UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

TOWN OF VERONA, TOWN OF VERNON, ABRAHAM ACEE and ARTHUR STRIFE,

Plaintiffs,

v.

S.M.R. JEWELL, in her official capacity as United States Secretary of the Interior; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

CIVIL ACTION NO.
6:08-cv-00647-LEK-DEP

UNITED STATES' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants S.M.R. Jewell, Secretary of the Interior, and the United States Department of the Interior ("DOI" or "Interior"), by undersigned counsel, submit this Memorandum of Law in Opposition to Plaintiffs Town of Verona, Town of Vernon, Abraham Acee, and Arthur Strife (collectively, "the Towns") Motion for Summary Judgment. For the reasons described below, and based upon the Administrative Record supporting DOI's determination to accept land into trust for the benefit of the Oneida Indian Nation of New York ("Oneidas" or "Nation"), Plaintiffs' surviving claims challenging this administrative action should be denied and their complaint dismissed.[1]

II. BACKGROUND

A. Statutory and Regulatory Background

Interior's decision to accept land into trust for the benefit of the Nation was made pursuant to authority granted by Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465.[2] That section authorizes the Secretary of the Interior, "in h[er] discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." Id. 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. The "overriding purpose" of the IRA is to "establish machinery whereby

[1] For this brief, Interior's May 20, 2008 Record of Decision is "ROD" and may be found at Dkt. No. 47-4. 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. 43.

[2] The Statutory and Regulatory Background is an abbreviated version of the same section in the United States' Memorandum in Support of Motion for Summary Judgment (Dkt. No. 65-1).

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).

Interior's land acquisition 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, among other things: "[t]he need . . . for additional land"; "[t]he purposes for which the land will be used"; "the impact on the state and its political subdivisions resulting from 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). Consideration of these factors ensures that Interior exercises its discretion after becoming fully informed of the potential impacts of placing land in trust, but the factors do not mandate specific outcomes to the decision process.

B. The Challenged Action

The Nation "is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation . . . one of the six nations of the Iroquois." City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 (2005) (internal quotations omitted). The Nation has a Reservation of some 300,000 acres of land which was guaranteed by to it by the United States in

the 1794 Treaty of Canandaigua. 7 Stat. 44, 45 ("The United States acknowledge the lands reserved to the Oneida . . . and called their reservations, to be their property . . . said reservations shall remain theirs until they choose to sell the same to the people of the United States"). "Despite Congress' clear policy that no person or entity should purchase Indian lands without the acquiescence of the Federal Government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land." Oneida County v. Oneida Indian Nation of N.Y., 470 U.S. 226, 232 (1985). The State's unlawful acquisitions continued until by the 1840's "most of [the Oneidas'] remaining lands" were held by the State. Sherrill, 544 U.S. at 206-07.

Despite the State's efforts, "a band of Oneidas continued to live" on a 32 acre parcel of land, holding it "continuously for over a century," and their rights to possession of that land were affirmed by the Second Circuit in United States v. Boylan, 265 F. 165 (2d Cir. 1920). Sherrill, 544 U.S. at 210 n.3. Beginning in the 1990s, the Nation added to this intact Reservation land by acquiring parcels in Madison and Oneida County, within the bounds of their Reservation, through open-market transactions. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 144 (2d Cir. 2003) rev'd on other grounds by 544 U.S. 197 (2005). The Nation's attempt to exercise self-government on its reacquired lands were disputed by the State and local governments, and the Supreme Court ruled in Sherrill that equitable grounds barred the Nation from seeking a declaration that the reacquired lands were immune to taxation. The Court concluded that the "piecemeal shift in governance" that the Nation "seeks unilaterally to initiate" was unworkable. 544 U.S. at 221. Instead, the Court stated that the proper avenue for the Nation to re-establish a land base over which it could exercise its sovereign rights was to use the IRA's land-to-trust process. The Court explained that "[t]he regulations implementing § 465 are

sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Id. at 220-21.

On April 4, 2005, the Oneidas requested 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. 47-4 (ROD). In order to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370, Interior opted to prepare an Environmental Impact Statement ("EIS") even though the Nation planned no change in the use of its lands and the expected environmental impacts of the acquisition would therefore be negligible. ROD at 9 (although not necessarily required, an EIS "ensure[d] that the Nation's fee-to-trust request received the most thorough environmental review available under NEPA"). Public participation occurred through scoping meetings 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.[3] ROD at 9. An additional public meeting was held by the BIA on March 2, 2006, in the City of Utica, New York, to describe the land-to-trust process and NEPA. Id.

DOI announced 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

[3] 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 EIS ("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.

another in the Town of Verona on February 6, 2008. Id. at 6. After considering all public comments provided on the DEIS, Interior issued a Final EIS ("FEIS") on February 22, 2008. The release prompted another comment period of thirty days during which additional comments were accepted. Id. at 10.

On May 20, 2008, DOI issued a ROD in which it decided to accept 13,003.89 of the proposed 17,370 acres into trust. 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. Interior was also sensitive to the potential jurisdictional problems and other concerns expressed by the State, local governments, and other commenters during the decision process and determined that over 4,000 acres of the Nation's proposed land would not be accepted in trust. Interior explained that 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. The chosen parcels are located around the Nation's Turning Stone Resort & Casino and around the thirty-two acre territory that the Nation never lost to New York. Id. Interior decided 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. 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. 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.

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 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

The Towns seek summary judgment on the ground that Interior failed to consider jurisdictional problems entailed by taking land into trust for the Nation. However, the decision regarding which parcels to accept and which to reject was guided by a desire minimize jurisdictional problems. Moreover, the ROD demonstrates that Interior thoroughly considered potential jurisdictional impacts and the Towns fail to meet their burden of establishing that DOI's consideration was arbitrary and capricious. The Towns also complain that Interior failed to consider tax impacts of the trust acquisition, but again the ROD belies this. Interior has considered the specific issues Plaintiffs raise with regard to both tax and jurisdictional impacts and that consideration was neither arbitrary nor capricious. That is all that is required of DOI by both its own regulations and the APA. Finally, the Towns allege that Interior should have treated Nation land as if it were off-reservation and applied its off-reservation land-to-trust regulations. However, as Interior concluded, the subject land is within the Oneida Reservation and the Nation is entitled to exercise government jurisdiction over that Reservation. Interior has considered the specific issues Plaintiffs raise and that consideration was neither arbitrary nor capricious.

VI. ARGUMENT

A. Interior Properly Considered the Jurisdictional Impacts of its Decision

The Towns contend that Interior acted arbitrarily and capriciously by failing to consider problems derived from "checkerboarding." "Checkerboarding" refers to the mixing of lands primarily under Federal jurisdiction as Indian country with parcels of land under State and local jurisdiction. The Towns cite Supreme Court decisions in which the Court acknowledges the jurisdictional problems deriving from checkerboarding. Dkt. No. 64-9 at 6-9. However, none of these cases cite a relevant rule of decision in this context because none of them address the controlling federal statute at issue here, the IRA, or Interior's land-to-trust regulations which implement the intent of Congress as expressed in the IRA. Instead, these cases all turn on the Court's conclusion that certain interpretations of other federal statutes and treaties that result in checkerboarding likely run counter to the intent of Congress. See Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479 (1976) ("Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area."); Hagen v. Utah, 510 U.S. 399, 420-21 (1994) ("our conclusion that the statutory language and history indicate a congressional intent to diminish [the Uintah Indian Reservation] is not controverted by the subsequent demographics of the Uintah Valley area"); Solem v. Bartlett, 465 U.S. 463, 471-72 (1984) ("we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers"); DeCoteau v. Dist. County Court for Tenth Judicial Dist., 420 U.S. 425, 449 (1975) (Court's task not to adjudicate "competing pleas" as to who should exercise jurisdiction because "[i]n the 1889 Agreement and the 1891 Act ratifying it, Congress and the

tribe spoke clearly"); Seymour v. Superintendent, 368 U.S. 351, 358 (1975) ("[s]uch an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid"). Thus, they are inapposite.

The Towns are correct that the Court in City of Sherrill v. Oneida Indian Nation disapproved of checkerboarding "created *unilaterally* at the [Oneidas'] behest." 544 U.S. 197, 219-220 (2005) (emphasis added). As the Court explained, the Oneida Reservation was largely acquired by the State of New York in violation of federal laws and treaties protecting Nation lands. Id. at 204-05. Because "only Congress can divest a reservation of its land and diminish its boundaries," id. at 215 n.9, the Oneidas (joined by the United States) argued that lands acquired on the open market in fee by the Nation were returned to their status as Indian lands. Id. at 213. The Court rejected the notion, explaining that "the *unilateral* reestablishment of present and future Indian sovereign control, even over land purchased at market price, would have disruptive practical consequences," and that "[i]f [the Oneidas] may *unilaterally* reassert sovereign control and remove these parcels from the local tax rolls, little would prevent . . . a new generation of litigation to free the parcels from local zoning or other regulatory controls." Id. at 219-20 (emphasis added).

The Court, however, did not reject the notion that the Oneidas could reestablish "sovereign control" over unlawfully lost Reservation land; rather it rejected the notion that the Nation could proceed *unilaterally* in re-establishing its homeland. In fact, the Court noted that Congress, through Section 5 of the IRA, had provided Indians a remedial mechanism to reconstitute lost Indian lands. Id. at 220 (noting that through 25 U.S.C. § 465 "Congress has

provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being"). Moreover, the Court explained, Interior's regulations implementing the IRA "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Id. at 220-221. The Court specifically cited 25 C.F.R. § 151.10(f), the regulation that requires Interior to consider jurisdictional issues in a land-to-trust transfer and which provides the relevant legal standard here for determining whether the Secretary of the Interior appropriately exercised the discretion afforded her by the IRA to accept land into trust.

That regulation requires Interior to inform itself of potential jurisdictional issues and land use conflicts but does not preclude it from accepting land into trust if such potential issues are not solved. South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1009 ("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) (Interior only required to "undertake an evaluation of potential problems," not to "resolve all potential issues."). Although the Towns argue to the contrary, in this instance, Interior did more than consider jurisdictional problems, including the complexities that can derive from checkerboards of Indian and non-Indian jurisdiction.[4] Interior's trust decision was guided by an effort to minimize these problems even though they could not be completely avoided, given the history of the Oneidas' Reservation and the Nation's clear need for land in trust if it was to freely exercise self-governance over any of its reacquired Reservation land.

[4] The Towns fault Interior for not "provid[ing] solutions," Dkt. No. 64-9 at 14, but the regulations, as interpreted by courts, do not require Interior to resolve jurisdictional problems before accepting land in trust; Interior is only required to assess potential jurisdictional impacts as part of the process of exercising its discretion under the IRA to accept land in trust.

The Nation requested Interior to accept in trust all 17,000 plus acres of the lands it held in fee. Those lands lay within two Counties and within the bounds of the Nation's Reservation. FEIS at 2-10, AR020220 (map of Nation lands proposed for trust acquisition). While many of the parcels were contiguous, some were not. Interior noted that the local governments contended that the properties were not contiguous because the "Nation selected prime properties" in reacquiring lands lost to the State, while the Nation explained that "the local governments preferred that the Nation not buy up lands in a concentrated area" resulting in a strategy to reacquire "reasonably contiguous parcels in several land groupings distributed among Madison and Oneida Counties." ROD at 56.

Interior considered a range of alternatives. Alternative A, which involved accepting all the Oneida land into trust, would have maximized the land subject to the Nation's sovereignty but at the expense of not addressing local government concerns about checkerboarding. ROD at 14-15. Other alternatives better addressed the problem of checkerboarding by reducing the amount of Nation land to be taken into trust, at times severely (see Alternatives E, G, and H; ROD at 16-18), but would have adversely impacted the Nation's ability to maintain a self-governing homeland. Interior chose Alternative I which "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." ROD at 19.

As Interior explained, "[m]ost relevant to this determination was the local government stress on contiguity, and their request . . . to focus any trust acquisition on the Casino-Resort and Government-Cultural areas." Id. Interior selected parcels such that 211 of the 234 chosen are contiguous to at least one other parcel and "many others are separated by only a few non-Nation

properties." Id. At the same time, Interior declined to include over 4,000 acres of land proposed for trust status, guided in large part by the same desire to maximize contiguity and minimize jurisdictional impacts of the acquisition. Id. at 19; see also FEIS 2-44, AR020254 (map of Nation lands selected for trust acquisition with rejected parcels outlined in gray and not colored).

Plaintiffs' argument proceeds by itemizing potential jurisdictional problems without reference to the ROD or the FEIS. Dkt. No. 64-9 at 10-13. The Towns must do more than reiterate their jurisdictional concerns to this Court; they must show that Interior either did not consider those concerns or that its consideration was arbitrary and capricious, something they have not done and would not be able to do, given Interior's analysis of this issue. Overton Park, 401 U.S. at 416 (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").

The Towns complain about the water consumption demands of Turning Stone. Dkt. No. 64-9 at 11-12. Interior considered comments addressed to that issue, ROD at 62-63, and noted specifically with regard to Turning Stone that

> the Nation financed the construction of a multi-million dollar water and sewer line and water tower, conveyed them to the Town of Verona, and now pays user fees along with other users . . . . Further, the Nation has offered to contribute $10 to $11 million to the development of a new water system in Oneida County that would serve several towns and help to alleviate water supply issues.

Id. at 58.[5] Interior reasonably concluded that these facts demonstrate the Nation's "willingness and ability to cooperate" with regard to issues of mutual concern to it and its local government neighbors, including water supply. Id. at 57.

[5] Interior explained that "[d]evelopment of the system, however, has been delayed due [to] the New York State processes and procedures." ROD at 58.

Plaintiffs also complain that the Town of Verona's volunteer fire department is responsible for Turning Stone and that the trust decision means the Nation will not have to support that department through tax payments. Dkt. No. 64-9 at 12. The Nation has paid $652,978 to the Verona Fire District since 1993. FEIS 3-354, AR020646. The Nation's agreement with the Fire District initially provided for $10,000 in 1993. However, the amount provided has increased over the years to its present figure of $100,000. Id. On top of the $100,000 annual negotiated payment to the Verona Fire Department, the Nation, with a BIA grant, is helping to fund a fire safety and training program for all fire departments participating in the Fire/Rescue Mutual Aid Plan established by the Verona Fire Department to respond to emergencies at Turning Stone. FEIS 3-355, AR020647. Moreover, with partial funding from BIA, the Nation has hired its own fire marshal. ROD at 58. The Nation's past history of dealing with the Verona Fire District and its present agreement with that District provided a reasonable basis for Interior to conclude that cooperative agreements, including contributory payments, address jurisdictional issues of mutual concern like fire protection.

Plaintiffs also allege the trust decision will disrupt their land use plans and zoning ordinances. Dkt. No. 64-9 at 12-13. Interior has considered the Nation's land use and noted that "about 90 percent of the [Nation's] land usage is agricultural, residential, or vacant." FEIS 4-290, AR021269. The Nation's non-conforming land use centers primarily around the Turning Stone resort and member housing. FEIS 4-290-91, AR021269-70. Moreover, "where zoning non-conformance has occurred there has been no adverse effects evident on adjacent land uses." Id. at AR021270. Accordingly, Interior reasonably concluded that "[t]he present use and condition of Nation lands is representative of conditions in the reasonably foreseeable future." Id.; see also ROD at 59 (discussing consistency of Nation land use). With regard to Turning

Stone, Interior recognizes that it is "not congruous with surrounding land uses," FEIS 4-299, AR021278, but also stressed that "this facility was constructed prior to *City of Sherrill* and that it is a key aspect of an enterprise that is essential to the self-sufficiency of the Nation and to the economic well-being of the surrounding community," ROD at 59.

When Plaintiffs do engage the ROD, their critique is superficial and off-point. Plaintiffs object to Interior's finding that "the Nation's past and current management and use of its land" provide grounds for concluding there will not be "significant" future jurisdictional impacts from placing the land in trust. ROD at 21; Dkt. No. 64-9 at 15. As Interior explained:

> Prior to the decision in *City of Sherrill*, the Nation managed its lands under Nation laws. Section 3.9.5 and 4.9.5 of the Final EIS analyzing the Nation's management of its lands show that there have not been significant adverse effects on environmental resources. In addition, Sections 3.2, 3.8.6, 4.2, and 4.8.6 of the Final EIS analyzing land resources and land use show that the permitted uses of Nation lands under Nation law are generally consistent with the uses of surrounding non-Nation lands. The Nation is using most of its re-acquired lands for the same purposes for which the lands were used prior to re-acquisition, with the primary exception being the Turning Stone Resort & Casino.

ROD at 21. In other words, Interior reasonably noted that the Nation had been governing its own lands in the years prior to Sherrill, and for the most part the jurisdictional problems posed by this self-government have been minimal. The Nation's present and past land management is discussed in detail in the ROD's discussion of 25 C.F.R. § 151.10(f). ROD at 55-69.[6]

[6] The Towns, while objecting to Interior's reasoning here, fail to offer any alternative approach other than asserting the overly simplistic argument that checkerboarding must cause jurisdictional problems which, in turn, precludes taking land in trust. In any event, Interior must consider potential, real, jurisdictional problems arising from the trust decision, but it does not have to engage in speculation. See Kansas v. Acting S. Plains Reg'l Dir., BIA, 53 IBIA 32, 38 (Feb. 11, 2011) ("The State's fear that zoning may change in the future is entirely speculative, and the Regional Director cannot rest his decisions on matters of speculation.").

Plaintiffs also complain that the Nation constructed and now operates its golf courses (and other operations) without local and State regulatory oversight. Dkt. No. 64-9 at 13, 17. As noted above, the fact that the Nation, prior to Sherrill, did not comply with local laws and regulations does not indicate environmental irresponsibility but, rather, the Nation's position that it was entitled to govern its Reservation lands. The Nation has a sovereign interest in environmental stewardship of its own lands and can provide regulatory oversight through enactment and enforcement of its own laws, ordinances and regulations. Moreover, the Nation will be subject to all applicable federal environmental requirements. Interior specifically considered the Nation's pesticide management practices on its golf courses, noting that they comport with Federal standards and that the golf courses were designed with "turf grass varieties . . . that require less chemicals, fertilizers, and water." ROD at 64-65. In addition, Interior noted that "several of the Nation's golf courses . . . are eco-friendly Certified Bronze Audubon Signature Sanctuaries, which meet standards for protecting water quality, conserving natural resources, and providing wildlife habitats." Id. at 61. The FEIS specifically addresses the Storm Water Control Measures utilized in the construction of Nation golf courses and noted that for "some of the Nation's golf courses the performance of storm water mitigation measures is monitored, reviewed annually, and certified under the Audubon International Signature Program" which "signifies the Nation's attitude toward protecting the environment for future generations." FEIS 3-58, AR020345.

Interior reasonably concluded that the Nation's past and present management of its lands, and the applicability of federal environmental requirements, suggest that there will not be a regulatory "gap" on lands placed in trust because the Nation is quite capable of sound and responsible management of its own lands. "Overall, placing the Subject Lands into trust is not

anticipated to make management significantly more difficult, because the Nation will assume jurisdiction over the lands and is prepared to do so, as evidenced by its past management of these lands." ROD at 69.

Finally, the Towns draw a quote out of context from a March 30, 2006 Memorandum from a DOI employee to the NEPA contractor which, two years before the ROD issued, offered "ideas that may be useful to keep in mind" in preparing the DEIS. ARS005037-42 at ARS005037 (attached as Exhibit 1 to the Affirmation supporting the present brief).[7] Dkt. No. 64-9 at 19. The Towns assert this document evidences a dismissive attitude towards jurisdictional concerns. Dkt. No. 64-9 at 19. First, the document is preliminary and deliberative in nature; it is the ROD that reflects Interior's final considered position. Second, the memo is not dismissive of jurisdictional concerns. Rather, cogent reasons are offered for these preliminary views expressed by the DOI employee, even if the Towns disagree with those views.[8] Regardless, the ROD is the document that offers Interior's final analysis of jurisdictional concerns and, as discussed above, its detailed consideration easily meets the APA's standards and therefore should be upheld.

[7] The bates number prefix "ARS" stands for Administrative Record Supplement. See Dkt. No. 41 (Noting Supplement to Administrative Record filed and maintained on disk in the Clerk's Office).

[8] For example, while the memo does find concerns regarding utilities not dispositive, that is because "Utility easements recorded with a deed are transferred with a deed when recorded by the BIA. The Nation's use of utilities can be freely negotiated with the local utility boards. The Nation has to pay for the use of utilities just like any other facility or service can be discontinued." ARS005037. The memo also notes the concern of local governments about "the loss of jurisdiction . . . . impact[ing] their ability to manage and control the property," but observes that such lands can "be just as well managed by an Indian Nation." Id.

B. Interior Properly Considered Tax Impacts

Plaintiffs claim Interior failed to adequately consider jurisdictional impacts. To develop that claim, they allege that Interior failed to consider the impacts of removing trust parcels from local government tax rolls.[9] Dkt. No. 64-9 at 10-11; 20. However, tax impacts are not considered as part of Interior's jurisdictional analysis under 25 C.F.R. § 151.10(f). Instead, they are considered under 25 C.F.R. § 151.10(e) which requires Interior to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."[10]

The ROD adequately considered potential impacts on local communities that might result from placing the land in trust, devoting fifteen pages to their discussion. ROD at 40-55 (tax impacts); ROD at 45-46 (tax impacts on individual towns, villages, and school districts). Interior, in accord with its regulations, 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.[11] Id. at 40. Plaintiffs do not really challenge Interior's

[9] Plaintiffs allege that the Nation refuses to pay taxes as a "by-product" of Interior's decision to accept land in trust, but the tax dispute between the Nation and local governments long preceded the Nation's trust application with Interior.

[10] Moreover, as the Supreme Court has made clear, checkerboarding does not pose a problem for tax assessment purposes because that is carried out on a "parcel-by-parcel" basis already. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 265 (1992).

[11] 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.

consideration of tax impacts so much as simply itemize the tax losses they believe they will suffer if land is placed in trust.[12] It is not enough, however, for Plaintiffs to simply express their dissatisfaction with Interior's decision. "In order to meet [their] burden of proof . . . [plaintiffs] must present evidence that the agency did not consider a particular factor; it may not simply point to the end result and argue generally that it is incorrect." South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 800 (8th Cir. 2005). Their burden is to demonstrate that Interior's consideration of tax impacts was arbitrary and capricious. South Dakota v. U.S. Dep't of Interior, 775 F. Supp. 2d 1129, 1143 (D.S.D. 2011) (DOI's analysis of tax impacts should be upheld as long as it is "sufficient and supported by a rational basis").

Interior has considered these tax impacts as well and balanced them against the Nation's overall fiscal contributions to the region which impact local government tax receipts both directly and indirectly.[13] ROD at 45-48. Against property tax 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." Id. at 47. Interior concluded that the Nation contributed $16.76 million more to the State and local governments than they

[12] Moreover, Plaintiffs' figures are derived from the Nation's non-payment of taxes in all the properties in each jurisdiction. Dkt. No. 64-9 at 10-11. But not all Nation properties are going into trust and, therefore, Plaintiffs are not identifying tax losses due to the trust decision but tax losses due to the tax dispute which preceded and is separate from Interior's decision to take land into trust. For tax impacts of the trust decision on individual jurisdictions, see ROD at 45-46.

[13] Interior considered three scenarios, one of which accepted the Town of Verona's inflated tax figures at face value even though the alleged tax losses claimed by the Town presume an ability to tax the Nation's gaming enterprise, something that, as Interior noted, is "contrary to the spirit, purpose, and letter of IGRA," and which results in the absurdity of the Nation "being assessed taxes that surpass individual budget items of the Town (e.g., the Nation's share of the $142,844 fire protection budget is $539,359)." ROD at 51, 52.

expended to provide it with services, and it estimates that even with the lands Interior proposes to take in trust, the State and local governments will continue to receive a net benefit. Id. at 48-49. Interior noted, however, that accepting the Town of Verona's assessment of the casino tax lot at face value (in spite of the fact that IGRA prohibits such taxation) would result in a net loss for the Town of Verona. Id. at 49. While recognizing that individual jurisdictions might suffer a net loss of revenues, Interior "determined that the benefits to the Nation of acquiring the Subject Lands in trust outweigh these impacts." Id. at 50. Thus, Interior considered all potential tax impacts of its decision.

The Towns complain that the Nation is avoiding its responsibility to pay property taxes to support local schools. Dkt. No. 64-9 at 11. That is untrue. In considering the Nation's trust application, Interior noted that the Nation has made payments to local governments totaling $38.5 million since 1995 and concluded that "[i]t can reasonably be expected that the Nation will continue to pay local governments for services provided." ROD at 47. With regard to schools, the Nation instituted the Silver Covenant Grant Program in 1996 as a vehicle to provide funds to local school districts to pay for school salaries, equipment, programs, and services. FEIS at 3-343-44, AR020635-36; 3-347, AR020639. The program was extended in 1998 to provide funds to municipalities. FEIS 3-343, AR020635. Between 1996 and 2005, the Nation voluntarily contributed $7.7 million to local schools and government. Id.[14]

[14] The Silver Covenant program ended when, after Sherrill issued, local governments sought to foreclose on Nation land for failure to pay taxes. Those same governments, while benefitting from the Nation Silver Covenant payments, did not credit those payments against the taxes they demanded from the Nation. FEIS at 3-344, AR020636. Nevertheless, the same incentives that compelled the voluntary payments in the past will compel them in the future – the fact that the Nation must live with its neighboring governments.

C. Interior properly treated the Oneida lands as within the Oneida Reservation

The Towns allege that Interior erred in treating the land proposed for trust as within the Oneida Reservation. Dkt. No. 64-9 at 17-21. The Towns note that Interior's land-to-trust regulations define reservation as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f). In effect, the Towns argue that if the Nation does not have governmental jurisdiction over the lands to be taken into trust, then Interior cannot treat those lands as reservation lands.

However, the United States does recognize the Oneidas as having governmental jurisdiction over their Reservation lands. The Treaty of Canandaigua, 7 Stat. 44, provided federal recognition of the Oneida Reservation and accordingly recognized the Oneidas' right to exercise governmental jurisdiction over that Reservation. That Reservation exists today, as recognized by the Second Circuit. Oneida Indian Nation of New York v. Madision County, 665 F.3d 408, 443-44 (2d Cir. 2011) ("It remains the law of this Circuit that the Oneidas' reservation was not disestablished.") (internal quotations omitted). The Nation's ability to actually exercise its governmental rights over its reservation lands may presently be impaired for equitable reasons, see Sherrill, 544 U.S. at 221, but that does not mean those rights or the Nation's Reservation no longer exist.

The Towns contend that Interior's treatment of the subject lands as on-reservation is relevant because a different regulation applies to applications to place off-reservation land in trust. 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"). The difference between the criteria is that for off-reservation acquisitions, the Secretary must also consider the "location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation," with greater scrutiny being given to the tribe's justification of benefits from the acquisition the further the land lies from the tribe's reservation. 25 C.F.R. § 151.11(b). The Secretary must also "give greater weight to the concerns raised" by state and local governments regarding the impacts of removing the land from the tax rolls and potential jurisdictional conflicts. Id.

However, even if the Towns were correct that Interior erred in treating the application as an on-reservation application, it would not matter because, as Interior explained in the ROD, it "has given thoughtful consideration both to the Nation's justification for placing lands into trust and to the concerns raised by New York State and local governments," and "even if the off-reservation criteria applied to the Nation's fee-to-trust request, Interior would still acquire the Subject Lands in trust." ROD at 33 n.5.

D. The Court should not defer deciding this case

The Towns finally argue the Court should defer deciding summary judgment motions while they pursue a state court case attacking the settlement agreement approved by this Court in New York v. Jewell, 6:08CV644. Dkt. No. 64-9 at 22-25. However, this action, which challenges a May, 2008 decision by Interior and the settlement agreement approved by this Court between the Oneidas, New York, and the Counties of Oneida and Madison are separate matters. Regardless of the outcome of the Towns' state court proceeding, this Court will have to rule on the Towns' APA challenge to Interior's land-to-trust decision. The state court action provides no basis for delaying resolution of this case. Indeed, the merits of the case are questionable in light

of this Court's own ruling (after the case was removed to federal court) that Plaintiffs cannot establish standing to bring any of their federal claims. Town of Verona v. Cuomo, 2013 WL 5839839 (N.D.N.Y. October 30, 2013).[15]

VII. CONCLUSION

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

[15] It is worth noting that the settlement agreement resolves most of the jurisdictional and tax disputes that have separated the Oneidas from their neighbors. See New York v. Jewell, Dkt. No. 319-2 (settlement agreement incorporated in the Court's Order of dismissal). The settlement agreement resolves the tax foreclosure litigation and establishes mutually agreeable terms on which the Nation will be subject to taxation. Id. at § V. It also resolves jurisdictional issues, defining and limiting the lands over which the Nation may assert sovereignty, and providing for coordination of Nation and Oneida County police services. Id. at § VI(B)-(C). Finally, the agreement provides for a Nation payment to the State, a significant portion of which is to be distributed to the County of Oneida where the Towns are located. Id. at § III(B). Even the Towns concede they will benefit from this agreement, although they do this backhandedly through their complaint about a waiver of an "exclusivity" provision in the settlement agreement that may affect the size of the Nation's payments to the State and Counties, in which the Towns see themselves as having an interest. Dkt. No. 64-9 at 23-24.

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Respectfully submitted,

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Certificate of Service

I, Steven Miskinis, hereby certify that on April 1, 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.

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