UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

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, in her official capacity as 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.

CENTRAL NEW YORK FAIR BUISNESS, et al. RESPONSE TO UNITED STATES MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Secretary of the Department of the Interior (DOI) continues to defy the clear language of this Court to apply Carcieri v. Salazar, 555 U.S. 379 (2009). This Court ordered the DOI and specifically the Secretary to render an opinion applying Carcieri v. Salazar to the Oneida Indian Nation (OIN) on September 24, 2012. Instead, almost a year and a half later the DOI issued an Amended Record of Decision (AROD) rearguing the Carcieri decision to allow all currently recognized Indian tribes to be eligible for the benefits of the Indian Reorganization Act (IRA), 25 U.S.C. § 461 et seq. , including the Oneida of New York.

The Supreme Court in Carcieri did not defer to DOI's interpretation of "under federal jurisdiction." The Court expressly held that Section 19, 25 U.S.C. § 479, is not ambiguous and that "now under federal jurisdiction" as of June 1934 was what Congress intended when it passed the Indian Reorganization Act (IRA). Carcieri at 390-1. Just after issuing the AROD the Solicitor of the DOI issued opinion M-370293 that is binding on the BIA. The M opinion is clearly intended to rewrite the Carcieri decision and allow the DOI to continue to apply 25 U.S.C. § 465 fee to trust benefits on all currently federally recognized tribes. Clearly the M opinion and the AROD were being prepared by the DOI and Department of Justice simultaneously as the United States admits in its Motion for Summary Judgment.

The real fact is that the DOI is not ever going to apply the actual majority opinion of Carcieri v. Salazar to satisfy the Order of this Court. This is because under Carcieri v. Salazar, the New York Oneida are a tribe under the jurisdiction of the State of New York not a federally recognized tribe eligible for the benefits of the IRA as of June 1934. This is more than enough reason to deny the Motion for Summary Judgment of the Secretary. It is also

the only way to protect the role of the federal courts within the constitutional structure of separation of powers and make the Executive branch accountable to the rule of law and the will of the people.

II. BACKGROUND

This Court ordered the DOI and specifically the Secretary to render an opinion applying Carcieri v. Salazar to the Oneida Indian Nation (OIN) on September 24, 2012. Instead, almost a year and a half later the DOI issued an Amended Record of Decision (AROD) rearguing the Carcieri decision by defying the express holding that 25 U.S.C. § 479 was not ambiguous and that only tribes "now under federal jurisdiction" as of June 1934 were intended by Congress to receive the benefits of the Indian Reorganization Act (IRA). Since the Carcieri decision issued on February 24, 2009, the Indian tribes and BIA have been pushing very hard for a "Carcieri fix." Congress has now allowed the Carcieri decision to stand for 5 years. Congress has not amended 25 U.S.C. § 479 or the language of 25 U.S.C. 2202 of the Indian Lands Consolidation Act (ILCA) to comport to the DOI/BIA's interpretation despite major lobbying efforts by Indian tribes and the BIA.

Apparently frustrated that Congress does not agree with the DOI's interpretation of 25 U.S.C. § 479, the DOI has decided to make its own "Carcieri fix" with the AROD and M opinion. Both the AROD and the M opinion apply the same conclusion made originally to the Supreme Court in Carcieri that any Indian tribe currently recognized is eligible for the benefits of the IRA under 25 U.S.C. § 479 including placing fee land into trust status per section 5 of the IRA, 25 U.S.C. § 465. They are trying to take another bite at the apple of the case they have already lost by adding additional pieces to their previous argument made in

Carcieri itself. The DOI and the Department of Justice (DOJ) representing the federal officials of DOI and the BIA clearly assume that 25 U.S.C. § 479 as interpreted in Carcieri v. Salazar by the Supreme Court is not the interpretation of 25 U.S.C. § 479 they must apply. This blatant opposition to a precedential opinion of the Supreme Court must not be tolerated if the rule of law and constitution are to be enforceable to limit the power of the Executive Branch. This is beyond the DOI and DOJ acting in bad faith in applying a court decision adverse to their stated policies. This is a deliberate attempt to undermine the authority of the federal courts, the United States Supreme Court and Congress.

A motion for summary judgment is appropriate when there are no undecided questions of material fact and only legal questions remain to be determined by the Court. In this case there are two remaining questions of fact that have not been determined. The first is whether the Oneida Indian Nation is a federally recognized tribe at all. As submitted to the Secretary after the Order of September 24, 2012 by Central New York Fair Business Association (CNYFBA) and the Citizens Equal Rights Alliance (CERA) there is a question whether the OIN has ever been federally recognized. The only direct evidence of federal recognition was done by Ada Deer as Commissioner of Indian Affairs to recognize Raymond Halbritter as the Chairman of the Oneida Indian Nation. See AR Docs. 1-5. This was not a tribal recognition as required by 25 CFR Part 83. These regulations were clearly in place in 1994 when Ada Deer issued her letter. No explanation is given in the AROD as to a formal tribal recognition of the OIN. Instead the AROD uses a fabricated "new" fact never raised in the Carcieri litigation that the BIA determined which tribes were eligible to be IRA tribes when they allowed them to vote on whether to adopt the IRA in the required vote. The M

opinion released after plaintiffs letter to this Court of February 12, 2014 informing the Court that documents exist proving that all possible tribes were allowed to vote on the IRA, relies on a different and weaker argument to rewrite the requirements of 25 U.S.C. § 479 as interpreted in Carcieri. The AROD goes into detail concerning the historical dealings with the Oneida but leaves huge gaps of time and does not even come close to the exacting requirements of the Part 83 regulations. Nor is the Treaty of Buffalo Creek, 7 Stat. 550, addressed in the AROD with its effects. In sum, the Secretary has never formally recognized the Oneida Indian Nation of New York that had ceased to exist as a tribe by the time of the Treaty of Buffalo Creek in 1838.

The second material fact in dispute is whether the area reserved by the State of New York for the ancient OIN under the Treaty of Fort Schuyler of 1788 placed the Oneida under exclusive state jurisdiction just like the Narragansetts were in Rhode Island before their formal recognition under the federal Part 83 process in 1983. Therefore, to place lands into trust for the OIN the Secretary must have the authority to remove land from state jurisdiction. The Supreme Court determined in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) that even Congress itself cannot remove lands it ceded to a state from state jurisdiction. If Congress does not have authority to make a law authorizing the removal of state jurisdiction then the Secretary of Interior certainly does not have the authority to withdraw lands from state jurisdiction by placing those lands into trust status. This factual dispute goes directly to the remaining constitutional claim that the 25 CFR Part 151 fee to trust regulations are *ultra vires* as being beyond the authority of the Secretary of Interior to promulgate and apply in New York. This is the exact same issue raised by plaintiffs in their

prior response to the federal motion for summary judgment in January 2012.

The legal question that must be decided to rule on the federal motion for summary judgment is whether the Secretary is required to follow the Supreme Court's interpretation of 25 U.S.C. § 479 as decided in Carcieri v. Salazar or is entitled to Chevron deference because it has used its own Carcieri interpretation in the AROD and then issued an M opinion further explaining the position taken in the AROD. Chevron v. Natural Resources Defense Council, 467 U.S. 387 (1984). What is at stake for the federal courts is their ability to protect separation of powers principles, a major component of the constitutional structure and have those judgments accepted as the "law" by the Executive Branch. The Supreme Court in Carcieri interpreted 25 U.S.C. § 479 using the normal canons of statutory construction. The Supreme Court determined congressional intent at the time the statute was passed and applied that intent to interpret the statute. The decision in New York boils down to this simple choice: Is the IRA to be interpreted as Congress intended in 1934 or can the Secretary and Executive Branch reinterpret the IRA as they see the Indian trust relationship defining tribal status and Indian country land status to meet their vision? The answer to this question begins with whether this Court will defer to the Secretary's and Executive Branch positions asserted in the AROD and M opinion. This is the first point addressed in the Argument.

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). As plaintiffs have said, this case has two material facts in dispute which render summary judgment inappropriate as a matter of law.

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." Plaintiffs' amended complaint alleges that the Record of Decision (ROD) and by implication the Amended ROD is arbitrary, capricious, an abuse of discretion and not in accordance with law pursuant to section 706 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. In addition, plaintiffs challenge whether the 25 CFR Part 151 fee to trust regulations are within the scope of authority of the Secretary of the Interior to promulgate. Plaintiffs claim the Secretary of Interior acted *ultra vires* in promulgating the Part 151 regulations. The burden of proof is on plaintiffs under the APA to win their case. However the burden of proof for the motion for summary judgment is on the United States.

V. SUMMARY OF ARGUMENT

Plaintiffs defend the Amended Complaint and explain to this Court that it is presented with a simple but very important choice. If the Court applies Carcieri v. Salazar the Oneida Indian Nation is a state tribe that was not a "tribe now under federal

jurisdiction" as of June 1934. This means they are not eligible for the fee to trust benefit of the IRA. The opposite choice is not to uphold this Court's prior order directing the Secretary to apply Carcieri and allow the Secretary Chevron deference to reinterpret 25 U.S.C. § 479. This would contradict the holding in Carcieri that 25 U.S.C. § 479 was not ambiguous and therefore not entitled to deference under Chevron. Id. at 390-1. Allowing the Secretary to use the plenary power authority to avoid the Carcieri ruling will also ensure that the United States will assume any lands it takes into trust for the Oneida Indian Nation will be treated as federal territorial lands also known as Indian country. Effectively, this would remove any lands taken into federal trust status from state jurisdiction.

VI. ARGUMENT

A. This Court is Bound to Apply Carcieri v. Salazar to Determine Whether the Oneida of New York was an Indian tribe "now under federal jurisdiction" as of June 1934

The Secretary and federal defendants do quite a song and dance to avoid applying Carcieri as this Court ordered. Then they use every means possible to claim that the AROD and M opinion must be given Chevron deference by this Court. The reality is that whether the Oneida of New York are eligible for fee to trust benefits is entirely dependent on meeting the definition of "tribe" in Sec. 19, 25 U.S.C. § 479 of the IRA. Unless they meet the definition of tribe in the IRA they are not eligible for the fee to trust benefits of Sec. 5, 25 U.S.C. § 465 of the IRA. Justice Thomas said this even more bluntly in the majority opinion of Carcieri. "Thus, although we do not defer to Commissioner Collier's interpretation of this unambiguous statute, see Estate of Cowart v. Nicklos Drilling Co., 505 U. S. 469, 476 (1992), we agree with his conclusion that the word "now" in § 479 limits the definition of "Indian,"

and therefore limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted." Carcieri at 390-1.

Eight out of nine Justices agreed that the phrase "now under federal jurisdiction" in 25 U.S.C. § 479 was not ambiguous and was therefore not entitled to Chevron deference. (5 in the majority, Justice Breyer with his concurring opinion and Justices Souter and Ginsburg in their very short concurring in part and dissenting in part opinion.) All eight of the Justices also concluded that the definition of tribe in Section 479 was an intentional restriction placed into the statute by Congress to limit the application of the IRA. The Justices also agreed that 25 U.S.C. § 2202 of the Indian Lands Consolidation Act did not amend or alter the definition of Indian in 25 U.S.C. § 479. Id. at 394-5. Justices Breyer, Souter and Ginsburg all also agreed with the majority that the Narragansetts could not meet the definition of being a "tribe" in 1934. Justices Souter and Ginsburg would have let them attempt to make an argument that because they had been formally recognized under the Part 83 process as a continually existing tribe in 1983 that they be allowed to at least try to make an argument they were under federal jurisdiction in 1934. Carcieri at 400.

Eight Justices in Carcieri determined that the intent of Congress in 25 U.S.C. § 479 was to allow all federally recognized tribes as of June 1934 to have the benefits of the IRA. What this interpretation prevented was exactly what Congress did not accept in John Collier's proposed IRA legislation—a continuing power in the Secretary and BIA to create or revive Indian tribes that no longer existed. If this statutory interpretation of Congressional intent by the Supreme Court was incorrect our elected representatives in

Congress could rewrite the law. See United States v. Lara, 541 U.S. 193 (2004). This protects Congress' ultimate authority to make the law. The Supreme Court says what the law is and means subject to the authority of Congress to rewrite the law. Marbury v. Madison, 5 U.S. 137 (1803).

Congress has been bombarded by Carcieri fix proposals and has not adopted any of them in five years. See Congressional Research Services Report April 2014. Exhibit 1. The fact is Congress is very aware that the Carcieri decision protects the authority of Congress to set federal Indian policy. Congress has not abdicated this authority to the Executive Branch and is very unlikely to do so in the future. Only Congress has the constitutional authority to change 25 U.S.C. § 479 to moot the majority opinion in Carcieri and it has refused to do so.

As an opinion of the court, under the doctrine of *stare decisis* this Court is bound to apply Carcieri v. Salazar to determine whether the Oneida Indian Nation meets the requirements of 25 U.S.C. § 479. The disagreement of the Justices over the application of Section 479 came not from the phrasing of Section 479 but from defining what it meant and means to be "under federal jurisdiction." The fact is that the Supreme Court itself had allowed "under federal jurisdiction" to be reinterpreted during the Nixon administration to allow federal courts subject matter jurisdiction to hear federal claims that had long ago grown cold. That case was Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). This case created more than 40 years of federal litigation over trying to reestablish the sovereignty of the OIN that had ceased to exist before the Treaty of Buffalo Creek in 1838. Counsel for plaintiffs will not belabor this point because this Court knows on a first hand

basis the effects of allowing this reinterpretation of 25 U.S.C. § 177 and federal treaties through a modern refracted lens of the federal Indian trust relationship.

The Supreme Court certainly did not intend to disrupt the settled expectations of thousands of property owners when it unanimously ruled for the Oneida to be able to try to reclaim their historical reservation in 1974. The Justices of the Supreme Court like most Americans wanted to "help the poor Indians." They had no idea that the Executive Branch was working to exploit this sympathy to expand its own power. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), ended the land claims but did not overrule the 1974 Oneida case and opened the door to this fee to trust litigation. Until the Indians are subject to the equal protection of the laws under the Fourteenth Amendment of the Constitution the Executive branch will continue to use their separate status to increase Executive authority over Congress, the Courts and the States. The real mistake was the Supreme Court separating the Indians from the rest of the people in order to try to justify slavery. Dred Scott v. Sandford, 60 U.S. 393 (1857). This mistake created its own federal Indian law case line.

1. There Are Two Federal Indian Law Case Lines

Carcieri v. Salazar follows a direct line of cases where the Supreme Court has assumed the authority to make federal Indian common law dating from the adoption of the Constitution. In Carcieri v. Salazar, the Supreme Court ruled that when Congress passed the pared down Indian Reorganization Act (IRA) in June 1934 that it deliberately limited the application of the IRA to only those "tribes now recognized and under federal jurisdiction." Congress was following the original case line of federal Indian common law that

distinguished between tribes under state jurisdiction and those tribes that were under federal jurisdiction. Eight Justices of the Supreme Court acknowledged that the Narragansett Tribe had been an Indian tribe under the sole jurisdiction of the State of Rhode Island until they were federally recognized in 1983. This original case line assumes regular principles of law apply to the Indians because the Indians are all citizens and will eventually lose their tribal relations to become part of the people of the United States and of the State wherein they reside. Carcieri v. Salazar applies this line of cases.

Events in our history led to the creation by the Supreme Court of a second line of Indian cases that started with the decision in Dred Scott v. Sandford, 60 U.S. 393 (1857). This second line of federal Indian cases assumes that the Indians will always maintain their tribal relations as separate people from the people of the United States. It also always applies the Indian canons of construction. AROD at 4, first paragraph. The AROD and the M opinion follow this second case line. This second line is based on the territorial war power authority that was developed around our Civil War and preserved through keeping the Indians separate from the rest of the people of the United States. It requires all Indian land to be classified as "Indian country" which is defined as federal territorial land. This is the federal Indian policy promoted by the Nixon Indian policy.

According to the Nixon Indian policy as defined in the Nixon Memorandum "What Level Sovereignty?" the President can on his own authority reinterpret the Indian trust relationship and interpret all existing federal law from the perspective of his interpretation of that trust relationship. See Nixon Memo at www.citizensalliance.com. What this means is that the Executive branch can decide that the way a still existing federal law was applied in

the past was not in accord to the current interpretation of the federal Indian trust relationship. Then using the resources of the United States to promote their version of what should have happened they sue on behalf of the Indian tribe to restore what they think was wrongfully taken. This was exactly the power that Congress was not willing to give the Secretary of the Interior when it rejected Commissioner John Collier's expansive Indian Reorganization Act legislation in 1934.

President Nixon did inform Congress of his change of interpretation of the Indian trust relationship in his Executive Memorandum to Congress of July 8, 1970. That Memorandum to Congress was the President's pronouncement to Congress that the Executive and not Congress now exercised the plenary power over the Indians the Supreme Court had defined in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), United States v. Kagama, 118 U.S. 375 (1886) and Elk v. Wilkins, 112 U.S. 94 (1884) that expressly follow the Dred Scott line of cases. The Nixon Indian Policy claims the authority to reinterpret the IRA as part of its assumed plenary power. The Nixon Indian Policy was designed to permanently preserve the plenary power over Indians keeping them forever separate from the States and people. Without informing the courts, Congress or anyone else, the Nixon White House began promoting this permanent tribal sovereignty through direct legal help to tribal claimants from the moment they took office. One of the first cases to receive this direct assistance from the White House was Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) that started this entire mess in New York .

As defined in Kagama, the plenary power over Indians is based on three clauses of the Constitution: the Property Clause (Art. IV, Sec. 3, Cl. 2), the Indian Commerce Clause

(Art. I, Sec. 8, Cl. 3) and the Treaty Clause (Art. VI, Cl. 2). These are the same exact list of powers asserted in the AROD in this case. The AROD openly claims the authority to "define the Federal Government's unique and evolving relationship with the Indian tribes." Citing its power as 'plenary and exclusive' as based on the Treaty Clause and Indian Commerce Clause. AROD at p. 4. Unlike in the original Record of Decision that also cited the Property Clause for this authority and claimed the Oneida Reservation was a federal Indian reservation, the AROD lists all the powers that derive from the territorial power including the war power authority over territories of the United States starting with the paragraph following its direct Treaty and Indian Commerce assertions and not ending until it finishes the contemporaneous rewrite of the holding in Johnson v. M'Intosh, 21 U.S. 543 (1823) on p. 5.

It is generally not hard to distinguish which line of federal Indian cases one is using. If the case dates from before 1857, the year of the Dred Scott decision it is on the original case line and not on the plenary power line. Many of the original cases have been reinterpreted in later cases. When this has happened it is usually reflected in the case citation. For purposes of this case there are two cases that must be clearly defined as to whether they fall on the original case line or the plenary power case line.

The first case is Oneida Indian Nation v. Oneida County from 1974 cited above as one of the first cases that received covert federal assistance from the White House. A cursory reading of the case is enough to demonstrate how old laws can be reinterpreted by expanding the nature of the federal trust relationship with the Indian tribes. The decision cites cases clearly on the plenary power case line side, including Holden v. Joy, 84 U.S. 211

(1872), that made the territorial war power connections to the Treaty Clause and Indian Commerce Clause.

The other case that must be defined is City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005). City of Sherrill like almost all recent Supreme Court decisions reflects more of the original case line than the plenary power case line. This is true of most of the cases that follow Montana v. United States, 450 U.S. 544 (1981). In City of Sherrill, Justice Ginsburg was willing to rebalance the equities and apply laches to end the land claims but it is still a hybrid in how it defers to the Secretary's authority under the Part 151 regulations. It is not until Carcieri and the Hawaii decision that followed two weeks later that the Supreme Court decided to attempt to impose actual limits on secretarial discretion as it had done in pre-Civil War times to protect the authority of Congress over Indian affairs. This Court can avoid the plenary power case line by applying Carcieri v. Salazar and its express holding that 25 U.S.C. § 479 is not ambiguous and is therefore not entitled to Chevron deference.

2. The Intent of Congress or Unlimited Secretarial and Executive Power

Carcieri v. Salazar is the first Supreme Court decision that directly confronts the Nixon Indian policy and tries to restore the intent of Congress as the interpretation of the very downsized IRA actually passed by Congress. The Supreme Court in Hawaii, has finally realized that it must enforce existing limitations on the Secretary and limit the territorial war power authority to make fee land back into federal territory as Indian country. The Supreme Court seems aware that the showdown is now on with the open defiance of the Secretary deliberately trying to circumvent Carcieri with the M opinion. The Supreme

Court seems to have made the realization that allowing the Secretary unlimited authority to redefine the federal Indian trust relationship means that federal litigation will never end until the Secretary wins. And even after a win if the Secretary or some bureaucrat in BIA or some tribal official decides they want even more authority that new litigation will be begun. If the Secretary is allowed to reinterpret the trust relationship there are an unlimited number of possible ways to restore tribal sovereignty that have not yet been tested in the federal courts.

This is exactly what happened with the land claims. When one theory failed another was presented. The case could not be closed because the Secretary and tribes were expressly allowed to try to develop any possible theory that would work. The same thing is happening with this fee to trust litigation.

There is not just one federal reinterpretation of the IRA or historical facts and records in this case. Right now there are at least four different federal interpretations of 25 U.S.C. § 479 in play. The first is from the Oneida decision in 1974 that recognized the standing of the remnants of the Oneida to bring suit to pursue the land claim based on the reinterpretation of 25 U.S.C. § 177. Even though the land claims are gone the ruling is still the basis of the Oneida Indian Nation's standing and even possibly the claim to federal recognition that will be discussed more fully later in this brief. The second is in the original ROD that was done before the Carcieri decision. The third is in the AROD and relies on the fabricated fact that tribes that were allowed to vote on the IRA were somehow precleared as eligible for the IRA. The fourth is the revised argument in the M opinion.

The issue that will decide this case is whether this Court follows Carcieri and the constitutional line of cases that interpret the historical facts using the intent of Congress or whether this Court gives Chevron deference to the Secretary and "the Federal Government's unique and evolving relationship with Indian tribes." that comes directly from the Nixon Indian policy. Giving this deference is essentially granting unlimited power to the Secretary and Executive Branch because the federal position will just continue to evolve to combat whatever the latest court ruling is that tries to limit the latest federal version of the evolving trust relationship bringing on new federal litigation until the federal government prevails. There is no limit that any Court can establish against this continually evolving claim of power except ending the separate status of the Indians.

Even more frightening is what this means in the context of the Settlement Agreement entered into between the State of New York, the Counties and the Oneida Indian Nation already accepted by this Court. The Secretary and Executive will continually reinterpret it adding more and more power and authority to the Oneida tribe until the have full territorial war power authority over the area. The Secretary and DOJ will be litigating solely for the benefit of the tribe with taxpayer money to remove more and more authority from the state government and individual rights from the people who choose to remain in the area.

The only way to limit the plenary power being asserted by the Secretary is by applying Carcieri and the case line following the Constitution and rejecting the plenary authority coming from the Dred Scott case line that is the basis of the AROD. Requiring the

IRA be interpreted as Congress intended in 1934 stops the evolving versions of the Secretary's authority.

B. The Oneida Indian Nation Was Not a Tribe Now Under Federal Jurisdiction in 1934

Plaintiffs have spent much of this case arguing about the absurdity of claiming the Treaty of Canandaigua, 7 Stat. 44, somehow converted the Oneida's state reservation into a federal Indian reservation. Even though the AROD does not make the direct claim that the Oneida reservation was turned into a federal Indian reservation subject to the Property Clause it still asserts that the state reservation was federalized by the Treaty placing it and the Indians residing on it "under federal Jurisdiction." AROD at p.16-17. In the federal motion for summary judgment at p. 13, the Secretary claims the "Second Circuit has made clear that the Nation possesses a federal Reservation, which has never been disestablished." with no citation. This sentence is intended to refute plaintiffs claims that the off reservation criteria of the Part 151 regulations should have been applied instead of the easier on-reservation criteria. The fact is that the on reservation criteria were used for the AROD conclusively proving that the Secretary is still asserting a direct federal territorial power that is based on the Property Clause for the Oneida Indian reservation set aside by the treaty of Fort Schuyler of 1788 that was between the Oneida tribe and the State of New York.

No issue in this case more clearly shows how differently the two federal case lines work in application than applying each line to the question of whether the Oneida Indian reservation as created by the state Treaty of Fort Schuyler and acknowledged in the federal

Treaty of Canandaigua was either a state reservation or was a federal reservation. The main historical facts and the timeline of those facts seem to be in agreement on both sides. The differences the parties assert in the historical facts are all based on whether the historical facts are subject to the interpretation they were given at the time the documents were created or whether these historical facts which are the treaties and laws that created the changes to the status of the historic Oneida Indian Nation can be reinterpreted contemporaneously by the Secretary. The plaintiffs and the Carcieri Court claim regular statutory construction applies and the historical documents are to be interpreted as they were understood when created and agreed to. The Secretary and DOJ claim a continuing and ever evolving authority to reinterpret the historical documents to meet their current version of the Indian trust relationship.

Applying federal law as the law was intended when adopted by Congress immediately confronts the Supreme Court's decision in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Until this decision, the remnants of the Oneida tribe were considered to be under the primary jurisdiction of the State of New York as a state tribe just like the Narragansett Tribe was under the primary jurisdiction of the State of Rhode Island in Carcieri. The whole basis of the 1974 Oneida case was the reinterpretation of 25 U.S.C. § 177 that was allowed because the Supreme Court blindly accepted the allegation that the Oneida tribe in New York still existed without any discussion or analysis.

1. The Removal Act of 1830 required termination of all federal Indian claims in the States East of the Mississippi River

The Removal Act of 1830, 4 Stat. 411, required the United States to remove any remaining Indians and relinquish all remaining federal claims of the United States to Indians remaining in the Eastern States. By 1838 and the Treaty of Buffalo Creek the Oneida had ceased to exist as an Indian tribe. The United States located the remaining Oneida descendants through the different Christian churches they attended. For purposes of the Buffalo Creek Treaty the remaining Oneida descendants were known generally as the Christian and Orchard parties. The subgroups were then denominated as the First Christian Party, the Second Christian Party etc… The United States accepted the relinquishment of all remaining federal claims for the Oneida remnants that chose to remain in New York. The only Oneida lands not terminated by the United States were those for the individual allotments that were to be made for any Oneida descendant that removed to Wisconsin. With the confirmation of the Treaty of Buffalo Creek in 1840 all federal jurisdiction or recognition of any kind over the Oneida Indians in New York was terminated and forever relinquished.

This was the intent of Congress in passing the Removal Act in 1830. A full cession by treaty was necessary to cancel any and all rights that could exist under the previous federal treaties with the Oneida, especially the Treaty of Canandaigua of 1794. New York State did not require the complete removal of Indians as many other States did. New York continued to honor its promises to the remaining Oneida. New York also made them full state citizens and still gives Indian descendants many special privileges for college attendance and for taxes.

Even before the Removal Act the Oneida Indians were considered to be an Indian tribe under primary state jurisdiction as was acknowledged in Fletcher v. Peck, 10 U.S. 87 (1810). This did not mean that federal government could not still assist the Indians on an individual basis. This special assistance was based on a general trust relationship with the Indians because of their race. Any time it was believed that an "Indian" was being taken advantage of by White persons the United States could intervene on behalf of the "Indians." Plaintiffs do not dispute that the United States on two occasions assisted individual Oneida Indians in preserving their rights to the remaining state reservation in the Boylan litigation. U.S. v. Boylan, 256 F. 468 (N.D.N.Y 1919), *aff'd* 265 F. 165 (2nd Cir. 1920). But that individual assistance is not the same thing as recognizing a group of Indian individuals as a "tribe" nor did it place those individuals under federal jurisdiction.

In fact, after the Boylan litigation the United States Supreme Court held that individual Indian members of the Seneca Indian Nation could be criminally prosecuted in New York state courts confirming that they were under State and not federal jurisdiction. See U.S. ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925). This is particularly important because the strongest claim of remaining federal jurisdiction over any New York State reservation would be for the Seneca. This is the result of the Supreme Court decision in Fellows v. Blacksmith, 60 U.S. 366(1857) decided with the Dred Scott decision in mind. It was actually the second case on what counsel is describing as the plenary power case line even though it was published before the Dred Scott opinion. Today we forget just how ill received the Dred Scott opinion was. The opinion was actually announced and read to the public several months before the written opinion was released. The case of Fellows v. Blacksmith has the

dubious distinction of being the first case where the Supreme Court did not adhere to the intent of Congress in adopting the Removal Act of 1830 and instead allowed the Executive Branch deference to determine when if ever the Seneca would be removed as they had agreed to in the Treaty of Buffalo Creek.

2. Being Allowed to Vote on Whether to Accept the IRA did not "Recognize" or Place the Tribe under federal jurisdiction to make it eligible for the benefits of the IRA

Neither Congress or the Secretary has "Recognized" the Oneida Indian Nation of New York after it was terminated in 1840 per the Treaty of Buffalo Creek. The closest the United States has come to formally recognizing the Oneida Indian Nation of New York in its modern incarnation is the letter from Commissioner Ada Deer to Ray Halbritter that these plaintiffs submitted to the Secretary to be considered in reviewing the application of Carcieri v. Salazar. AR Docs. 1-5. Not even the Secretary claims that the Ada Deer letter was sufficient to create formal recognition. It just counts as more indicia of relations with the Oneida.

The Part 83 regulations are supposed to be the only way an Indian tribe can seek formal recognition. These regulations were adopted when Congress threatened to unrecognize many Tribes that appeared on the tribes eligible for federal benefits list in the federal register in 1979. The Secretary without informing Congress had decided that it was within his power to "recognize" all of the Indian groups identified by the American Indian Policy Review Commission in 1977 as actually having continuing federal relations with the United States. The Oneida of New York were not on this list. More than 200 tribes that were not on the lists prepared by the BIA in 1936-7 for tribes eligible for the benefits of the

IRA were suddenly eligible according to the Secretary. This claimed authority to ignore 25 U.S.C. § 479 eventually led to the legal confrontation decided in Carcieri. The Oneida of New York did make the tribes eligible for federal benefits list in 1994 just after the Ada Deer letter was sent.

Instead, the Secretary relies on the fact 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." citing AROD at 21, Fed Motion at 20. In other words, the Secretary has decided she has full use of the plenary power over Indians and she says that the Oneida of New York are a federally recognized tribe. Because this is plenary authority, this Court and all federal courts must give full Chevron deference to her decision. This summarizes both the arguments in the AROD and the M opinion. This is also the basis of the "recognition" authority.

The fact that the Carcieri decision directly implicates this authority and specifically denies Chevron deference because 25 U.S.C. § 479 is not ambiguous is the reason the Secretary now claims that any tribe that was eligible to vote on the IRA is eligible for the benefits of the IRA. The historical documents prove exactly the opposite was true.

On September 29, 1934 the Indian Organization Division of the BIA sent to Field Representative Roy Nash of the Sacramento Regional Office a memorandum explaining that some Indian groups had been approved for voting on the IRA referendum and that it was his responsibility to encourage additional support through an educational campaign and

find more Indian groups that might possibly be able to vote. See Exhibit 2. In California, there was a major debate on which Indian groups were eligible to vote. The big question being whether the Rancherias were to be considered bona fide Indian reservations. See Exhibit 3 letter of Roy Nash to the Indian Office Washington received November 9, 1934. Eventually it was decided that the Rancherias could vote if any Indians could be found on the Election date. In fact, 6 of the Rancherias had no voters appear for the election. See Exhibit 4 Revised Tabulation of Election Returns, June 27, 1935. Even Indian groups in California that were allowed to vote on the IRA and accepted it were denied its benefits when the Indian Organization Division (IOD) decided to not allow any Indian group under 50 members to organize. See Exhibits 5 and 6 to the Indians of the Santa Ynez reservation. Being allowed to vote on the IRA referendum meant nothing. All of the decisions as to which Indian groups were actually tribes eligible for the benefits of the IRA were made later by the IOD. This was a national policy being decided in Washington directly under the authority of Commissioner John Collier.

In New York all of the Indian groups were allowed to vote on the IRA referendum and they all rejected it. Because of the total rejection the discussions about federal jurisdiction over the state reservations that had begun between different BIA officials just stopped. One major report was prepared by Archie Phinney, Field Agent U.S. Indian Service dated July 31, 1942. Appendix D of that report is a separate Report on New York Indian Situation by C.H. Berry, Superintendent, New York Agency March 1st 1939. This report lists 6 New York reservations that the federal BIA continued to assist. The 6 listed were Cattaraugus, St. Regis, Allegany, Onondaga, Tonawanda and Tuscarora. Both reports

describe the jurisdictional situation of assisting the Indians on the state land reservations but neither comes to any definitive conclusions that would be helpful. Both discuss trying to reach agreement with New York State over jurisdiction. Neither asserts anything about federal jurisdiction or recognition being assumed because the Indian groups were allowed to vote on whether to adopt the IRA. Counsel will scan the 44 pages if the Court or counsel for the United States requests copies.

As of 1942, the remaining Oneida reservation was only a state reservation and the remaining Oneida Indians were still under state jurisdiction. This means that there are two material facts in dispute that preclude this Court from granting the federal motion for summary judgment.

C. The Secretary has No Authority to Remove Fee Lands from State Jurisdiction as Asserted in the Part 151 regulations

To place lands into trust for the OIN under the Part 151 regulations requires the Secretary to have the authority to remove these lands from state jurisdiction. The regulations assert that the primary reason for taking fee lands into trust is for the Indian tribe to have full tribal sovereignty over the acquired lands. 25 C.F.R. 151.3. The Supreme Court determined in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) that even Congress itself cannot remove lands it ceded to a state from state jurisdiction. If Congress does not have authority to make a law authorizing the removal of state jurisdiction then the Secretary of Interior certainly does not have the authority to withdraw lands from state jurisdiction by placing those lands into trust status.

1. The Indian Reorganization Act

Section 5 of the IRA, 25 U.S.C. § 465 does not say anything about removing state jurisdiction from lands placed into trust status. The statute, 25 U.S.C. § 465, only requires that lands taken into trust be considered tax exempt. The fact that the United States takes title to the fee lands renders them tax exempt. The purpose of Section 465 was for the United States to give additional lands to Indians. Nothing is said in the IRA about extending tribal sovereignty over those lands.

Plaintiffs in their amended complaint specifically allege that 25 C.F.R. Part 151, the fee to trust regulations are *ultra vires* because they exceed the statutory authority of the IRA. In Commissioner John Collier's draft bill for the IRA as submitted to Congress there was an express fee to trust provision that was removed by Congress. See PRESS MEMO, Exhibit 7. The PRESS MEMO says that landless Indians were going to be assisted through the Wheeler-Howard Bill "through various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership...". It was in the congressional discussion of these "various devices" that the expansive vision of Commissioner Collier was expressly limited by Congress. One of these "devices" was the idea of the Indians purchasing their own lands or having other persons or entities purchase lands for them that could then be added to or create new Indian reservations. This fee to trust device was originally in Section 5 of the IRA. The BULLETIN of the Mission Indian Agency of April 16, 1934, Exhibit 8, in Paragraph 10 states:

"The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. <u>In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy</u>

members." (underlined added to indicate words deleted from final act). This BULLETIN was released almost three months before the IRA bill was passed by Congress. The device we now call "fee to trust" in the original bill was expressly removed by Congress before it passed the IRA. Therefore, as passed by Congress, the only way to add additional lands under Section 5 of the IRA, 25 U.S.C. § 465, is for Congress to make a specific appropriation to purchase lands. Congress expressly did not intend Section 5 of the IRA to delegate any authority to the Secretary to accept fee lands into Indian trust status.

In 1941, the Attorney General imposed an order that prevented the Department of the Interior and all other Departments from claiming to remove lands from state jurisdiction without express state consent. Letter from Attorney General Jackson to Secretary of the Interior Harold Ickes, dated March 31, 1941, No. 151695, Record Group 75, Entry 132B, Departmental Memo, Box 1, BIA Orders. The 1941 position of the Attorney General was opposed by the IOD with an express Solicitor's Opinion, 58 Interior Dec. 32 (1942). The Letter clearly cites the Enclave Clause, Art. I, Sec. 3, Cl. 17 as the basis for the 3 types of federal land holdings that could result from the United States acquiring fee property that was under state jurisdiction. First, the state could consent with legislative approval ceding exclusive jurisdiction to the federal government as a true federal enclave. The now closed Griffiss Air Force Base was ceded this way for a specific purpose. Second, if the United States condemned the land the Governor was requested to approve some cession of state jurisdiction giving the federal government concurrent jurisdiction over the fee property. Lastly, if the fee property acquired was a small purchase like for a post office it would just become property tax exempt but remain under state jurisdiction. The Letter

simply states the basics of the law for the federal government acquiring fee property as constitutionally permitted under the Enclave Clause.

While this case directly concerns Section 5, 25 U.S.C. § 465, of the IRA, the other land provisions in the IRA concern further acquisitions of federal public domain territorial land for Indians and change the law for federal lands that had been allotted to individual Indians preserving the trust period indefinitely to prevent those lands from ever being fee patented to come under state jurisdiction. So even though the Congress removed most of the extreme positions of Commissioner Collier, it did allow the plenary power case law to expand the authority of the United States with the IRA over public domain lands and over the lands allotted to Indians. Allotted lands that had not received their patents were placed in a permanent limbo between state and federal jurisdiction. Only recently has the Supreme Court at least partially defined the competing jurisdiction over the allotted lands in Plains Commerce Bank v. Long Family Land and Cattle Co., 544 U.S. 316 (2008).

Attorney General Jackson's position on land acquisition was an attempt to prevent the ever expanding federal authority over the federal territorial lands from disrupting the settled law in the non-public land states. His position officially lasted until the Congress commissioned a new report in 1965 over the public lands. See One Third of the Nation's Lands, 1970. Find website. This report changed the whole concept of disposing of the public domain lands and proposed keeping them permanently using the plenary authority that began with our Civil War just as Commissioner Collier had established for the Indians in the IRA. The report did note the major changes in water law that came from being able to expand the Winter's doctrine of federal reserved water rights that developed in Indian

law into applying to the now permanently reserved federal public domain. See Winters v. United States, 207 U.S. 564 (1908) and Cappaert v. United States, 426 U.S. 128 (1976).

The assertion that Indian lands and federal public domain land can be permanently reserved in federal territorial status changed the effect of the plenary powers. When the Kagama Court ruled in 1886 it was assuming that these plenary powers would only be used as long as needed to stop the Indian raids. Like the public domain they were considered temporary intrusions on our individual rights until States were formed and the full advantages of our constitutional structure were realized. Permanent plenary powers have a very insidious effect because bureaucrats and politicians get used to unlimited authority and begin reaching for more and more. Counsel for the plaintiffs believes this is why the Department of the Interior and not just the BIA have become so arrogant. That arrogance is very much reflected now in the Department of Justice that is used to winning these cases because they have the plenary power behind them. This arrogance is now the issue in this case that the DOI and DOJ do not believe they must follow the Supreme Court ruling in Carcieri v. Salazar that imposes a limit on what they consider their unlimited authority. They are liked spoiled children being told no. They don't believe their parents won't give in if they scream enough.

Comparing Commissioner John Collier's PRESS MEMO to the recently released letter to Congress from the Indian Law and Order Commission is telling. See Exhibit 9. Virtually everything that they assert was in the original IRA legislation that Congress would not agree to. The Special federal Indian Court, tribal court authority over non-Indians and federal money to fund it were all in the legislation submitted by Commissioner Collier for

the IRA. There is no limit to these plenary powers unless the federal courts enforce the statutory and constitutional structural limitations as the Court did in Carcieri and Hawaii.

2. Permanent Plenary Powers threaten the Constitutional Structure and our natural Individual Rights

Using the plenary powers the Secretary has arbitrarily decided that because she is required in one federal statute to treat all Indian tribes equally that all Indian land must have the same tribal sovereign rights attached to it. This is not just the application of 25 CFR 1.4 being applied to the Part 151 regulations as was previously argued against the first federal motion for summary judgment. Plaintiffs naively assumed that the Secretary was still agreeing that there were two clauses in the Constitution allowing federal land ownership. This was our specific cause of action in the Amended Complaint over the radar station not being subject to disposal or transfer like it was federal territory because it was an official federal enclave. This Court has dismissed this cause of action. We will be appealing that decision because now that same exact issue has become the question of what any fee lands taken into trust will be classified as by the United States.

We know the answer to this question because the Village of Hobart v. Oneida Tribe of Wisconsin, 732 F.3d 837 (7th Cir. 2013), case which has been cited throughout these proceedings is already before the Supreme Court with a petition for certiorari. The Seventh Circuit in that case has ruled that the fee lands taken into trust by United States for the Oneida Indian Tribe of Wisconsin are identical to and have all the attributes of federal territorial land. We also now know that the United States supports that decision because it has filed its opposition to the petition.

The main argument of the United States in their opposition uses the City of Sherrill decision. "The statutorily authorized process by which the United States takes land into trust for an Indian tribe, See 25 U.S.C. 465 'provides the proper avenue for (a tribe) to reestablish sovereign authority over territory' that it previously held and lost. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 221 (2005)." Hobart U.S. Opp. Brf at 11. The United States added the words "that it previously held and lost" changing the whole meaning of the first part of the case that used an expanded laches doctrine to finally end the thirty years of tribal attempts to restore the lands taken away from their original reservation. In the context of the Sherrill opinion it makes more sense to read Justice Ginsburg's approval of 25 U.S.C. § 465 as being the proper process because the Part 151 regulations purportedly protect the interests of the non-Indians and the local government. What Justice Ginsburg did not want to believe is that the Secretary and United States are only representing the interests of the tribal government. She seems to think this is supposed to be a neutral federal lands decision the way it was before the plenary power was allowed by the Supreme Court to apply to all Indian land decisions at the end of 1963 in Arizona v. California, 363 U.S. 546 (1963). That decision allowed the Secretary to represent only the interests of the five Indian tribes on the lower Colorado River against all existing private property rights.

The United States then cites Nevada v. Hicks as it has done throughout this case in virtually every pleading. "It is true that States are not stripped of all jurisdiction when the federal government takes land into trust. See e.g. Nevada v. Hicks, 533 U.S. 353, 361 (2001);

Mescalero Apache Tribe, 462 U.S. at 331-332." Hobart U.S. Opp. Brf at 16. In re-reading Nevada, counsel realized that the Justices are actually treating the federal Indian reservation reserved before statehood on real territorial lands in Nevada as a federal enclave. This is one very possible way that the Supreme Court could define the remaining permanently reserved public domain lands to end the federal plenary power.

Treating fee to trust lands in New York as a federal enclave would have been a workable solution before the Settlement Agreement. But in the Settlement Agreement New York has conceded the plenary power authority to the OIN. Even if these lands were declared by a federal court to be like or actually a federal enclave would now not prevent the complete loss of the state political processes and individual rights that are about to happen unless this Court denies the federal government the authority to take the fee lands into trust under the AROD.

Denying the fee to trust would void parts of the Settlement Agreement as it is presently written. It would not necessarily void the whole agreement because it could be treated either as a gaming compact or just as a tribal/state compact under New York law. Nothing says that the State of New York cannot make the lands under the Turning Stone tax exempt if there is another form of compensation to the State. Every State does this all the time to encourage big corporations to bring in jobs.

But as presently construed the consequences to the vast majority of residents in the area are catastrophic because any lands taken into trust will be treated by the United States as territorial lands of the Oneida, a land status that has never existed in the State of New York. The non-Indian citizens will be completely disrupted in their daily processes and may

very well be subject to the Oneida police and court systems under this agreement. These police and courts are not bound by either the Constitution of the United States or the Constitution of the State of New York. See Santa Clara Pueblo v. Martinez, 436 U.S. 39 (1978).

For an Oneida Indian like plaintiff Melvin Phillips it may mean the loss of all his rights of any kind as a citizen of New York or of the United States. See Elk v. Wilkins, 112 U.S. 94 (1884). The tribe will control the land he lives on, they will control where and if he will be allowed to vote or have any other rights. They can deny him access to any tribal function, building gathering, office and even the tribal courts without him having any recourse. They can turn off the utilities to his home or disrupt the utility rights of way that provide services. Counsel for CERA has seen with her own eyes these things happen to reservation Indians in the Western States.

The fact is that requiring the Indian tribes as political sovereigns to be treated equally deprives everyone else of individual rights. It literally turns the Framer's concept of popular sovereignty on its head. This result happened because Morton v. Mancari made the historically racial trust into a political trust relationship. See Morton v. Mancari, 417 U.S. 535 (1974). Morton must be overruled for anyone to have enforceable individual rights against these plenary powers. For this reason plaintiffs will be appealing the dismissal of their civil rights causes of action.

Lastly, plaintiffs request the Court allow this federal motion to be supplemented if the Supreme Court makes a major ruling in either Michigan v. Bay Mills Indian Tribe, Docket No. 12-515, argued December 2, 2013 or Bond v. United States, Docket No. 12-158,

argued November 5, 2013. Both of these cases have issues that could change the arguments made by both sides in this litigation. Plaintiffs also point out that for the first time in Schuette v. BAMN, Docket No. 12-682, Decided April 22, 2014, the affirmative action case decided earlier this week, that Justice Scalia of the Supreme Court noted that there are actually two separate case lines running in civil rights law. Enforcement of civil rights under Section 5 of the Fourteenth Amendment has included the plenary powers since Elk v. Wilkins, 112 U.S. 94 (1884).

VII. CONCLUSION

This Court should apply Carcieri v. Salazar and deny the federal motion for summary judgment .

Dated April 25, 2014

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