiry: 1) whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, and 2) whether the tribe's jurisdictional status remained intact in 1934. Opinion at 5-6. Finally, "some activities and interactions could so clearly demonstrate federal jurisdiction over a tribe as to render elaboration of the two-step inquiry unnecessary." Id. at 7.

In articulating the two-part test, DOI reasonably construed an ambiguous statutory phrase in a manner that relied on the Agency's regulatory expertise and was consistent with its past practices and policies. Accordingly, its interpretation and the application of the test to the Oneida Nation are entitled to a high degree of deference from this Court. In any event, the

[9]This Court should apply Chevron deference to the Secretary's interpretation, rather than the deference standard in Skidmore v. Swift & Co., 323 U.S. 134 (1944). Chevron provides "the appropriate legal lens through which to view the legality of the Agency interpretation," Barnhart v. Walton, 535 U.S. 212, 222 (2002), because of the "interstitial nature of the legal question" and the "related expertise of the Agency," id. In any event, Skidmore deference is more than sufficient to uphold the Secretary's interpretation and determination in this case. Further, ambiguous statutes and statutory provisions enacted for the benefit of Indians are to be construed liberally in their favor. See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 149 (1984); Bryan v. Itasca Cnty., 426 U.S. 373, 392 (1976); Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)); John v. City of Salamanca, 845 F.2d 37, 41-42 (2d Cir. 1988).

Secretary's determination was neither arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, nor was it in excess of her statutory authority.

The first inquiry in the two-part test is whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions, through a course of dealings or other relevant acts, for or on behalf of the tribe that are sufficient to establish, or that reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Id. at 5-6. Interior explained that some federal actions may in and of themselves demonstrate that a tribe was under federal jurisdiction, or a variety of actions when viewed in concert may achieve the same result. Id. at 6. Once having established that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether there is evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status remained intact in 1934. Id. As Interior has previously explained, "for some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g. tribes that voted to accept or reject the IRA following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934." Doc. 736 at Amended Rod 011729 n. 99. The Oneidas present such a case.

2. Interior's Determination that the Oneidas were under federal jurisdiction in 1934 is consistent with the Supreme Court's decision in Carcieri and should be upheld

a. The Oneidas' IRA vote

Interior concluded that the fact that the Oneidas voted in an election called by the Secretary of the Interior pursuant to Section 18 of the IRA suffices, in and of itself, to establish that the Oneidas were under federal jurisdiction at the time of the IRA's enactment. Opinion at

7. Section 18 of the IRA provides that it "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478. The statute required the Secretary to conduct such votes "within one year after June 18, 1934," id., although Congress subsequently extended the deadline until June 18, 1936. See Act of June 15, 1935, 49 Stat. 378. That Oneida vote occurred on June 18, 1936, within the statutory deadline. Opinion at 7-8; Doc Nos. 267-68 (documenting Oneida vote in 1936). DOI explained that the significance of the vote for purposes of the Carcieri analysis lies not with the result of the vote, *but with the fact that Interior conducted the vote in the first place*:

> In order for the Secretary to conclude a reservation was eligible for a vote, a determination had to be made that the relevant Indians met the IRA's definition of Indian and were thus subject to the Act. Such an eligibility determination would include deciding the tribe was under federal jurisdiction and render inappropriate as well as superfluous, in most circumstances, allowing third party challenges to that determination decades later.

Opinion at 7. In other words, the question of whether the Oneidas were under federal jurisdiction at the time of the enactment of the IRA has already been decided by DOI – in the years immediately following enactment of the statute. That determination is not subject to challenge by these Plaintiffs over seventy years later.

The weight accorded the Oneidas' vote here is consistent with Interior's practice, as explained in its Carcieri decision. Id. at 8-9; see also Shawano County v. Acting Midwest Reg. Dir., 53 IBIA 62 (Feb. 28, 2011) (IRA vote dispositive to question of federal jurisdiction); Village of Hobart v. Midwest Reg. Dir., 57 IBIA 4 (May 9, 2013). Moreover, Interior's view of the significance of Section 18 votes has been affirmed by the U.S. District Court for the District of Columbia. Opinion at 9-10 (citing and discussing Stand Up for California! et al., v. U.S.

Dep't of the Interior, 919 F. Supp.2d 51 (D.D.C. 2013). As the Stand Up court explained, "it was perfectly reasonable for the Secretary to conclude that any persons voting in an IRA election were . . . adult 'members of [a] recognized Indian tribe now under Federal jurisdiction.'" Id. at 67-68 (quoting 25 U.S.C. § 479) (brackets in original). Interior further considered various arguments attempting to discount the importance of the Oneida vote, but found them meritless. Opinion at 10-14.

b. Other Indicia of Federal Jurisdiction over the Oneidas

Interior made clear that independent of the IRA vote, the record of dealings "between the United States and Oneida . . . conclusively demonstrate . . . that the Nation was under federal jurisdiction in 1934," whether those dealings are considered "either by themselves or collectively." Opinion at 15. First, DOI noted the long history of federal treaty relations with the Oneidas, focusing on the 1794 Treaty of Canandaigua, but recognizing that treaty-making with the Oneidas extended well into the nineteenth-century with the 1838 Treaty of Buffalo Creek, 7 Stat. 550, and the negotiation of another treaty in 1868 that never received Senate ratification.[10] Opinion at 16-17, 26; Doc. No. 293 (1868 unratified treaty materials). Article 2 of the Treaty of Canandaigua guaranteed federal protection of the Oneida Reservation lands while the Treaty further pledged an annual distribution of cloth to the Oneidas, an obligation the United States fulfilled through the 1930s when the IRA was enacted. Opinion at 16-17.

The State of New York unlawfully acquired the majority of the Oneida Reservation throughout the eighteenth and nineteenth centuries, over the objection of George Washington's

[10] But, as DOI points out, federal treaty-making with Oneidas precedes 1794. Opinion at 4 n.16 (citing Treaty of Fort Harmar, 7 Stat. 33; Treaty of Fort Stanwix, 7 Stat. 15). Formal treaty-making with Indian tribes ended in 1871. Act of Mar. 3, 1871, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71).

administration and in violation of the Non-Intercourse Act, 25 U.S.C. § 177, and the Treaty of Canandaigua which both established federal supervision of Oneida lands. Id. at 15. Nevertheless, the State's actions were neither able to destroy the tribe nor sever its relations with the United States. As DOI explained, as late as 1915, the United States, exercising its trust and federal supervisory authority, brought suit to recover Oneida land for the benefit of the Oneidas. Id. at 17-25 (discussing United States v. Boylan, 265 F. 165 (1920). In Boylan, the Second Circuit Court of Appeals expressly held that the Oneidas were a tribe under federal jurisdiction, making the United States the proper party to represent their interests in Court. Boylan, 265 F. at 171; Opinion at 18 (discussing holding). As DOI pointed out, Boylan was "decided only fourteen years before enactment of the IRA" and therefore "shows that the Nation was under federal jurisdiction in the early decades of the twentieth century." Id. Specifically, DOI concluded Boylan demonstrates three things relevant to Interior's Carcieri inquiry: (1) "the Oneida were recognized as a tribe by the United States"; (2) "they had federally protected reservation land"; and (3) "in the years before the IRA, the federal government had numerous dealings with the Oneida Indian Nation as a ward of the federal government." Id. at 19.

Interior acknowledged that some materials submitted to it evidenced confusion within the federal government as to the interplay of federal and state jurisdiction over the Oneidas, but concluded they did not demonstrate that federal jurisdiction over the Oneidas had been extinguished because it is indisputable "that the federal government (specifically, Congress) has plenary authority over Indian affairs," and moreover, such incorrect statements were insignificant when weighed against "the overriding evidence demonstrating a long history of interactions between the Oneida and the federal government." Id. at 21. Moreover, DOI noted "numerous annual reports and census records" prepared by federal agents as part of their duty to

oversee Indian affairs in the nineteenth and twentieth centuries "that collectively demonstrate that the Oneida were under federal jurisdiction leading up to 1934." Id. at 26. While the parties, particularly New York and the Counties of Oneida and Madison, raised a host of other arguments which Interior considered, none had merit for reasons explained in Interior's decision and they provided no basis to alter the Interior's conclusion. See e.g., Opinion at 20 (addressing assertion that the land at issue in Boylan was not tribally owned); 22 (addressing assertion that Department of Justice brought Boylan without proper authorization from DOI); 24-25, 32 (addressing allegation that the Oneidas lacked a continuous tribal existence); 33-40 (addressing arguments opposing the Interior's conclusion).

3. The Court should affirm Interior's conclusion that IRA eligibility does not turn on being a "recognized Indian tribe" in 1934 and, in any event, the Oneidas were a recognized Indian tribe in 1934

Parties argued to Interior that Carcieri requires that DOI determine whether the Oneidas were a "recognized" tribe in 1934. DOI rejected this, explaining that the "word 'now' in the IRA only modifies the phrase 'under Federal jurisdiction' and is not related to the phrase 'any recognized Indian tribe." Id. at 30. That interpretation, like Interior's interpretation of the statutory phrase "under Federal jurisdiction," is entitled to Chevron deference and is consistent with Justice Breyer's concurrence in Carcieri and Interior's past practice in the wake of Carcieri. Nevertheless, the Oneidas have been a federally recognized tribe since the 1794 Treaty of Canandaigua so regardless of how one interprets "recognized Indian tribe under Federal jurisdiction," the Nation meets the definition. Opinion at 31.

In the Carcieri decision, the majority did not address the phrase, "any recognized Indian tribe," that precedes the phrase "under Federal jurisdiction" in the IRA's first definition of "Indian," but Justice Breyer did in his concurrence. He explained that the word "now" modifies

"under federal jurisdiction," but does not modify "recognized," and concluded that the IRA therefore "imposes no time limit on recognition." Id. at 397-98. Because the term "now" does not modify the term "recognized Indian tribe," there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, as Justice Breyer noted, "a tribe may have been 'under federal jurisdiction'" in 1934 even though the Federal Government did not realize it "at the time." Id. at 397 (explaining that the Stillaguamish Tribe, as a signatory to an 1855 Treaty, had fishing rights subject to federal protection even though its formal recognition status was not confirmed until 1976). Interior analyzed the IRA and joined Justice Breyer in concluding that, in the first definition of "Indian" in the IRA, the word "now" modifies the phrase "under Federal jurisdiction," and not the phrase "recognized Indian tribe." Opinion at 30; Cowlitz ROD, Doc. No. 736 at Amended ROD 011722-011723.

If this Court rejects the argument that "now" only modifies "under Federal jurisdiction," a plaintiff must still establish that the term "recognition" in the IRA means formal federal recognition in the modern sense and that Interior acted arbitrarily in finding that the Oneidas meet this standard. While parties in the agency process argued "recognition" means the modern definition of federal recognition, Interior has concluded the meaning of the term itself is not so obvious. Again, Interior considered this in detail and concluded "recognized Indian tribe" could mean either in a "cognitive" or "quasi-anthropological" sense – i.e., the fact of tribal existence; or it could mean in a more "formal" or "jurisdictional sense" – i.e., as in a federally recognized tribe.[11] Opinion at 31; Cowlitz ROD, Doc. No. 736 at Amended ROD 011721-011723. Nevertheless, Interior found that "the Oneida have been recognized since at least 1794,"

[11]The Nation appeared on the first formal list of federally recognized tribes published by Interior. See 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979).

explaining that "the full historical record, including the IRA vote itself, demonstrates that the Oneida have been recognized both in the cognitive and more formal sense for more than two centuries." Id. In other words, the evidence demonstrating the United States held and exercised jurisdiction over the Oneidas also shows that the Oneidas were a federally recognized tribe.

4. Interior properly rejected CNYFBA's arguments

CNYFBA participated in the agency process and its arguments were considered and rejected by DOI. Docs. 1-5 (CNYFBA submissions); Opinion at 40 (considering CNYFBA submissions). First CNYFBA argued that the 1838 Treaty of Buffalo Creek "disestablished" the Nation. Doc. 5 at Amended Rod 000016. The Second Circuit has held that the Treaty of Buffalo Creek did not disestablish the Oneidas' Reservation. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 160-165 (2d Cir. 2003) rev'd on other grounds by City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005). That same decision also addressed whether the Nation was itself "disestablished," concluding that the Oneidas had maintained a continuous tribal existence. Id. at 166 ("even if continuous tribal existence were required, the record before us shows it"). Moreover, as Interior explained, any claim that the Oneidas ceased to exist as a tribe is refuted by Boylan where the United States brought an action on behalf of the Oneidas as a tribe and the Second Circuit affirmed Oneida tribal existence. Opinion at 19; Boylan, 265 F. at 171. CNYFBA also objected to a potential legislative fix to the IRA to address the Carcieri decision and further asserted that the fee to trust process is unconstitutional. Doc. 5 at Amended Rod 000017. As DOI explained, these arguments are outside the scope of the remand and irrelevant to the question of whether the Oneidas were under federal jurisdiction in 1934. Opinion at 40 & n.282.

B. Interior Has Not Exceeded Its Statutory Authority

1. Not all aspects of State Jurisdiction are precluded on trust land

CNYFBA's third count alleges that DOI's land-into-trust regulations exceed the Secretary's statutory authority under the IRA and are ultra vires as applied to this case. Amd. Compl. Third Claim Subtitle. Plaintiffs' allegation that the regulations exceed any statutory authority appears premised on their belief that placing land in trust removes land from a state's jurisdiction. Amd. Compl. ¶ 146 (Secretary cannot "encroach or attempt to remove . . . land from state jurisdiction."). CNYFBA relies upon Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009), for the propositions that the federal government cannot reassert federal jurisdiction over public lands once they have been granted to a state at the time of statehood. Amd. Compl. ¶ 144; see Hawaii, 556 U.S. at 176 ("Congress cannot, after statehood, reserve or convey . . . lands that have already been bestowed upon a State.") (internal quotations omitted). In Hawaii, the Supreme Court rejected an interpretation of a Congressional Apology Resolution that would have suggested that native Hawaiians had ownership claims to land ceded by the United States to Hawaii. 556 U.S. at 169-170. CNYFBA appears to argue that if Congress cannot re-assert jurisdiction over public lands once they have been ceded to a state at statehood, similarly, Congress lacks authority to remove land from State jurisdiction in the original thirteen colonies. Amd. Compl. ¶¶ 144-148.

Phillips raises a similar argument. Phillips appears to contend that placing land in trust removes it from state jurisdiction, Compl. ¶ 74, allowing a restoration of aboriginal title, id. ¶ 73, and the creation of a federal Indian reservation where none has ever existed before, id. ¶¶ 83-85. These various characterizations of trust status are the premise for the claim that DOI's

interpretation of the IRA is unlawful to the extent it allows the Secretary to "carve out OIN land from the jurisdiction of the State of New York." Id. ¶ 86.

These arguments fail because while primary jurisdiction over trust land and Indian country in general rests with the Federal government (and the Indian tribe for whose benefit such land is held or reserved), Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993), placing land in trust does not remove it from all aspects of State jurisdiction. See Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border."). See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority [on Indian trust lands].") (citing Bracker, 448 U.S. 136, 145 (1980)); Town of Verona v. Salazar, 2009 WL 3165556 (N.D.N.Y. 2009) at *3 ("Accepting land into trust does not amount to exclusive federal jurisdiction over the subject land . . . ."). The preemption of conflicting state and local law occurs whenever the federal government holds land within a state, not just when the land is held on behalf of Indians. See United States v. Matherson, 367 F. Supp. 779, 781 (E.D.N.Y. 1973) (Secretary of Interior authorized to administer Fire Island National Seashore and promulgate rules and regulations concerning motor vehicle use within its bounds with preemptive effect on conflicting local or state regulations). Because neither the IRA nor the

Secretary's regulations implementing that statute remove land from all aspects of state sovereignty, Plaintiffs' fail to state a claim.[12]

Moreover, nothing in the ROD purports to establish a reservation for the Oneidas or somehow "create Indian land for the first time." Compl. ¶ 87. While the IRA does provide authority for the proclamation of reservations on land acquired in trust pursuant to the statute, see 25 U.S.C. § 467, that was not done here, nor was it necessary as all the land is located within the already existing Oneida Reservation.[13] Phillips' characterization of DOI as creating reservation land where none existed before flies in the face of the Second Circuit's precedent, which recognizes the continued existence of the Oneida Reservation. See Oneida Indian Nation of N.Y. v. Madison Cnty., 665 F. 3d 408, 433(2d Cir. 2011) ("It remains the law of this Circuit that the Oneidas' reservation was not disestablished.") (internal quotations and citations omitted). [14]

[12] Phillips' contention, Compl. ¶ 74, that the IRA provides no authority for DOI to remove lands from the State or local tax base is answered by the statute itself, which states that lands taken in trust under the IRA "shall be exempt from State and local taxation." 25 U.S.C. § 465.

[13] Plaintiffs allege that by creating Indian land for the first time in New York, DOI is creating a separation of powers problem. Compl. ¶ 87. As noted above, Indian land is not being created by this administrative action. As to the notion that DOI is somehow usurping a power reserved to Congress, that claim fails because Congress itself delegated to DOI authority to take the current action in Section 465 of the IRA. And, as discussed above, taking land in trust does not "subvert[] the sovereign authority of the State of New York," Compl. ¶ 87, because taking land in trust does not oust all state jurisdiction or sovereignty over the land.

[14] CNYFBA and Phillips also assert that the Supreme Court ruled a previous version of DOI's land-into-trust regulations unconstitutional. Compl. ¶ 76; Amd. Compl. ¶¶ 136-137. It did not. The authority Plaintiffs cite, U.S. Dep't of the Interior v. South Dakota, 519 U.S. 919 (1996), instead vacated an Eighth Circuit decision without opinion and remanded the challenged administrative decision to Interior for reconsideration. It has no precedential value.

2. The IRA is applicable to the Oneidas regardless of whether the Nation voted to reject the IRA in 1936 and regardless of whether the Nation land was ever subject to allotment

The Phillips Plaintiffs contend that the IRA cannot apply to the Oneidas because they voted against application of the statute to themselves. Compl. ¶¶ 88, 90. Section 18 of the statute provides that the Act "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478. As noted above, the Secretary called an Oneida vote in 1936 at which time the Nation voted against application of the Act. However, Congress subsequently passed the Indian Land Consolidation Act, which made all tribes eligible to have land held in trust pursuant to the IRA regardless of how they initially voted on the applicability question. See 25 U.S.C. § 2202 ("The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title."); H.R. Rep. 97-908, reprinted in 1982 U.S.C.C.A.N. 4415, 4416. See also ROD at 33-34 (noting that Indian Land Consolidation Act extends DOI's authority to accept land into trust under the IRA to all tribes except as otherwise provided by law).[15]

Phillips also contends that Congress intended to restrict the IRA's application to lands subject to the allotment policy as set forth in the Indian General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (repealed 2000). Compl. ¶ 89. Since no Indian lands were allotted in New York, Plaintiffs reason, the IRA cannot apply there. Id. ¶ 89. This Court, in a related case, has already rejected this claim and should reject it here for the same reasons:

[15] Plaintiffs seem to restate this claim as part of their third count, in which they allege the ROD wrongly relies upon the IRA as statutory authority for accepting land in trust. Compl. ¶¶ 108, 110. That claim also fails for the reasons stated above.

> Contrary to Plaintiff's contention, the IRA is explicit as to its geographic application and does not exclude New York State. See 25 U.S.C. § 473. Further, the legislative history of the IRA and Section 465 contradicts Plaintiff's assertion and provides unequivocal evidence that the statute was not restricted to land subject to allotment and was, in fact, meant to apply to New York State. See, e.g., 78 Cong. rec. 11124, 11125.

City of Oneida, N.Y. v. Salazar, No. 5:08-CV-0648 (LEK/GJD), 2009 WL 3055274, at *5 (N.D.N.Y. Sept. 21, 2009).

C. Interior Properly Applied its On-Reservation Regulations

CNYFBA and Phillips also allege that DOI improperly concluded that the land proposed for trust acquisition lies within the Oneida Reservation and accordingly misapplied the regulatory provision addressing on-reservation applications. Amd. Compl. ¶ 134; Compl. ¶ 107. When a trust application concerns land located within or contiguous to an Indian reservation, Interior must consider the criteria identified in 25 C.F.R. § 151.10 ("On-reservation acquisitions"). When the land proposed for trust acquisition is outside a tribe's reservation and non-contiguous to it, Interior applies different criteria, identified in 25 C.F.R. § 151.11 ("Off-reservation acquisitions"). Plaintiffs rely on the Sherrill decision to apparently argue that there is no longer an Oneida Reservation. Compl. ¶¶ 111-112.

This Court has already held that Sherrill did not overturn the Second Circuit's holding that the Oneida Reservation has not been disestablished. New York v. Salazar, No. 6:08-CV-644 (LEK/GJD), 2009 WL 3165591, at *8-9 (N.D.N.Y. Sept. 29, 2009) ("This Court agrees that the Second Circuit's holding [that the Oneida reservation was not disestablished] remains good law."). Indeed, the Second Circuit has noted as much in a decision that was vacated on other grounds. See Oneida Indian Nation of N.Y. v. Madison County, 605 F.3d 149, 157 n.6 (2d Cir. 2010), vacated on other grounds by Madison County v. Oneida Indian Nation of N.Y., 131 S. Ct.

704 (2011) ("Our prior holding on this question – that the Oneidas' reservation was not disestablished – therefore remains the controlling law of this circuit.") (internal citations and quotations omitted). Interior applied the correct regulation because all the land proposed for trust lies within the bounds of their reservation.[16]

D. Interior Properly Considered Potential Jurisdictional Impacts of Its Decision

In Count 3, CNYFBA alleges that jurisdictional concerns were not considered in either the FEIS or the ROD. Amd. Compl. ¶ 143. Phillips alleges the same. Compl. ¶¶ 79-80. As an initial matter, CNYFBA's allegation concerning a deficiency in the FEIS is a NEPA claim, and this Court has already determined that CNYFBA lacks standing to bring a claim under NEPA.[17] See Memorandum-Decision and Order of Mar. 1, 2010, Dkt. No. 74, at 22 (dismissing NEPA claim in Amended Complaint because the complaint "offers no new allegations of environmental

[16] Even if courts had concluded that the Reservation had been disestablished, because the lands are within the original boundaries of the Reservation, evaluation under § 151.10 would still be appropriate. 25 C.F.R. § 151.2(f). Moreover, Interior noted that even if it had used the off-reservation criteria, 25 C.F.R. § 151.11, it would still make the same decision. ROD at 33 n.5. The off-reservation criteria require Interior to consider the distance between the land proposed for acquisition and the tribe's reservation, with greater weight being given to the State and local governments' comments about jurisdictional and tax impacts as the distance increases. See 25 C.F.R. § 151.11(b),(c).

[17] Even if Plaintiffs had standing to challenge the FEIS on this score, this claim would fail. The ROD's discussion of the jurisdictional impacts is based in part upon – and cites to – discussion of the same issue in the FEIS. See, e.g., ROD at 58 (citing FEIS provisions detailing service agreements between Nation and local government); 59 (FEIS provisions addressing conformity of tribal and local land use); 60 (FEIS provisions considering potential future jurisdictional and land use conflicts); 61-62 (FEIS provisions analyzing Nation's land management); 66 (Section 3.9.5 of FEIS details the Nation's regulatory programs and cooperative relations with local government on jurisdictional matters). It cannot be said that the FEIS or the ROD fail to consider jurisdictional impacts.

harm that would suffice to bring Plaintiffs' challenge within the zone of interests protected by NEPA"). As for the allegation that the ROD fails to consider jurisdictional impacts, Plaintiffs in effect are alleging that the Secretary failed to follow 25 C.F.R. § 151.10(f) which requires consideration of "[j]urisdictional problems and potential conflicts of land use which may arise." Id.

DOI "fulfills its obligations under Section 151.10(f) as long as it undertakes an evaluation of potential [jurisdictional and land use conflict] problems" and "there exists a rational basis for [DOI's] decision." County of Charles Mix v. U.S. Dep't of Interior, 799 F. Supp. 2d 1027, 1046-47 (D.S.D. 2011) (internal quotations omitted); see also South Dakota v. U.S. Dep't of Interior, 487 F.3d 548, 553 (8th Cir. 2007) (Secretary's obligation under Section 151.10(f) met where "the Secretary adequately 'considered' such problems [relating to jurisdiction and land use conflicts]"); South Dakota v. U.S. Dep't of Interior, 775 F. Supp. 2d 1129, 1143 (D.S.D. 2011) ("The BIA fulfills its obligation under § 151.10(f) as long as it undertakes an evaluation of potential problems.") (internal quotations and brackets omitted); South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1009 (D.S.D. 2005) ("This consideration of relevant information is all that is required by § 151.10(f)."); City of Lincoln City v. U.S. Dep't of Interior, 229 F. Supp. 2d 1109, 1124-25 (D. Or. 2002) (DOI only required "undertake an evaluation of potential problems" not "resolve all potential issues.").

Beyond the bare allegation that jurisdictional impacts were not considered, the only other allegation in the Amended Complaint that might be construed as fleshing out this claim is an allegation that DOI had a duty to consider "the 'justifiable expectations' of the local non-Indian residents or state and local governments identified in Sherrill." Amd. Compl. ¶ 99. That is wrong. In Sherrill, the Supreme Court considered the "justifiable expectations" of the local

populace, among other factors, in its conclusion that equitable considerations bar the Oneidas from asserting tax immunity over parcels of land within its reservation that it reacquired unilaterally through free market purchases. See Sherrill, 544 U.S. at 211-12; 221 (relief Oneidas sought; holding equity precludes such relief). In point of fact, the Court stated that, instead of acting unilaterally to acquire and then reassert sovereignty over Reservation land, the proper course for the Oneidas was to apply to have their re-acquired land placed in trust by Interior. "Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." Id. at 221. The Court approvingly noted that the land to trust regulations – and it specifically cited Section 151.10(f) – requires federal consideration of jurisdictional problems and land use conflicts before acquiring land in trust. Id. It was precisely the absence of any consideration of these concerns in Sherrill that in part led the Court to conclude that equitable considerations precluded the relief the Oneidas sought. But those equitable considerations are irrelevant here where the Nation has availed itself of the land-to-trust process as the Court recommended and Interior has thoroughly considered the jurisdictional impacts of placing land into trust.

The ROD considered jurisdictional impacts and land use conflicts in a lengthy discussion. ROD at 55-69. First, the ROD noted that in selecting which parcels to accept into trust, Interior established "two highly contiguous clusters," one centered on the Nation's Turning Stone Resort & Casino, and the other centered around the Nation's 32 acre territory never lost to New York. Id. at 56. The parcels, in other words, were selected to be as contiguous as possible in order to minimize jurisdictional impacts, although "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." Id. The ROD also noted that Federal law, in the form of 25

U.S.C. §§ 232-233, provides New York courts with jurisdiction over certain criminal offenses and civil actions involving Indians regardless of whether the land is held in trust. ROD at 57.

Additionally, the ROD explained that the Nation has a history of reaching service and intergovernmental agreements with local governments to defray costs of utility and other services and to address tax and regulatory matters. Interior reasonably expects such cooperative efforts to deal with jurisdictional problems to continue into the future. Id. at 57-59. With regard to potential environmental impacts, the ROD noted that "Federal environmental, health, and safety laws" apply to lands in trust and, after considering the past incidences of land use conflicts raised by the State and local governments as grounds for future concern, concluded that the "incidents, individually and collectively, are not substantial." Id. at 60-61; see also id. at 61-66 (considering comments and addressing jurisdictional issues related to: wetlands and threatened and endangered species; air; wildlife protection and conservation; water; historic, cultural, and archaeological resources; solid and hazardous wastes; petroleum and chemical bulk storage; oils and gas; hazardous waste sites; pesticides; transportation; and utilities and infrastructure). Moreover, Interior noted that because the Nation plans no change in use for the lands going in trust, "there is no direct environmental, health, or safety impact that would result from a change in jurisdiction following the acquisition of land in trust." Id. at 66.

Finally, in response to comments alleging that taking land into trust creates a 'checkerboard' of parcels subject to either state or tribal jurisdiction, DOI explained that the trust decision does not create that problem. Jurisdictional disputes between the Oneidas and their neighbors have been on-going for years with litigation at times being the means of resolving questions of what authority the Nation may exercise over its Reservation lands. Id. at 69. The trust decision actually resolves the disputes with regard to lands taken in trust, while the

contiguous nature of the parcels accepted is meant to "facilitat[e] the Nation's successful governance and minimiz[e] potential impacts to the State and local governments." Id. Interior also noted that lands accepted into trust would continue to be subject to existing rights of way (like those for electricity and other utilities). With regard to the need for future rights-of-way for utility providers, Interior explained that "[i]t is in the Nation's best interests to work collaboratively with the local governments and service providers to improve the existing infrastructure system." Id. at 66.

Because the ROD evidences DOI's careful and thorough consideration of jurisdictional and land use problems potentially resulting from the trust decision, CNYFBA and Phillips' claims that DOI failed to adequately consider jurisdictional problems should be dismissed.

E. Phillips' Third Count should be dismissed

Phillips' third count alleges various deficiencies in Interior's application of its land-into-trust regulations.[18] Plaintiffs specifically allege that Interior failed to adequately consider the Nation's need for the land to be acquired in trust; and failed to adequately consider the impact of removing the lands from the tax rolls of the local governments. Phillips also alleges that Interior failed to adequately consider the creation of a state-law Indian reservation as an alternative to placing land in trust and finally alleges that the trust decision unlawfully allows Oneida businesses to operate with unfair advantages. As discussed below, even if Phillips has standing to assert these claims, none of them have merit. It is not enough to disagree with Interior's conclusions or to object to how it applies its regulations, particularly in so conclusory a fashion as Phillips does here. Courts extend "substantial deference" to BIA's interpretations of its own regulations, see, e.g., South Dakota IV, 487 F.3d at 551, and a decision to take land into trust

[18] The allegation that DOI misapplied its on-reservation regulations is addressed above.

should be upheld if it is "supportable on any rational basis." Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004) (citation omitted).

1. The ROD Adequately Considers the Oneidas Need for Land in Trust

Phillips alleges, in a conclusory fashion, that the ROD fails to adequately explain the Oneidas' need for land held in trust. Compl. ¶ 113. 25 C.F.R. § 151.10(b) requires the Secretary to consider "[t]he need of the individual Indian or the tribe for additional land." 25 C.F.R. § 151.10(b). Courts interpreting this provision have uniformly rejected the need for some kind of particularized, acre by acre justification for the trust acquisition. "It was sufficient for the Department's analysis [of § 151.10(b)] to express the Tribe's needs and conclude generally that IRA purposes were served." South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 801 (8th Cir. 2005). South Dakota affirmed a district court decision which similarly explained that "[r]egulation § 151.10(b) requires that the Secretary must merely explain why the Tribe needs the additional land" without requiring a discussion of "the history and purpose of the IRA each time the United States is requested to take land into trust for an individual Indian or tribe." South Dakota v. U.S. Dep't of Interior, 314 F. Supp. 2d 935, 943 (D.S.D. 2004). In addressing a tribe's need for land, Interior does not have to justify why the land should be held in trust, as opposed to fee, status. South Dakota, 423 F.3d at 801 (it "would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in a particular circumstance"); see also South Dakota, 314 F. Supp. 2d at 943 (§ 151.10(b) contains "no mention of the word 'trust'"). Nevertheless, in this case, Interior opted to address the Nation's need for land to be held in trust status. ROD at 34-35.

DOI carefully and thoroughly considered the Nation's need for the land in the ROD. See Id. at 34-39. The Nation requested the Secretary take 17,370 acres of land into trust within the bounds of its historic reservation. The request was made in light of the Supreme Court's City of Sherrill decision which called into question the extent of the ability of the Nation to exercise governance and sovereign jurisdiction over those lands and which recommended precisely this course of action. See Sherrill, 544 U.S. at 220 ("Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others [in Section 5 of the IRA]"). DOI acknowledged as an initial matter the often antagonistic relationship the Nation had with local and State governments. As DOI explained, the State has taken the vast majority of the Oneidas' historic Reservation in violation of federal law. ROD at 36. With regard to lands reacquired by the Nation, at the time the ROD was issued, the Counties of Madison and Oneida sought the remedy of foreclosure while the State had opined that it believed the Nation's Turning Stone casino is illegal. Id. The State and Counties had likewise expressed their position that no land should be taken into trust for the benefit of the Nation and that instead the Nation should learn to function like "a private landowner or corporation on fee land." Id.

In light of Sherrill, it is clear that the Nation will face litigation if it attempts to be anything other than a private landowner or corporation on the lands it holds in fee within its reservation.[19] However, the Nation is a federally recognized tribe, not a private corporation. As

[19] While the Court's approval of a settlement agreement in New York v. Jewell, 6:08CV644-LEK-DEP Dkt. No. 341, will hopefully allay much of the antagonism between the Nation and its neighbors, the host of suits challenging the present determination make clear that the Nation still faces much opposition to its attempt to assert sovereignty. In any event, "judicial review of an agency decision . . . is generally limited to review of the administrative record at the time the decision was made." Northcoast Envt'l Center v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998).

such it needs – and this federal action provides – a base of lands over which it can exercise its sovereign powers and govern itself:

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

Id. at 36. The ROD also notes that placement of non-gaming lands into trust will support the Nation's efforts to diversify its economy and land base, and provide lands for other member needs. Id. at 36-37. Placement of the lands in trust also settles the question of whether the Nation can exercise sovereign jurisdiction and government authority over them, and that, in turn, ensures that the Nation can exist as a federally recognized Indian tribe without endless litigation resulting from each effort at self-government on its trust lands.

While it is sufficient for purposes of satisfying APA review to note that DOI thoroughly considered the Nation's need for additional land before determining to accept land into trust, in this instance DOI went further and examined the need for specific parcels of land. The ROD contains an inventory of the Nation's enterprises and facilities on lands located in Madison and Oneida County. Id. at 37-38. It further explains that approximately 4,366 acres of land proposed by the Nation for trust acquisition were rejected and identifies what functions occur and resources lie on the rejected lands. Id. at 38. DOI balanced its consideration of the Nation's need for more land with "concerns expressed by the State and local governments regarding potential jurisdictional and fiscal impacts" of taking all the lands into trust and therefore focused on accepting parcels in close proximity to either the Nation's economic center or the Nation's governmental and cultural center. Id. at 39; id. at 38 (rejected lands "are not adjacent to the

Nation's economic or government/cultural centers at the Turning Stone Resort & Casino and surrounding 32-acre territory respectively").

2. The ROD Adequately Considered the Impacts of Removing Trust Land from Tax Rolls

Phillips alleges, again without explaining, that the ROD fails to consider the impacts of the trust decision on local communities pursuant to 25 C.F.R. § 151.10(e) and NEPA. Compl. ¶¶ 114-115. 25 C.F.R. § 151.10(e) requires DOI to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." As long as DOI's analysis is "sufficient and supported by a rational basis," it should be upheld even if other parties offer alternative methods to assess the impacts. South Dakota v. U.S. Dep't of Interior, 775 F. Supp. 2d 1129, 1143 (D.S.D. 2011). Moreover, even if a party establishes "some erroneous findings" in the "§ 151.10(e) analysis," as long as "on the whole" DOI "considered this factor and reached a rational decision supported by the record," then the Department's findings will be upheld. South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1008-09 (D.S.D. 2005). Finally, the regulations only require consideration of the tax impacts; they do not prohibit land being taken in trust if the Secretary concludes there will, in fact, be impacts. See City of Lincoln City v. U.S. Dep't of Interior, 229 F. Supp. 2d 1109, 1125 (D. Or. 2002) ("the regulations require the BIA to 'consider' this factor, but the regulations do not require the Tribe to agree to reimburse the City for revenues that might be lost due to a fee-to-trust transfer, and do not require the BIA to deny the application for a fee-to-trust transfer merely because a potential impact exists").

Interior thoroughly considered potential impacts on local communities that might result from placing the land in trust. ROD at 40-55. In accord with its regulations, Interior solicited

comments from state and local governments potentially affected by the land-to-trust decision (and extended the thirty day comment window to over five months). Those comments, and the Nation's response to them, were considered in the ROD as well as in the FEIS.[20] Id. at 40.

Interior's calculation of taxes was particularly difficult because the Nation and the Counties were in active litigation over the legality of local government efforts to tax lands within the Oneida reservation. While Sherrill held that the Nation could not assert tax immunity as a legal defense to local efforts to tax its lands, subsequent district court decisions held specifically that taxes on the land were unlawful under state law. Id. at 41. See also Oneida Indian Nation of New York v. Oneida County, 432 F. Supp. 2d 285 (N.D.N.Y. 2006); Oneida Indian Nation of New York v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005).[21]

Interior explained that its analysis "is based on existing circumstances, i.e., taxes actually assessed and paid," and that Interior was not required to "speculate on the outcome of the pending litigation between the Nation and the Counties over taxes and related charges that may or may not be owed by the Nation." ROD at 41. By only considering taxes the Nation currently pays, this analysis, Interior explained, supports DOI's decision should the Nation prevail in the tax litigation. Id. at 42. Interior noted that due to the on-going tax dispute, the Nation generally does not pay taxes to Oneida and Madison Counties. Id. The Oneidas have tax agreements with

[20] The relevant sections of the FEIS evaluating fiscal impacts of the trust decision are Sections 3.7.6 ("Nation Contributions to Federal, New York State and Local Government"), AR020628 ff.; 3.7.8 ("Fiscal Conditions"), AR020655 ff.; 4.7 ("Fiscal Effects"), AR021159 ff.; 5.2 ("Prior Mitigation Related Actions"), AR021388 ff.; and Appendix E ("Socioeconomics: Data Sources and Methodology"), AR021826 ff. Plaintiffs do not elaborate how NEPA is violated by the extensive analysis of these sections.

[21] Subsequently, the Second Circuit vacated the district court state law holdings, concluding that those claims should be decided in the first instance in state court. See Oneida Indian Nation of N.Y., 665 F.3d at 436-440.

the Cities of Sherrill and Oneida. Because no Sherrill parcels will be taken in trust, that city will continue to receive all taxes. Twenty-five of forty-five tribal parcels in the City of Oneida will be taken in trust for an estimated annual tax loss of $618,029 in future tax revenues spread among the various taxing jurisdictions (the County, City, and assorted school districts). Id. at 42-43. In no case did the lost revenue amount to more than 10% of the annual tax levy, with the City of Oneida losing 8.7% in special assessment districts. Id. at 43. While recognizing this impact, Interior concluded that "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." Id. at 44.

Although not required by its regulations, Interior also undertook an alternative analysis that hypothetically assumed that the Counties eventually would prevail in the tax litigation. Assuming the Oneidas' land is taxable under State law, taking land in trust would cause a loss in tax receipts of $2.19 million excluding the casino tax lot. Id. at 45. The Town of Verona values the casino tax lot at $362.55 million, a valuation which unlawfully includes the value of the Nation's casino-related improvements on the lot which are not taxable under IGRA. See 25 U.S.C. § 2710(d)(4) (IGRA provides States and their subdivisions no authority to impose taxes, fees or assessments on a tribe authorized to conduct gaming under the statute); ROD at 51. Including Verona's unlawful taxes, the amount of lost receipts totals $14.39 million.[22] ROD at 45.

[22] The ROD notes that "the Nation is being assessed taxes that surpass individual budget items of the Town [of Verona] (*e.g.*, the Nation's share of the Town's $142,844 fire protection budget is $539,359)." ROD at 47.

Against these losses, Interior also considered the "overall fiscal impacts of the trust acquisition," including "the degree to which the tribe's ongoing business activities generate economic and tax benefits to the local community that offset the taxes that would be lost as a result of the trust acquisition." ROD at 47. Those benefits include: (1) Nation grants and payments to local governments; (2) Nation employee property taxes; (3) Nation employee state income taxes withheld and remitted by the Nation; (4) Nation spending and Nation employee spending; (5) Nation payments to the New York State Police and the New York State Racing and Wagering Board. Id. at 47-48.[23] Interior concluded that the Nation contributed $16.76 million more to the State and local governments than they expended to provide it with services, and it estimated that even with the lands Interior proposes to take in trust, the State and local governments will continue to receive a net benefit of the same magnitude. Id. at 48.

Interior also addressed Verona's unlawfully assessed taxes on the Oneida gaming facility, explaining that

> due to the dispute over taxation of the casino tax lot, total property tax loss was evaluated in three scenarios: (1) without the casino tax lot; (2) with the casino tax lot as assessed by the local government; and (3) with the casino tax lot valued for non-gaming uses, based on non-gaming lands at comparable locations.

Id. at 49. Including the disputed property taxes on the costs side of the ledger, Interior still concluded that "the Nation's direct and indirect contributions were greater than the unpaid real property taxes." Id. The impact on individual jurisdictions was similar, with individual jurisdictions generally predicted to receive a net benefit even if their taxes on Oneida lands are

[23] Interior explained that it "subtracted both property taxes and Nation payments that are reflective of the cost of services attributable to the Nation and not usually paid for with property tax revenues (i.e., reimbursements to New York State and water, sewer, and utility payments) from the economic benefits generated directly and indirectly by the Nation." Id. at 48.

legitimate and lost for those parcels going into trust. Id. Interior identified and considered a number of exceptions. It noted that the Vernon-Verona-Sherrill ("V.V.S.") School District would experience a net loss of revenues, and that if the casino tax lot, as valued by Verona at $362.55 million is included, then Oneida County, Verona, and the V.V.S. School District all experience a net loss. Id.

The ROD concluded that "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." Id. at 50. Assuming the assessed taxes are legitimate, but excluding Verona's unlawful assessment of taxes on the gaming facility, "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." Id. at 50. With Verona's unlawful assessment of the casino tax lot, Interior recognized 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." Id. Provided Interior has considered potential impacts, it is not barred from taking land in trust even where those impacts may be negative. See City of Lincoln City, 229 F. Supp. 2d at 1125. Because Interior carefully considered the tax impacts of taking the subject lands into trust, Phillips' claim that DOI failed to adequately consider 25 C.F.R. § 151.10(e) should be denied.

3. The ROD Adequately Addressed All Alternatives

Phillips alleges that the ROD does not adequately consider the alternatives offered by the commenters, particularly the suggestion that a State reservation be created for the Oneida in lieu of accepting land into trust. Compl. ¶ 116. NEPA requires a federal agency preparing an EIS to

"provide full and fair discussion of significant environmental impacts and [to] inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." Natural Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 556 (2d Cir. 2009) (alteration in original) (quoting 40 C.F.R. § 1502.1). An "agency satisfies its duty under the NEPA where it rigorously explores and objectively evaluates all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discusses the reasons for their having been eliminated." Natural Res. Def. Council, Inc. v. USDA, 613 F.3d 76, 85 (2d Cir. 2010) (quoting 40 C.F.R. § 1502.14(a)) (internal quotations and brackets omitted). Interior's obligation to consider reasonable alternatives to the action challenged here, including the possibility of establishing a State reservation in lieu of taking land in trust, derives from NEPA. As this Court has held already, Plaintiffs lack standing to bring a challenge under that statute. Memorandum-Decision and Order (Dkt. No. 74) at 19-20.

Even if Plaintiffs had standing, which they do not, their NEPA claim would fail on the merits. NEPA requires analysis of "all reasonable alternatives, and for alternatives which were eliminated from detailed study, [an agency must] briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). The alternative Phillips is concerned with, the creation of a State reservation for the Nation, is discussed in the FEIS as one of the alternatives eliminated from further study. FEIS 2-52, AR020262. The FEIS explains the main problem with this suggested alternative: "Denial of the Nation's Trust Land Application in the hope that New York State would enact legislation or take other action to create such a state reservation or state trust status would not be a reasonable alternative." Id. The ROD further elaborated on the problems with this proposed alternative: "A New York State-created reservation or State-created trust would be only as protective as the State would allow and it would not prevent future

encroachment by the State or local governments in the areas of alienation, taxation, or regulation." ROD at 12. In other words, the alternative is hypothetical because DOI has no power to establish a State reservation and, moreover, such a reservation would not meet the Nation's need for land over which it may securely exercise sovereignty because its sovereignty on a State reservation would exist at the State's pleasure.

Moreover, the establishment of a State reservation was apparently intended in lieu of the currently existing federal reservation, and Interior, citing Sherrill, 544 U.S. at 215 n.9, noted that only Congress has power to disestablish the Oneida Reservation. ROD at 12. Finally, Interior noted that while state legislation had been introduced with the stated purpose of enabling the Turning Stone Casino to operate lawfully by establishing it within a state reservation, such legislation "alone would not authorize gaming under IGRA." Id.

Because both the FEIS and the ROD considered the commenter's proposed State reservation and explained why such an alternative is not viable, Phillips' claim that Interior did not adequately consider all reasonable alternatives pursuant to NEPA should be denied.

4. The ROD Does Not Unlawfully Promote Unfair Advantages for Tribal Businesses

Finally, Phillips alleges that the ROD is unlawful because it "would allow OIN to continue its unfair advantage over other taxpaying businesses." Compl. ¶ 117. This fails to state a legally cognizable claim. Congress has established a policy of promoting self-governance and self-determination amongst Indian tribes and, through the IRA, has established a mechanism by which Indians may have lands placed in trust for their benefit and in furtherance of these federal policies.

However, trust status under the IRA does not necessarily make Indian businesses immune to state sales or other kinds of taxes. See generally White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 64 (1994) ("On-reservation cigarette sales to persons other than reservation Indians . . . are legitimately subject to state taxation."). As Interior notes, at the time the ROD was issued New York had opted not to enforce fuel and cigarette excise tax remittals. The ROD explained that, nevertheless, "[p]lacement of the Nation's lands into trust would not prevent the State from enforcing lawfully applicable sales and excise taxes if in the future it determines to do so." ROD at 44. Thus, if Phillips has concerns about economic advantages to Oneida businesses deriving from the State's failure to tax tribal businesses, that is a matter for the State of New York, not Interior.

VII. CONCLUSION

For the reasons stated above, the United States should be granted summary judgment on all CNYFBA's and Phillips' surviving claims and their complaint should be dismissed.

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Respectfully submitted,

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Certificate of Service

I, Steven Miskinis, hereby certify that on March 26, 2014, I served the United States' Memorandum of Law In Support of Motion for Summary Judgment upon all counsel in this action via the Court's electronic case filing system.

_____/s/_____

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