UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

UPSTATE CITIZENS FOR EQUALITY, INC., DAVID VICKERS, SCOTT PETERMAN, RICHARD TALLCOT, AND DANIEL T. WARREN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

CIVIL ACTION NO.
5:08-cv-00633-LEK-DEP

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

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I. INTRODUCTION

In May 2008, the Department of the Interior ("DOI" or "Interior") determined to take 13,003.89 acres of land into trust for the Oneida Nation of New York ("Oneidas" or "Nation"). That decision occurred prior to the issuance of Carcieri v. Salazar, 555 U.S. 379, 381 (2009). As a result, DOI did not undertake a Carcieri analysis of the Oneidas. In its Order of September 24, 2012, this Court remanded this case to Interior for further proceedings to determine whether the Nation was under federal jurisdiction in 1934 and therefore eligible to have land taken into trust pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 et seq. ("IRA"). Dkt. No. 65. Interior has concluded that the Nation was under federal jurisdiction in 1934. Dkt. No. 76-1 Amendment to the May 20, 2008 Record of Decision for Oneida Indian Nation of New York Fee-to-Trust Request (adopting Determination of Whether the Oneida Indian Nation was Under Federal Jurisdiction in 1934) ("Opinion"). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants United States of America; S.M.R. Jewell, Secretary, United States Department of the Interior, Michael L. Connor, Deputy Secretary of the Interior; Elizabeth J. Klein, Associate Deputy Secretary of the Interior; and the United States Department of the Interior by undersigned counsel, now submit this Memorandum in Support of Summary Judgment.[1] For the reasons described below, and based on the May 2008 Record of Decision as well as the December 2013 Amendment to that Record of Decision and their accompanying

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

administrative records, Plaintiffs' surviving claims challenging this administrative action should be denied and their complaint dismissed.[2]

II. BACKGROUND

A. Statutory and Regulatory Background

Section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary of the Interior, "in h[er] discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." Section 5 further provides that any such lands acquired by the Secretary "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian," and "shall be exempt from State and local taxation." Congress enacted the IRA in 1934 in large part to reverse the "failure" of its earlier allotment policy, reflected in the General Allotment Act, 24 Stat. 388 (1887), Hodel v. Irving, 481 U.S. 704, 708 (1987), and similar policies that stripped tribes of their lands. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 254 (1992).

The allotment policy and similar policies designed to strip tribes of their lands "proved disastrous for the Indians." Hodel, 481 U.S. at 707; see Hagen v. Utah, 510 U.S. 399, 425 n.5

[2] For this brief, Interior's May 20, 2008 Record of Decision is "ROD" and may be found at Dkt. No. 57-4. 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. 54. The Carcieri Opinion adopted by the Amendment is "Opinion" and may be found at Dkt. No. 76-1. Page references correspond to the pagination of the Opinion, not the ECF pagination. References to documents in the administrative record supporting the Amendment and Opinion are by document number ("Doc.") and then by page number in the form "Amended Rod 000000." The administrative record for the Amendment and Opinion was provided to the Court on disk which contains an index identifying documents by number with hyperlinks to the document. The filing of the administrative record is acknowledged at Dkt. No. 74.

(1994) (Blackmun, J., dissenting) (noting that "[t]he 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934"). That policy came to an "abrupt end" in 1934 with the passage of the IRA, which marked a return to "the principles of tribal self-determination and self-governance" that had characterized federal Indian policy prior to the General Allotment Act era. County of Yakima, 502 U.S. at 255.

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

The IRA has two central goals: (1) "to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains"; and (2) "to enable the tribe to interact with and adapt to modern society as a governmental unit." F. Cohen, Handbook of Federal Indian Law § 1.05, at 81 (Newton ed., 2012). Accordingly, among other things, the IRA expressly discontinued the allotment program (IRA § 1, 25 U.S.C. § 461), and extended indefinitely the periods of the federal government's trust with respect to Indian lands (IRA § 2, 25 U.S.C. § 462). See Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978). As noted above, section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary, in her discretion, to acquire land in trust on behalf of Indian tribes or individual Indians. By authorizing new trust acquisitions, section 5 allows the Secretary to restore or replace the lands and related economic opportunities that were lost

through the allotment and other governmental policies that sought to dispossess tribes of their ancestral lands. See Mescalero Apache Tribe, 411 U.S. at 151; South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 798 (8th Cir. 2005).

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

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

The Part 151 regulations state a general policy regarding trust acquisitions (id. § 151.3) and specify particular factors that guide the Secretary's review of land acquisition requests (id. § 151.10(a)-(h)). Those factors include, among other things: "the need . . . for additional land"; "the purposes for which the land will be used"; "the impact on the state and its political subdivisions resulting from removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." Id. § 151.10(b), (c), (e), and (f).

B. The Challenged Action

Plaintiffs, Upstate Citizens for Equality, Inc., David Vickers, Scott Peterman, Richard Talcot and Daniel T. Warren (collectively, "UCE"), have brought an Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, challenge to Interior's May 20, 2008 decision to accept 13,003.89 acres of land into trust for the benefit of the Nation.

The administrative process leading to the 2008 decision began with the April 4, 2005 land-to-trust application by the Oneidas requesting 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. 57-4 (Oneida Record of Decision). An Environmental Impact Statement ("EIS") was not mandated under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370, because the Nation planned no change in the use of its lands and the expected environmental impacts of the acquisition would therefore be negligible.[3] Nevertheless, Interior opted to issue an EIS addressing environmental and other impacts of the proposed trust acquisition "to ensure that the Nation's fee-to-trust request received the most thorough environmental review available under NEPA." ROD at 9. The BIA issued a Notice of Intent to prepare an EIS on December 23, 2005 in the Federal Register. 70 Fed. Reg. 76325. Scoping meetings were held on January 10 and 11, 2006, and comments were received from cooperating

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

agencies, government agencies, the public, tribal entities, and other interested parties through January 23, 2006. ROD at 9. On March 2, 2006, the BIA held a public meeting in the City of Utica, New York, to describe the land-to-trust process and NEPA. Id. The Scoping Report was issued on July 28, 2006. Final Environmental Impact Statement ("FEIS") at ES-2, AR020152.

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

DOI announced issuance of a DEIS on November 24, 2006 through a Federal Register notice and 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, and another in the Town of Verona on February 6, 2008. Id. at 7. After considering all public comments provided on the DEIS, Interior issued a FEIS on February 22, 2008. The release prompted another comment period of thirty days during which additional comments were accepted. Id. at 10.

In the FEIS, Interior considered nine reasonable alternatives, ranging from accepting the full 17,370 acres to accepting no land at all. Id. at 7. On May 20, 2008, DOI issued a ROD in which it determined to accept 13,003.89 of the proposed 17,370 acres into trust. Interior explained that prior to issuing its decision, it had conducted a parcel-by-parcel review of the land proposed for trust acquisition, and had considered the DEIS and FEIS, as well as comments received from the public, federal agencies, State agencies, local governmental entities, and other potentially affected Indian tribes. Id. The ROD reflects Interior's consideration of these

materials and its analysis of the Nation's application under Section 5 of the IRA, 25 U.S.C. § 465, and the land acquisition regulations, 25 C.F.R. Part 151. Id.

Interior explained that the Oneidas' need the land "for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth by providing a tribal land base and homeland." Id. at 8. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping than the Proposed Action." Id. at 19. Interior chose parcels located around the Nation's Turning Stone Resort & Casino and around the thirty-two acre territory that the Nation never lost to New York.[4] Id. Interior determined to acquire in trust two highly contiguous clusters of land in order to minimize jurisdictional and other problems, but recognized that complete contiguity was neither practical nor reasonable. Id. at 56. DOI's focus on contiguity and the minimization of governmental and jurisdictional problems resulted in the rejection of over 4,000 acres originally proposed by the Oneidas for trust acquisition. The land to be taken in trust comprises only 1% of the land in Madison County and 1.1% of the land in Oneida County. Id. Madison and Oneida Counties, along with the State of New York, recently entered a settlement withdrawing their objections to the trust acquisition at issue here. This Court approved the settlement on March 4, 2014. New York v. Jewell, 6:08CV644-LEK-DEP Dkt. No. 341.

C. Prior Proceedings

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

Plaintiffs filed suit challenging this action on June 16, 2008, Dkt. No. 1, and subsequently filed an Amended Complaint on January 29, 2009, Dkt. No. 35 ("Compl."). On October 24, 2008, the United States moved for partial dismissal of Plaintiffs' original complaint. Dkt. No. 23. On April 13, 2009, the United States moved for dismissal of the supplemental claims in the Amended Complaint. Dkt. No. 45. The Court granted both motions in a Memorandum-Decision and Order dated March 4, 2010. Dkt. No. 49. That Order dismissed several claims from Plaintiffs' original complaint, including constitutional challenges to the IRA, claims alleging the Turning Stone Casino operates in violation of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, a challenge to a DOI letter concerning the Nation's gaming compact, and a claim seeking a writ of mandamus against Interior. Dkt. No. 49 at 7-26. In that Order, the Court also dismissed a claim challenging Interior's December 30, 2008 acknowledgment of administrative custody over an 18 acre parcel transferred to it by the General Services Administration to be held in trust for the Oneidas. Dkt. No. 49 at 27-30.

On November 15, 2011, UCE and the Federal Defendants both moved for summary judgment on the remaining claims in UCE's Complaint. Dkt. No. 58 (Plaintiff motion); 57 (Defendant motion). By Order dated September 24, 2012, this Court denied both motions and remanded to Interior to determine in the first instance whether the Oneidas were under federal jurisdiction in 1934 and therefore eligible to have land placed in trust under the IRA. Dkt. No. 65. In declining to address that issue *de novo* and remanding to the agency tasked by Congress with implementing the IRA, the Court recognized that DOI "has specific expertise that the Court lacks." Id. at 31. The Court further explained that "one of the primary reasons that courts defer to and that so much responsibility is delegated to agencies is that agencies possess unique

expertise and a special set of skills that allows them to address certain statutory claims both accurately and efficiently." Id. at 32.

D. Interior's Carcieri Opinion

On December 23, 2013, Interior issued an Amendment to the 2008 ROD that adopted as the agency's decision a Carcieri Opinion ("Opinion") prepared by the Office of the Solicitor to determine whether the Oneidas were a recognized tribe under federal jurisdiction in 1934. Opinion, Dkt. No. 61-1. Prior to making a decision on this issue, Interior afforded the parties to all the related cases an opportunity to submit materials – whether historical or argumentative – to the record and to respond to the submissions of other parties. Opinion at 2. Interior reviewed and considered all the submissions prior to issuing its Carcieri decision.

Interior concluded that the Oneidas were under federal jurisdiction in 1934 because "the Oneidas voted in an election called and conducted by the Secretary . . . pursuant to Section 18 of the IRA on June 18, 1936." Opinion at 3. That fact alone, Interior concluded, was dispositive. Nevertheless, given the unique posture of the remand and arguments raised during that process, Interior further noted that "notwithstanding the IRA vote, additional federal actions, either in themselves or taken together, establish that the Nation was under federal jurisdiction prior to 1934 and retained this status in 1934." Id. These actions include: federal treaties with the Oneidas, including the Treaty of Canandaigua, 7 Stat. 44, which placed the Oneida Reservation under federal protection; the ongoing distribution of cloth to the Oneidas pursuant to the Treaty of Canandaigua, as well as affirmative litigation brought by the United States on behalf of the Nation to protect Nation land in the years immediately preceding enactment of the IRA. Id.

UCE participated in the agency proceedings by submitting comments which Interior considered and rejected. Opinion at 39-40.

III. STANDARD FOR SUMMARY JUDGMENT

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

IV. REVIEW OF AGENCY ACTION UNDER THE APA

Section 706(2)(A) of the APA permits a court to set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." This standard encompasses a presumption in favor of the validity of agency action. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) ("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. 1992) (same). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (same); Shalala, 34 F.3d at 1167 (same).

V. SUMMARY OF ARGUMENT

This Court directed Interior to amend the Record of Decision and supplement the Administrative Record with findings and conclusions regarding whether the Oneidas were under federal jurisdiction at the time of the IRA's enactment. Dkt. No. at 36; 44-45. Interior has done so, and its Carcieri decision is entitled to Chevron deference from this Court. That decision concludes, among other things, that the Oneidas were under federal jurisdiction in 1934 by virtue of the federal government conducting an IRA vote, which alone makes the fact of federal jurisdiction incontrovertible. Because UCE cannot show, as it must under the APA, that Interior's conclusion is either arbitrary or capricious, that decision should be upheld. As DOI explained, the fact that the Secretary called a vote by the Oneidas on whether the IRA would apply to them in 1936, two years after the IRA was enacted and within the statutorily allotted time-frame for holding votes among tribes eligible for the Act's benefits, is dispositive of the question. That shows the Secretary regarded the Oneidas as under federal jurisdiction and moreover makes Plaintiffs' effort to reopen the question untimely. Even if that vote were ignored, there can be no real question that the Oneidas were under federal jurisdiction in 1934. In response to a number of arguments raised by parties that participated in the remand and challenged the Nation's under federal jurisdiction status, Interior confirmed that the Oneidas are

a successor tribe to the historic Oneida Nation that signed the Treaty of Canandaigua with the United States in 1794, as well as earlier treaties with the United States. Their Reservation has never been disestablished, as confirmed by the Second Circuit, and their right to that land, and the federal supervision of that land, was affirmed in litigation brought by the United States on the Nation's behalf in the years preceding the IRA's enactment. UCE participated in the agency process leading to the Carcieri Opinion, and its arguments should be rejected here for the same reason they were rejected by Interior.

As for Plaintiffs' complaint, only three counts remain, with each of those counts consisting of a multitude of claims, many of them alleged in conclusory fashion. UCE's first remaining count alleges that Interior lacks authority to place land in trust, even though none of the authorities cited by UCE stands for that proposition. UCE also alleges that the IRA does not apply to the Oneidas or to land in New York, arguments already rejected by this Court. UCE's second count alleges that neither the Constitution nor New York State laws provide authority for Interior to remove land entirely from state jurisdiction, a claim that is contrary to long standing federal law. Plaintiffs' third count likewise consists of a hodgepodge of meritless claims. First, UCE contends that the current leader of the Oneida Indian Nation of New York was removed in 1995, even though this Court is without jurisdiction over internal tribal matters. UCE also asserts that Interior failed to consider their comments during the administrative process leading up to the May 2008 ROD, an allegation belied by the Administrative Record. UCE also contends that the BIA is biased because it deals with Indian concerns, notwithstanding that Congress statutorily tasked it with precisely that responsibility. Finally, UCE broadly and vaguely alleges that Interior failed to adequately consider all the factors it is required to consider in its land-into-trust regulations before placing land in trust. As discussed below, none of these

claims have merit and the ROD demonstrates that Interior properly accepted the parcel at issue into trust.

VI. ARGUMENT

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

Section 5 of the IRA provides that the "Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians." 25 U.S.C. § 465. In turn, the IRA defines Indians, in pertinent part, as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Interior determined that the phrase "under Federal jurisdiction" is ambiguous and requires a two-part inquiry and the Oneidas meet the requirements of that inquiry. DOI's reasonable interpretation of the IRA is consistent with the Carcieri decision and the statutory text and is entitled to Chevron deference. Further, Interior's application of its test to the Oneidas and resulting conclusion that the Nation was "under Federal jurisdiction" at the time of the IRA's enactment is factually and legally correct, entitling the Federal Defendants to summary judgment.

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

a. The Chevron Standard Applies to Interior's Determination

In Carcieri the Supreme Court interpreted the word "now" in the phrase "now under Federal jurisdiction" to mean under federal jurisdiction in 1934. The majority did not elaborate on how a tribe might show that it "was under federal jurisdiction" at the time of the IRA's

enactment because it concluded that the parties in effect had conceded that the Narragansett Tribe was under state, not federal, jurisdiction in 1934. Id. at 395-96.[5]

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction," nor does the legislative history clarify the meaning of the phrase.[6] Opinion at 4. Because the phrase is ambiguous and the statute does not define its meaning, Interior appropriately applied the rule of statutory construction articulated in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), and interpreted the phrase "under federal jurisdiction." Under Chevron, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." Chevron, 467 U. S., at 842.[7] First, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. But "if the

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

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

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

statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

As the Supreme Court recently confirmed, courts must give Chevron deference to an agency's interpretation of a statutory ambiguity concerning the scope of the agency's statutory authority. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1866 (2013). The Court noted that "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." Id. at 1868. The Court stressed that there is no difference between the question of whether an agency exceeded the authorized application of authority and the exercise of that authority. Id. at 1870-71. Therefore, the Court reaffirmed that it has "consistently held 'that Chevron applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'" Id. at 1871 (citation omitted). Under the longstanding principles of Chevron deference, this Court should defer to the Secretary's determination of her jurisdiction and her interpretation of an ambiguous statutory provision.[8]

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

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

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

In articulating the two-part test, DOI reasonably construed an ambiguous statutory phrase in a manner that relied on the Agency's regulatory expertise and was consistent with its past practices and policies. Accordingly, its interpretation and the application of the test to the Oneida Nation are entitled to a high degree of deference from this Court. In any event, the Secretary's determination was neither arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, nor was it in excess of her statutory authority.

The first inquiry in the two-part test is whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions, through a course of dealings or other relevant acts, for or on behalf of the tribe that are sufficient to establish, or that reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Id. at 5-6. Interior explained that some federal actions may in and of themselves demonstrate that a tribe was under federal jurisdiction, or a variety of actions when viewed in concert may achieve the same result. Id. at 6. Once having

established that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether there is evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status remained intact in 1934. Id. As Interior has previously explained, "for some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g. tribes that voted to accept or reject the IRA following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934." Opinion at 7 (quoting Doc. 736 at Amended Rod 011729 n. 99). The Oneidas present such a case.

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

a. The Oneidas' IRA vote

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

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

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

The weight accorded the Oneidas' vote here is consistent with Interior's practice, explained in its Carcieri decision. Id. at 8-9; see also Shawano County v. Acting Midwest Reg. Dir., 53 IBIA 62 (Feb. 28, 2011) (IRA vote dispositive to question of federal jurisdiction); Village of Hobart v. Midwest Reg. Dir., 57 IBIA 4 (May 9, 2013). Moreover, Interior's view of the significance of Section 18 votes has been affirmed by the U.S. District Court for the District of Columbia. Opinion at 9-10 (citing and discussing Stand Up for California! et al., v. U.S. Dep't of the Interior, 919 F. Supp.2d 51 (D.D.C. 2013). As the Stand Up court explained, "it was perfectly reasonable for the Secretary to conclude that any persons voting in an IRA election were . . . adult 'members of [a] recognized Indian tribe now under Federal jurisdiction.'" Id. at 67-68 (quoting 25 U.S.C. § 479) (brackets in original). Interior further considered various arguments attempting to discount the importance of the Oneida vote, but found them meritless. Opinion at 10-14.

b. Other Indicia of Federal Jurisdiction over the Oneidas

Interior made clear that while the IRA vote is alone dispositive as to the Nation's under federal jurisdiction status, the overall record of dealings "between the United States and Oneida .

. . conclusively demonstrate[s] . . . that the Nation was under federal jurisdiction in 1934," whether those dealings are considered "either by themselves or collectively." Opinion at 15. First, DOI noted the long history of federal treaty relations with the Oneidas, focusing on the 1794 Treaty of Canandaigua, but recognizing that treaty-making with the Oneidas extended well into the nineteenth-century with the 1838 Treaty of Buffalo Creek, 7 Stat. 550, and the negotiation of another treaty in 1868 that never received Senate ratification.[9] Opinion at 16-17, 26; Doc. No. 293 (1868 unratified treaty materials). Article 2 of the Treaty of Canandaigua guaranteed federal protection of the Oneida Reservation lands while the Treaty further pledged an annual distribution of cloth to the Oneidas, an obligation the United States fulfilled through the 1930s when the IRA was enacted. Opinion at 16-17. Based on the Treaty of Canandaigua, Interior concluded, "The Oneida were under, and continue to be under, federal jurisdiction by virtue of the treaty relationship between the Nation and the United States, which continues to the present day." Id. at 17.

The State of New York unlawfully acquired the majority of the Oneida Reservation throughout the eighteenth and nineteenth centuries, over the objection of George Washington's administration and in violation of the Non-Intercourse Act, 25 U.S.C. § 177, and the Treaty of Canandaigua which both established federal supervision of Oneida lands. Id. at 15. Nevertheless, the State's actions were neither able to destroy the tribe nor sever its relations with the United States. As DOI explained, in 1915, the United States, exercising its trust and federal supervisory authority, brought suit to recover Oneida land for the benefit of the Oneidas. Id. at

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

17-25 (discussing United States v. Boylan, 265 F. 165 (2d Cir. 1920). In Boylan, the Second Circuit Court of Appeals expressly held that the Oneidas were a tribe under federal jurisdiction, making the United States the proper party to represent their interests in Court. Boylan, 265 F. at 171; Opinion at 18 (discussing holding). As DOI pointed out, Boylan was "decided only fourteen years before enactment of the IRA" and therefore "shows that the Nation was under federal jurisdiction in the early decades of the twentieth century." Id. Specifically, DOI concluded Boylan demonstrates three things relevant to the Interior's Carcieri inquiry: (1) "the Oneida were recognized as a tribe by the United States"; (2) "they had federally protected reservation land"; and (3) "in the years before the IRA, the federal government had numerous dealings with the Oneida Indian Nation as a ward of the federal government." Id. at 19.

Interior acknowledged that some materials submitted to it evidenced confusion within the federal government as to the interplay of federal and state jurisdiction over the Oneidas, but concluded they did not demonstrate that federal jurisdiction over the Oneidas has been extinguished because it is indisputable "that the federal government (specifically, Congress) has plenary authority over Indian affairs," and moreover, such incorrect statements were insignificant when weighed against "the overriding evidence demonstrating a long history of interactions between the Oneida and the federal government." Id. at 21. Moreover, DOI noted "numerous annual reports and census records" prepared by federal agents as part of their duty to oversee Indian affairs in the nineteenth and twentieth centuries "that collectively demonstrate that the Oneida were under federal jurisdiction leading up to 1934." Id. at 26. While the parties, particularly New York and the Counties of Oneida and Madison, raised a host of other arguments which Interior considered, none had merit for reasons explained in the Carcieri decision and provided no basis to alter Interior's conclusion. See e.g., Opinion at 20 (addressing assertion that

the land at issue in Boylan was not tribally owned); *id.* at 22 (addressing assertion that Department of Justice brought Boylan without proper authorization from DOI); *id.* at 24-25, 32 (addressing allegation that the Oneidas lacked a continuous tribal existence); *id.* at 33-40 (addressing arguments opposing the Interior's conclusion).

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

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

In the Carcieri decision, the majority did not address the phrase, "any recognized Indian tribe," that precedes the phrase "under Federal jurisdiction" in the IRA definition of "Indian," but Justice Breyer did in his concurrence. He explained that the word "now" modifies "under federal jurisdiction," but does not modify "recognized," and concluded that the IRA therefore "imposes no time limit on recognition." Id. at 397-98. Because the term "now" does not modify the term "recognized Indian tribe," there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, as Justice Breyer noted, "a tribe may have been 'under federal jurisdiction'" in 1934 even though the Federal Government did not realize it "at the time." Id. at

397 (explaining that the Stillaguamish Tribe, as a signatory to an 1855 Treaty had fishing rights subject to federal protection even though its formal recognition status was not confirmed until 1976). Plaintiffs' assumption, Compl. ¶ 57, that the term "recognized Indian tribe" also carries with it a temporal component dating back to 1934, such that the tribe must have been federally acknowledged (in today's terms) in 1934, is therefore incorrect and contrary to the language of the statute. Interior analyzed the IRA and joined Justice Breyer in concluding that, in the first definition of "Indian" in the IRA, the word "now" modifies the phrase "under Federal jurisdiction," and not the phrase "recognized Indian tribe." Opinion at 30; Cowlitz ROD, Doc. 736 at Amended ROD 011722-011723.

If this Court rejects the argument that "now" only modifies "under Federal jurisdiction," Plaintiffs must still establish that the term "recognition" in the IRA means formal federal recognition in the modern sense and that Interior acted arbitrarily in finding that the Oneidas meet this standard. While Plaintiffs equate "recognition" with the modern definition of federal recognition, Doc. 417 at Amended Rod 007396, Interior has concluded the meaning of the term itself is not so obvious. Again, in the Cowlitz ROD, Interior considered this in detail and concluded "recognized Indian tribe" could mean either in a "cognitive" or "quasi-anthropological" sense – i.e., the fact of tribal existence; or it could mean in a more "formal" or "jurisdictional sense" – i.e., as in a federally recognized tribe.[10] Opinion at 31; Cowlitz ROD, Doc. 736 at Amended ROD 011721-011723. Nevertheless, Interior found that "the Oneida have been recognized since at least 1794," explaining that "the full historical record, including the IRA vote itself, demonstrates that the Oneida have been recognized both in the cognitive and

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

more formal sense for more than two centuries." Id. In other words, the evidence demonstrating the United States held and exercised jurisdiction over the Oneidas also shows that the Oneidas were a federally recognized tribe.

4. Interior considered UCE's comments and properly rejected them

UCE participated in the remand process offering arguments and supporting materials which Interior considered. Docs. 410-417 (November 22, 2012 submissions); Docs. 68-78 (December 12, 2012 submissions); Opinion at 39-40 (discussing UCE's submissions). First, UCE asserts there was no entity called the Oneida Indian Nation of New York in 1934 that was either federally recognized and or under federal jurisdiction. Doc. 417 at Amended Rod 007396. Interior's Carcieri decision addressed those questions and, as discussed above, based on the record before it, Interior concluded otherwise.

Second, UCE asserts that the tribe under federal jurisdiction in 1934 "may have been the Oneida Tribe of Wisconsin." Id. This undeveloped assertion is refuted by all the evidence supporting DOI's conclusion. For example, the 1936 Oneida IRA vote concerned the Oneida Nation of New York, not Wisconsin. See Doc. 268 at Amended Rod 004762 (excerpt of 1936 Annual Report of the Commissioner of Indian Affairs noting that "the Oneida Indians of New York . . . voted on June 18, 1936").

Third, UCE argues that "there is no legitimate link between the Oneida Indian Nation of New York and the entity currently enjoying BIA 'recognition,'" elaborating by noting that "[t]here has never been any 'Mens Council' and Mr. Halbritter has been stripped of legitimate authority. . . ." Doc. 417 at Amended Rod 007396. Interior explained in its decision that arguments premised on the difference between the Nation's present government and the one that it had in 1934 are beside the point because "the United States . . . has officially recognized the

OIN as a successor in interest to the historic Oneida Nation since treaty times . . . . and the Department is not now revisiting the question of the federal recognition of the Oneidas." Opinion at 25 n.168; see also Opinion at 40 n.279 ("Arguments regarding leadership challenges in the late twentieth century are not relevant to the 'under federal jurisdiction' analysis."). Moreover, "tribes may establish their own form of government" and that government may change over time, also without any relevance to the question of whether a tribe is under federal jurisdiction. Opinion at 24.

Fourth, UCE asserts that New York exercises jurisdiction over the Oneidas "except for flawed court decisions to the contrary," referring to the Second Circuit's Boylan decision.[11] UCE argues that any test developed by Interior to assess whether a tribe was under federal jurisdiction should find that where a state exercises primary jurisdiction over a tribe, there can be no finding that the tribe was under federal jurisdiction. Doc. 417 at Amended Rod 007396-97. The assertion of state jurisdiction, however, does not deprive the federal government of jurisdiction over the Oneida Nation. As Interior explained, "despite any deference to the State that had been occurring, the Oneida continued to be under the jurisdiction of the federal government as demonstrated, among other things, by the Department's determination that the Nation was entitled to vote on the IRA." Opinion at 34. Indeed, the Second Circuit itself concluded that regardless of what the State's role in Oneida affairs may be, "the exclusive jurisdiction over the Indians is in the federal government." Boylan, 265 F. at 171. And it bears repeating that the Second Circuit affirmed federal jurisdiction over the Oneidas in 1920 because the United States actively asserted such jurisdiction in the form of the Boylan litigation.

[11] The State and Counties raised numerous arguments before Interior aimed at discounting the significance of Boylan but, as Interior concluded, none of them had merit. Opinion at 19-23.

Moreover, the test applied by DOI here was developed in the wake of the Carcieri decision, has been applied in other cases, and deserves this Court's deference, as discussed above.

UCE's complaint also alleges that the Oneidas were not under federal jurisdiction because they ceased to exist as a tribe by 1934. Dkt. No. 35 at ¶ 56. UCE cites the "Reeves Report," written by John R. T. Reeves, Chief Counsel in the Office of Indian Affairs in 1914. Doc. 284. That report stated that the Oneidas had sold all their land, except 350 acres which had been divided in fee and that "as a tribe these Indians are known no more in that State." Id. at Amended Rod 004905. Interior considered this report and arguments premised upon it, concluding that it "is not an accurate representation of the Oneidas' status in 1934," particularly since it "is directly contradicted by the ruling of the Second Circuit in 1920." Opinion at 33. Moreover, DOI concluded that the report did not reflect the Interior's official view of the Oneidas. Id. Among the reasons for DOI rejecting this notion is that the same year the report was made, 1914, the Commissioner of Indian Affairs listed the Oneidas as a tribe under the jurisdiction of BIA's New York Agency. Opinion at 34; Doc. 372 at Amended Rod 007045 (1914 Report of the Commissioner of Indian Affairs). Indeed, Reeves' own view of the Oneidas changed over time such that by 1936 he was on record stating "The Oneida's of New York ought to be taken in, or let into the I.R.A., -- unless, of course, they vote to exclude themselves." Doc. 283 at Amended Rod 004901.

Moreover, the Second Circuit in Sherrill considered evidence of "a handful of government officials and commentators" opining that the Oneidas were no longer a tribe and rejected it, explaining, "these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in Boylan." Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 167

(2d Cir. 2003) rev'd on other grounds by City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005). Like the Second Circuit, Interior reasonably concluded that confused and incorrect statements regarding the status of the Oneidas in New York provide no basis for concluding that the Nation was not under federal jurisdiction in 1934. Opinion at 34.

B. Summary Judgment Should Be Granted on UCE's First Count

UCE's first count alleges that the federal government lacks authority to place land in trust, relying on City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), and a number of other authorities, none of which stand for that proposition. UCE also alleges that the IRA cannot apply to the Oneidas or to New York land, arguments already rejected by this Court. Finally, UCE complains that the FEIS does not adequately address the factors Interior must consider pursuant to its land-into-trust regulations. Those factors, however, are considered in detail in the ROD.

1. The IRA Provides Authority for DOI to Place Land in Trust in New York

First, UCE asserts that Sherrill, Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), and Oneida Indian Nation of New York v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007), all stand for the proposition that the Federal Government lacks authority to "create federal public domain land or federal Indian land" in New York or any of the thirteen original colonies. Compl. ¶ 109. None of those cases stand for such a broad proposition. Instead of casting doubt on Interior's ability to place land in trust, Sherrill noted that the IRA and its implementing regulations provide the proper way for the Oneidas to establish a land base in New York over which it can exercise its sovereign powers. Sherrill, 544 U.S. at 220-21. Furthermore, this Court has already addressed the applicability of the IRA to New York, explaining that the IRA

"is explicit as to its geographic application and does not exclude New York State," and that the statute's legislative history "provides unequivocal evidence that the statute . . . was, in fact, meant to apply to New York State." City of Oneida, N.Y. v. Salazar, No. 5:08-CV-0648 (LEK/GJD), 2009 WL 3055274, at *5 (N.D.N.Y. Sept. 21, 2009) (citing 25 U.S.C. § 473 and 78 Cong. Rec. 11124, 11125).

Plaintiffs also allege that, absent an Act of Congress to remove land from State jurisdiction, the Secretary lacks authority to remove land from a State's tax base.[12] Compl. ¶ 129. In support of this assertion, Plaintiffs cite Mescalero Apache Tribe, 411 U.S. 145, 157 (1973), and Hynes v. Grimes Packing Co., 337 U.S. 86, 101-06 (1949). Id. Neither decision supports their sweeping contention. Moreover, as noted above, Congress did pass an Act of Congress – the IRA – delegating authority to the Secretary to place land in trust for the benefit of Indian tribes.

While primary jurisdiction over trust land and Indian country in general rests with the Federal government, Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993), placing land in trust does not remove it from all aspects of State jurisdiction. See Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border."). See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal

[12] UCE also alleges that unless the lands to be taken in trust are purchased with federal funds, the Nation may not exercise sovereignty over them. Compl. ¶ 128. This assertion is wrong – no such restriction exists – but also irrelevant since it does not so much challenge the Secretary's authority to accept land into trust as it argues about what the Nation may do on its trust land after that land has been placed in trust.

law, unless the state interests at stake are sufficient to justify the assertion of state authority [on Indian trust lands].") (citing Bracker, 448 U.S. 136, 145 (1980)); Town of Verona v. Salazar, 2009 WL 3165556 (N.D.N.Y. 2009) at *3 ("Accepting land into trust does not amount to exclusive federal jurisdiction over the subject land . . . ."). Moreover federal law provides New York courts with jurisdiction over certain civil actions involving Indians, 25 U.S.C. § 233, and certain criminal offenses committed by or against Indians, 25 U.S.C. § 232. This is so regardless of whether land is held by the Nation in trust or fee.

Moreover, Plaintiffs' cases lend no support for their argument. Mescalero Apache Tribe recognized that section 5 of the IRA provided immunity from taxes on "land and rights in land" held in trust, but given the facts and circumstances particular to that case held that trust acquisition did not preclude all state taxation authority. 411 U.S. at 157-58 ("We therefore hold that the exemption in § 465 does not encompass or bar the collection of New Mexico's nondiscriminatory gross receipts tax income taxes and that the Tribe's ski resort is subject to that tax."). As for Hynes, the court there was concerned with whether the Secretary had authority to include adjacent tidelands and coastal waters in a reservation established for the Karluk natives. 337 U.S. at 91, 116. Hynes does not address Section 465 at all, other than to note that the provision is "inapplicable here." 337 U.S. at 102.

2. The IRA Applies to the Oneidas

UCE contends that the IRA cannot apply to the Oneidas because they voted against application of the statute to themselves. Compl. ¶ 136. Section 18 of the statute provides that the Act "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478. As noted above, the Secretary called an Oneida vote in 1936 at which time the

Nation voted against application of the Act. See 1936 Office of Indian Affairs Ann. Rep. 159, 163 (attached as U.S. Exh. 2). However, Congress subsequently passed the Indian Land Consolidation Act ("ILCA") which made all tribes eligible to have land held in trust pursuant to the IRA regardless of how they initially voted on the applicability question. See 25 U.S.C. § 2202 ("The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title."). See also ROD at 33-34 (noting that ILCA extends DOI's authority to accept land into trust under the IRA to all tribes except as otherwise provided by law).

UCE alleges that ILCA cannot extend application of the IRA to the Nation because ILCA only applies to tribes for which the United States holds land in trust. Compl ¶ 59. This claim has been extensively briefed in two related cases and the Court has determined it lacks merit. See New York v. Salazar, No. 6:08-CV-644 (LEK/GJD), 2009 WL 3165591, at *12-15 (N.D.N.Y. Sept. 29, 2009); Town of Verona v. Salazar, No. 6:08-CV-647 (LEK/GJD), 2009 WL 3165556, at *8-11 (N.D.N.Y. Sept. 29, 2009). For the same reasons, this claim should be denied here.[13]

Plaintiffs also contend that Congress intended to restrict the IRA's application to lands subject to the allotment policy as set forth in the Indian General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (repealed 2000). Compl. ¶¶ 137-39. This Court, in a related case, has already rejected this claim and should reject it here for the same reasons:

> Contrary to Plaintiff's contention, the IRA is explicit as to its geographic application and does not exclude New York State. See 25 U.S.C. § 473. Further, the legislative history of the IRA and Section 465 contradicts Plaintiff's assertion and provides unequivocal evidence that the statute was not restricted to land

[13] In any event, the United States does hold land in trust for the Nation. Dkt. No. 31 (noting receipt of land to be held in trust by DOI for the benefit of the Nation pursuant 40 U.S.C. § 523).

> subject to allotment and was, in fact, meant to apply to New York State. See, e.g., 78 Cong. Rec. 11124, 11125.

City of Oneida, 2009 WL 3055274, at *5.

3. The ROD Addresses All Factors Interior is Required to Consider Pursuant to Its Land-into-Trust Regulations

Interior's land-into-trust regulations identify a number of factors that the Secretary must consider before placing land in trust. 25 C.F.R. § 151.10. Those factors include, among other things: the existence of statutory authority for the trust acquisition; the need of the tribe for the land; the purpose for which the land will be used; the impact on the State and local government from removing the lands from the tax rolls; and jurisdictional problems and potential land use conflicts that may arise from the acquisition. 25 C.F.R. § 151.10(a), (b), (c), (e), (f). UCE alleges that the FEIS fails to address these factors. Compl. ¶¶ 134-35. The FEIS was prepared as part of Interior's compliance with NEPA. Consideration of the factors identified by UCE is not required by NEPA and therefore the FEIS need not contain analysis of those factors. Instead, Interior's consideration of the factors identified in Part 151.10 is found in the ROD. ROD at 33-70.[14]

C. The Court Should Grant Summary Judgment on UCE's Second Count

The portion of UCE's second count that has not already been dismissed appears to state two claims. First, UCE argues that the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, does not provide the federal government authority "to expand Indian lands within the territory of the United States," Compl. ¶ 141, at least not without the consent of a State to the cession of

[14] Plaintiffs also assert that the Supreme Court ruled it unconstitutional for Interior to accept fee land into trust, citing United States Department of the Interior v. South Dakota, 519 U.S. 919 (1996). Compl. ¶ 131. That decision did nothing of the sort; it merely vacated an Eighth Circuit decision without opinion and remanded the challenged administrative decision to Interior for reconsideration. It has no precedential value.

jurisdiction over that land, Compl. ¶¶ 142, 149. Second, UCE argues that under New York State law, the United States is prohibited from owning real property unless the State has consented to its acquisition for a specific purpose pursuant to New York State Law § 50 (McKinney 2003).

The Indian Commerce Clause provides Congress with power "to regulate Commerce with foreign Nations, and among the various States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3. The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). The Supreme Court explains that this clause "is a grant of authority to the Federal Government at the expense of the States," which has, in effect, "divested [the States] of virtually all authority over Indian commerce and Indian tribes." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1966). This Court has already ruled that "Section 465 represents a valid exercise of congressional authority pursuant to the Indian Commerce Clause." New York v. Salazar, 2009 WL 3165591, at *6. Further, even if there were some question as to whether the Clause allows acquisition of federal property at all, that also is irrelevant because the Property Clause undisputedly does. See United States v. Johnson, 994 F.2d 980, 984 (2d Cir. 1993) ("The federal government may acquire property within a state. U.S. Const. art. I, § 8, cl. 17; Kohl v. United States, 91 U.S. 367, 371 (1875)."). Either way, Constitutional authority allows the federal government to place land in trust for the benefit of Indian tribes under the IRA, including in New York State.

UCE's contentions that state law forbids the federal government from acquiring land in trust absent State consent ignores the fact that the United States does not need the consent of New York to acquire land within the State – it has that power by virtue of the Supremacy and Property Clauses of the Constitution. Consent is only needed where the federal government

seeks to establish exclusive jurisdiction over the property. "The federal government can only acquire [exclusive] jurisdiction over that property, however, if both the state and federal governments agree to the transfer." Johnson, 994 F.2d at 984. In such a case, legislative consent of the state may be needed for such an acquisition, and that is what State Law § 50 provides – general state consent to the acquisition of land by the United States through purchase, lease, exchange, donation or otherwise for certain enumerated purposes "where a special act of the legislature shall be required." N.Y. State Law § 50.1 (McKinney 2003); see also New York v. Vendome Serv., 19 N.Y.S. 2d 195, 196 (1940), aff'd, 31 N.E.2d 508 (1940) ("Section 50 of the State Law . . . authorizes the Government of the United States to acquire land for the purposes therein specified, including post offices."). Again, because the United States will not assume exclusive jurisdiction over the land placed in trust, State Law § 50 is not applicable to the trust acquisition. See United States v. McGowen, 302 U.S. 535, 539 (1938) ("The federal government does not assert exclusive jurisdiction within the [reservation]. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the [reservation], of such state laws as conflict with the federal enactments.").

D. The Court Should Grant Summary Judgment on UCE's Third Count

Plaintiffs' third count is a collection of varied claims ranging from allegations that Ray Halbritter is not the legitimate leader of the Oneida Indian Nation of New York, to an allegation of institutional bias on the BIA's part because it is tasked with implementing federal Indian policy, to allegations that Interior failed to adequately consider factors prescribed by its land-into-trust regulations. As discussed below, none of these allegations have merit.

1. This Court Lacks Jurisdiction over UCE's Challenge to Halbritter's Leadership of the Nation

UCE alleges in conclusory fashion that Raymond Halbritter was removed from his position as Nation Representative in 1995 and therefore lacked tribal authority to submit the application to have Oneida land taken in trust. Compl. ¶ 159. If UCE is asking this Court to decide who should be the Nation's Representative, this Court lacks subject matter jurisdiction over such a matter of internal tribal governance. See Runs After v. United States, 766 F.2d 347, 352 (8th Cir. 1985) ("We believe the district court correctly held that the resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."); Bowen v. Doyle, 880 F. Supp. 99, 113 (W.D.N.Y. 1995) ("It is equally well-settled that tribal authority over internal matters is exclusive."). In the alternative, if UCE is seeking to challenge federal recognition of Halbritter as Nation Representative based on events occurring sixteen years ago, that claim should be brought in the first instance before Interior. See Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708, 712 (2d Cir. 1998) ("Moreover, in the absence of an initial determination by Interior, the issue of Oneida leadership, which involves questions of tribal law, is not properly resolved by a federal court."). Other problems also plague this claim, should UCE seriously intend to develop it beyond its current conclusory state, such as whether UCE has standing to challenge federal recognition of Halbritter as the Oneida leader and whether or not the statute of limitations have run on such a challenge given the dated nature of the purported event UCE's claim hangs upon.[15]

[15] In the prior round of summary judgment briefing, mooted by the remand, UCE explained that it "does not cloak itself in the garb of a litigant with respect to the legitimate leadership of the OIN" but rather "raises the issue for the Court to consider." Dkt. No. 58 at 4. If UCE is just offering observations that do not translate into a legal claim, that is fine, but the Federal Defendants reiterate their arguments on this score in case UCE should read its Complaint differently in this round of briefing.

2. Interior Considered UCE's Comments

UCE contends that Interior did not respond to the comments it submitted during the trust decision process. Compl. ¶ 160. NEPA's CEQ regulations require an agency preparing a FEIS to "discuss at appropriate points . . . any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issue raised." 40 C.F.R. § 1502.9(b); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 n.13 (1989) (same). An agency may either alter the FEIS in response to comments or explain "why the comments do not warrant further agency response." 40 C.F.R. § 1503.4(a)(5). UCE's allegation that its comments were ignored is belied by the administrative record. See AR010877-79 (UCE comment letter dated December 14, 2006 and BIA response); AR029681-95 (UCE comment letter dated December 27, 2006 and BIA response); FEIS, App. M at 174-76, AR26057-59 (Vicker's comments at Public Hearing of December 14, 2006 and BIA responses). Besides responding to specific comments, Interior also provided "common responses" to public comments where numerous comments were received on the same topic making it burdensome and repetitive to provide individually tailored responses to common issues. See AR010548-84 (PDEIS common responses to comments). It is also worth noting that the majority of UCE's comments have nothing to do with environmental concerns, but instead attack the constitutionality of the statute Interior is tasked with implementing, the IRA. AR005322-27 (UCE comment letters dated February 25, 2008 and March 5, 2008). Plaintiffs' assertion that a failure to consider constitutional comments is arbitrary and capricious does not state a claim for which relief can be granted. As the Supreme Court has emphasized, whether an agency action is arbitrary and capricious under the APA is a separate inquiry from whether the statute that the agency relied upon is constitutional. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516,

192 S. Ct. 1800, 1812 (2009). Nevertheless, although it was not required to do so, Interior addressed these comments in the ROD. ROD at 34 (noting that "[s]ome commenters questioned the authority of the Secretary to acquire lands in trust in New York State" and addressing constitutional and statutory authority for the acquisition).

To the extent UCE is complaining that comments it submitted with regard to the factors DOI considers as part of its land-to-trust regulations were ignored, it has no claim. DOI's regulations require it to provide notice of a trust application to "state and local governments having regulatory jurisdiction over the land to be acquired," and to solicit comments from those governments concerning "potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.10. Unlike NEPA, the regulations afford UCE no procedural right to notice or to comment. Nevertheless, as noted above, Interior did address UCE's comments.[16]

3. Allegations of Institutional Bias in the BIA

UCE broadly contends that BIA has a conflict of interest because it is tasked with fulfilling the federal government's responsibilities towards Indians, and that this in turn somehow rebuts the presumption of agency regularity. Compl. ¶¶ 161-162. Congress has required that "[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States." 25 U.S.C. § 13. Plaintiffs, on the one hand, fault the BIA for carrying out its congressionally

[16] UCE also conclusorily asserts that Interior acted without "due regard" for all other comments by all other parties with regard to the factors Interior is required to consider pursuant to its land-into-trust regulations. Compl. ¶180. Casual examination of the ROD belies this assertion. Moreover, the ROD explains how comments were addressed and provides readers with a topical guide to see where comments addressing specific subject matter were addressed. ROD at 71-72.

assigned responsibilities, while, on the other, ignore the fact that in the context of the land-into-trust process, the regulations, as described by the Supreme Court, "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Sherrill, 544 U.S. at 220-21.

The fact that the BIA is tasked by Congress with promoting the welfare of Indians establishes neither institutional bias nor impermissible discrimination. See, e.g., Morton v. Mancari, 417 U.S. 535, 553-54 (1974) (rejecting claim that the BIA hiring preference for Indians is unconstitutional discrimination); South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005) ("The BIA's policies of tribal self-determination, Indian self-government, and hiring preferences for Indians are policies established by Congress in the IRA," and the fact that the BIA follows "Congress's statutory policies does not establish structural bias."). In any event, as noted by the Fourth Circuit, a claim of "institutional bias" lacks the force of allegations that "isolate certain decision makers and indicate reasons why those particular adjudicators are biased," because "[p]resumably all agencies inherently have some level of 'institutional bias,' but such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decision making in the administrative setting." Doolin Sec. Sav. Bank F.S.B. v. FDIC, 53 F.3d 1395, 1407 (4th Cir. 1995); see also Brooks v. N.H. Supreme Court, 80 F.3d 633, 640 (1st Cir. 1996) ("[A]n entire group of adjudicators cannot be disqualified wholesale solely on the basis of an alleged institutional bias in favor of a rule or policy promulgated by that group."); Hammond v. Baldwin, 866 F.2d 172, 177 (6th Cir. 1989) ("Thus we hold to the basic principle that the entire government of a state cannot be disqualified from decision making on grounds of bias when all that is alleged is a general bias in favor of the alleged state interest or policy.").

Finally, Plaintiffs' claim cannot be reconciled with the presumption of regularity of administrative decisions, a presumption which attaches to the actions of every government agency. U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001) ("a presumption of regularity attaches to the actions of Government agencies"). As the Supreme Court held in United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926), "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Accordingly, the BIA is entitled to the same presumptions of administrative regularity and the same deference in the course of judicial review of its decisions as any other government agency.

4. Interior Correctly Applied the "On-Reservation" Criteria to this Trust Acquisition

Plaintiffs also allege that DOI improperly concluded that the land proposed for trust acquisition lies within the Oneida Reservation and therefore incorrectly applied the regulatory provision addressing on-reservation applications. Compl. ¶¶ 163-169. 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.

Plaintiffs argue that Sherrill stands for the proposition that the Oneidas no longer have a reservation and therefore claim Interior should have used the off-reservation criteria.[17] Compl. ¶¶ 167-69. This Court has already held that Sherrill did not overturn the Second Circuit's holding that the Oneida Reservation has not been disestablished. New York v. Salazar, 2009 WL 3165591, at *8-9 ("This Court agrees that the Second Circuit's holding [that the Oneida reservation was not disestablished] remains good law"). The Second Circuit has recently reaffirmed this. See Oneida Indian Nation of N.Y. v. Madison County, 665 F.3d 408, 443 (2d Cir. 2011) ("It remains the law of this Circuit that the Oneidas' reservation was not disestablished.") (internal quotations and citations omitted).[18] Interior applied the correct regulation because all the land proposed for trust lies within the bounds of the Oneida Reservation.[19]

5. Interior Considered the Existence of Statutory Authority for the Trust Acquisition

[17] Interior explained in the ROD that 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 assuming arguendo that "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.

[18] Even if courts had concluded that the Reservation had been disestablished, the acquisition lands are within the original boundaries of the Reservation and thus still meet the land-to-trust regulations' definition of "Indian reservation." 25 C.F.R. § 151.2(f) ("Indian reservation" includes judicially disestablished reservations). Accordingly the on-reservation regulations apply. See also ROD at 32 (explaining that on-reservation regulations apply even where a reservation has been disestablished).

[19] UCE also alleges that seven parcels of land in the Town of Vienna do not lie within the bounds of the Oneida Reservation. Compl. ¶ 164. However, none of the land proposed for placement in trust lies within the Town of Vienna.

Interior's land-into-trust regulations require the Secretary to consider the "existence of statutory authority for the acquisition and any limitations contained in such authority." 25 C.F.R. § 151.10(a). UCE does not contend Interior failed to consider the relevant statutory authorities; rather, it argues that no such authority exists based on allegations "set forth above." Compl. ¶ 172. UCE's challenges to the constitutionality of the IRA have been dismissed by this Court in its Memorandum-Decision and Order dated March 4, 2010. Dkt. No. 49. UCE's remaining challenges to the applicability of the IRA to the Oneida trust application are addressed above.

6. Interior Considered the Oneidas' Need for Land

Interior's land-into-trust regulations require consideration of the "need of . . . the tribe for additional land." 25 C.F.R. § 151.10(b). UCE contends that the Nation has not shown any need for the land, and that it can be used productively without being placed in trust. Compl. ¶¶ 173-174.

25 C.F.R. § 151.10(b) requires the Secretary to consider "[t]he need of the individual Indian or the tribe for additional land." 25 C.F.R. § 151.10(b). Courts interpreting this provision have uniformly rejected the need for some kind of particularized, acre by acre justification for the trust acquisition. "It was sufficient for the Department's [Interior's] analysis [of § 151.10(b)] to express the Tribe's needs and conclude generally that IRA purposes were served." South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 801 (8th Cir. 2005). South Dakota affirmed a district court decision which similarly explained that "[r]egulation § 151.10(b) requires that the Secretary must merely explain why the Tribe needs the additional land" without requiring a discussion of "the history and purpose of the IRA each time the United States is requested to take land into trust for an individual Indian or tribe." South Dakota v. U.S. Dep't of Interior, 314 F. Supp. 2d 935, 943 (D.S.D. 2004). Interior is only required to address the Nation's need for land.

It does not have to justify why the land should be held in trust, as opposed to fee status. South Dakota, 423 F.3d at 801 (it "would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in a particular circumstance"); see also South Dakota, 314 F. Supp. 2d at 943 (§ 151.10(b) contains "no mention of the word 'trust'"). Nevertheless, Interior may choose to consider a tribe's need for land in trust status and, in this case, did so. ROD at 34-35. See South Dakota v. Acting Great Plains Reg. Dir., BIA, 39 IBIA 283, 293 (Apr. 6, 2004) (although the regulations do not require consideration of why the tribe needs land in trust as opposed to fee, "the language of subsection 151.10(b) does not preclude BIA from considering the applicant's need for having additional land held in trust.")

DOI carefully and thoroughly considered the Nation's need for the land in the ROD. See ROD at 34-39. The Nation requested the Secretary take 17,370 acres of land into trust within the bounds of its Reservation. The request was made in light of the Supreme Court's City of Sherrill decision which called into question the extent of the ability of the Nation to exercise governance and sovereign jurisdiction over those lands. DOI acknowledged as an initial matter the often antagonistic relationship the Nation has had with local and State governments. As DOI noted, the State has taken the vast majority of the Oneidas' Reservation in violation of federal law. Id. at 36. At the time the ROD was issued, with regard to lands reacquired by the Nation, the Counties of Madison and Oneida had sought their foreclosure while the State had opined that it believed the Nation's Turning Stone casino is illegal. Id. The State and Counties, like UCE, have moreover contended that the Nation's business successes show no economic need for land

in trust, and suggested that the Nation should learn to function like "a private landowner or corporation on fee land."[20] Id.

In response to these positions, Interior explained that the Nation is a federally recognized tribe, not a private corporation. Id. As such it needs – and this federal action provides – a base of lands over which it can exercise its sovereign powers and govern itself:

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

Id. The ROD also notes that placement of non-gaming lands into trust will support the Nation's efforts to diversify its economy and land base, and provide lands for other member needs. Id. at 36-37. Placement of the lands in trust settles the question of whether the Nation can exercise sovereign jurisdiction and government authority over them, and that, in turn, ensures that the Nation can exist as a federally recognized Indian tribe without endless litigation resulting from each effort at self-government on its trust lands. The economic need of the Nation is only one consideration, one that is here overshadowed by the Nation's need for a homeland. Because DOI adequately and thoroughly considered the Oneidas' need for land before determining to accept land into trust, UCE's claim should be denied.[21]

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[20] The State, the Counties and the Nation have resolved their differences with this Court's recent approval of the settlement agreement between them in New York v. Jewell, 6:08CV644-LEK-DEP (Dkt. 341). Nevertheless, "judicial review of an agency decision . . . is generally limited to review of the administrative record at the time the decision was made." Northcoast Envt'l Center v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998).

[21] UCE also alleges that the Oneidas' gaming facility operates illegally and that the trust process should not be used to help the Oneida's escape compliance with the law. Compl. ¶¶ 175-76. These allegations merely restate a claim this Court already dismissed. See Dkt. No. 49 at 10-15.

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

UCE alleges that Interior failed to adequately consider the impact on local governments of the loss of taxes actually assessed on the lands to be placed in trust, and further alleges that DOI wrongfully considers taxes assessed on the Nation's gaming facility unlawful. Compl. ¶¶ 177, 179. Even assuming UCE has standing to make such a claim, this Court should reject it. 25 C.F.R. § 151.10(e) requires DOI to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." As long as DOI's analysis is "sufficient and supported by a rational basis," it should be upheld even if other parties offer alternative methods to assess the impacts. South Dakota v. U.S. Dep't of Interior, 775 F. Supp. 2d 1129, 1143 (D.S.D. 2011). Moreover, even if a party establishes "some erroneous findings" in the "§ 151.10(e) analysis," as long as "on the whole" DOI "considered this factor and reached a rational decision supported by the record," then Interior's findings will be upheld. South Dakota, 401 F. Supp. 2d at 1008-09. Finally, the regulations only require consideration of the tax impacts; they do not prohibit land being taken in trust if the Secretary concludes there will, in fact, be impacts so long as those impacts are reasonably considered. See City of Lincoln City v. U.S. Dep't of Interior, 229 F. Supp. 2d 1109, 1125 (D. Or. 2002) ("the regulations require BIA to 'consider' this factor but the regulations do not require the Tribe to agree to reimburse the City for revenues that might be lost due to a fee-to-trust transfer, and do not require the BIA to deny the application for a fee-to-trust transfer merely because a potential impact exists").

The ROD adequately considered potential impacts on local communities that might result from placing the land in trust. ROD at 40-55. 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.[22] Id. at 40.

The calculation of taxes was particularly difficult in these circumstances because the Nation and the Counties were in active litigation over the propriety of local government efforts to tax lands within the Oneida reservation. While Sherrill held that the Nation could not assert tax immunity as a legal defense to local efforts to tax its lands, district court decisions subsequent to Sherrill held that taxes on the land were unlawful under state law. Id. at 41. See also Oneida Indian Nation of New York v. Oneida County, 432 F. Supp. 2d 285 (N.D.N.Y. 2006); Oneida Indian Nation of New York v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005).[23] Given the state of the law at the time the ROD issued, Interior opted not to treat as lawful taxes which this Court had held unlawful under New York law.

Interior explained that its analysis "is based on existing circumstances, *i.e.*, taxes actually assessed and paid," and that Interior was "not required to speculate on the outcome of the pending litigation between the Nation and the Counties over taxes and related charges that may or may not be owed by the Nation." ROD at 41. Interior noted that due to the on-going tax dispute as of the time it issued the ROD, the Nation generally does not pay taxes to Oneida and Madison Counties. Id. at 42. The Oneidas have tax agreements with the Cities of Sherrill and Oneida. Because no Sherrill parcels will be taken in trust, that city will continue to receive all taxes. Twenty-five of forty-five tribal parcels in the City of Oneida will be taken in trust for an estimated annual tax loss of $618,029 in future tax revenues spread among the various taxing

[22] The relevant sections of the FEIS evaluating fiscal impacts of the trust decision are Sections 3.7, 4.7, 5.2, and Appendix E.

[23] Subsequently, the Second Circuit vacated the district court state law holdings, concluding that those claims should be decided in the first instance in state court. See Oneida Indian Nation, 665 F.3d 408, 436-440 (2d Cir. 2011).

jurisdictions (the County, City, and assorted school districts). Id. at 42-43. In no case did the lost revenue amount to more than 10% of the annual tax levy, with the City of Oneida losing 8.7% in special assessment districts. Id. at 43. While recognizing this impact, Interior concluded that "the impact of removing the Subject Lands from the tax rolls is not significant when balanced with the benefits to the Nation of acquiring the Subject Lands in trust." Id. at 44.

Although not required by its regulations, Interior also undertook an alternative analysis that hypothetically assumed that the Counties eventually prevail in their litigation position making their taxation of Nation land lawful. Assuming the Oneidas' land is taxable under State law, taking land in trust would cause a loss in tax receipts of $2.19 million excluding the casino tax lot. Id. at 45. The Town of Verona values the casino tax lot at $362.55 million, a valuation which unlawfully includes the value of the Nation's improvements on the lot which are not taxable under IGRA. See 25 U.S.C. § 2710(d)(4) (IGRA provides States and their subdivisions no authority to impose taxes, fees or assessments on a tribe authorized to conduct gaming under the statute); ROD at 51. Including Verona's unlawful taxes, the amount of lost receipts totals $14.39 million.[24] Id. at 45.

Against these losses, Interior also considered the "overall fiscal impacts of the trust acquisition," including "the degree to which the tribe's ongoing business activities generate economic and tax benefits to the local community that offset the taxes that would be lost as a result of the trust acquisition." Id. at 47. Interior concluded that the Nation contributed $16.76 million more to the State and local governments than they expended to provide it with services,

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

and it estimated that even with the lands Interior proposes to take in trust, the State and local governments will continue to receive a net benefit of the same magnitude. Id. at 48.

Contrary to UCE's contention otherwise, Interior did consider Verona's unlawfully assessed taxes on the Oneida gaming facility, explaining that:

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

Id. at 49 (emphasis added).[25] Including the disputed property taxes on the costs side of the ledger, Interior still concluded that "the Nation's direct and indirect contributions were greater than the unpaid real property taxes." Id. The impact on individual jurisdictions was similar, with individual jurisdictions generally predicted to receive a net benefit even if their taxes on Oneida lands are legitimate and lost for those parcels going into trust. Id. Interior identified and considered a number of exceptions. It noted that the Vernon-Verona-Sherrill ("V.V.S.") School District would experience a net loss of revenues, and that if the casino tax lot, as valued by Verona at $362.55 million is included, then Oneida County, Verona, and the V.V.S. School District all experience a net loss. Id.

The ROD concluded that "based on the taxes actually assessed and paid, the impact of removing the Subject Lands from the tax rolls is not significant when balanced with the benefits to the Nation of acquiring the Subject Lands in trust." Id. at 50. Assuming the assessed taxes are legitimate, but excluding Verona's unlawful assessment of taxes on the gaming facility, "the overall net economic impacts projected to State and local governments are positive and

[25] Thus, UCE's contention that Verona's assessment of $362.55 million on the gaming facility tax lot is lawful is irrelevant because Interior did in fact consider that assessment in one of the scenarios addressing tax impacts of the trust acquisition. Id. at 49

substantial because of the Nation's direct and indirect economic contributions to the community." Id. With Verona's unlawful assessment of the casino tax lot, Interior recognized that "individual jurisdictions (e.g., the V.V.S. School District) may experience a net loss of revenues, but determined that the benefits to the Nation of acquiring the Subject Lands in trust outweigh these impacts." Id. Provided Interior has considered potential impacts, it is not barred from taking land in trust even where those impacts may be negative. See City of Lincoln City, 229 F. Supp. 2d at 1125. Because Interior carefully and thoroughly considered the tax impacts of taking the subject lands into trust, Plaintiffs' claim that DOI failed to adequately consider 25 C.F.R. § 151.10(e) should be denied.

8. Interior Adequately Addressed the Payment of Taxes on Land Proposed for Trust

UCE finally contends that Interior failed to address the need to satisfy outstanding tax liens on the land proposed for trust before it is actually taken into trust. Compl. ¶ 178. UCE lacks standing to challenge DOI's compliance with its title regulations. Standing is issue-specific, and "is not dispensed in gross" or as to all issues or claims asserted in a given case. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) (internal quotations omitted). The APA requires a plaintiff to show that a final agency action injures it and that the plaintiff falls within the "zone of interests" of the statutory or regulatory provision allegedly violated. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990) (internal quotations and citations omitted). Application of the zone of interests test requires a court to "first discern the interests arguably to be protected by the statutory [or regulatory] provision at issue; [the court] then inquire[s] whether the plaintiff's interests affected by the agency action in question are among them." Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S.

479, 492 (1998) (internal quotations and alterations omitted); see also B.K. Instrument, Inc. v. United States, 715 F.2d 713, 720 (2d Cir. 1983) ("zone of interests" requires consideration of "applicable . . . statutes and regulations.") (internal quotations omitted).

Plaintiffs lack standing to challenge the Department's compliance with its title examination provisions because Plaintiffs do not fall within zone of interests protected by 25 C.F.R. § 151.13. The title examination process is separate from the process of deciding whether to accept land in trust in the first place. Title examination only begins after the Secretary has concluded she will accept land in trust. 25 C.F.R. § 151.13 (applicant required to furnish title evidence "[i]f the Secretary determines that he will approve a request for the acquisition of land"). UCE's alleged injuries here flow from Interior's decision to acquire land in trust, not from the title examination procedures underway as a result of that decision. Title examination ensures that when the Secretary formally takes title to trust land, that title is good. That provision is designed to protect the United States by ensuring that it acquires good title when placing land in trust. See 45 Fed. Reg. 62034, 62035 (Sept. 18, 1980) (noting that Section 120a.12 [currently designated as Section 151.13] was designed to ensure title infirmities do not "impose burdens on the United States"). Plaintiffs' lack standing to object to Interior requiring letters of credit because those letters are designed to protect the United States, not Plaintiffs. They are the means by which Interior ensures it acquires title that is not marred by tax liens, should those liens eventually have been held lawful.

The lawfulness of those tax liens was doubtful at the time Interior determined to accept land into trust, given that this Court had held that "the County's assessment of taxes upon the [Oneida] property and its attempts to foreclose for non-payment of such taxes is contrary to state law." Madison County, 401 F. Supp. 2d at 231. Because, at the time the ROD issued, the tax

litigation appeared like it would not be resolved for some time to come, and the validity of the liens placed on Oneida land would remain in doubt for the future, DOI decided to require the Oneidas to tender letters of credit that would ensure that the Counties' tax liens may be satisfied should they ever prevail in their ongoing litigation.[26] ROD at 53 ("Interior has considered the letters of credit and the Nation's commitments, and determined that they will be adequate to satisfy tax liens for purposes of acquiring the Subject Lands into trust."); *id.* at 54 ("The purpose of the letters of credit, however, is to provide assurances that revenues will be paid over to the Counties *if and when* taxes are judicially determined to be due and owing.") (emphasis in original).[27]

DOI's requirement of letters of credit is a reasonable interpretation of its regulations, which provide: "The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable." 25 C.F.R. §151.13. DOI's course of action is reasonable given the

[26] The Federal Defendants note that letters of credit are frequently utilized by federal agencies for financial assurance purposes, in accord with Federal law. For example, pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992, EPA requires owners of hazardous waste facilities to establish "financial assurance" that "owners and operators" can meet their obligation to "provide for the compensation of third parties for certain injuries or damages resulting from spills and accidental occurrences." S.C. Dep't of Health & Envtl. Control v. Commerce & Indus. Ins. Co., 372 F.3d 245, 250 (4th Cir. 2004). Letters of credit are one of a number of means by which RCRA allows a party to establish financial assurance. See 42 U.S.C. § 6924(t)(1).

[27] Interior did not require the Nation to post a letter of credit for Verona's taxes assessed on the gaming facility lot improvements, explaining that the "Nation need not satisfy the taxes and related charges on the gaming and gaming-related improvements, unless litigation over this issue is pending at the time Interior could formalize acceptance of the casino tax lot into trust, in which case the Nation would be required to provide the United States a letter of credit for the taxes and related charges on the improvements." Id. at 53. Interior did require a letter of credit for Verona's assessment of taxes on the land without improvements. Id. at 54.

circumstances, comports with the regulations governing fee to trust acquisitions, and is entitled to deference. This is so particularly since it is unclear that liens declared unlawful by this Court at the time the ROD issued make title unmarketable. Moreover, as the ROD explained, "the requirements for acquiring title to land in trust do not call for liens to be removed to the satisfaction of the local taxing authority; liens must be addressed to the satisfaction of the Federal government pursuant to Federal title standards." ROD at 54. Those federal title standards provide that "[p]rior to or at the time of acquisition of title to the property, except as to certain easements hereinafter set out, all liens against the title must be fully paid and satisfied or adequate provision should be made therefore." Section 6(a), Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393, U.S. Dep't of Justice (Oct. 2, 1970) (Dkt. No. 57-6). Given the doubtful nature of the Counties' liens, letters of credit are such "adequate provision."

With this Court's approval of the settlement agreement in New York v. Jewell, the Nation no longer needs to retain letters of credit because the tax dispute is resolved by the settlement and the liens will be removed from the land. See New York v. Jewell, 6:08CV644-LEK-DEP Dkt. No. 341.

VII. CONCLUSION

For the foregoing reasons, the Court should grant the federal defendants summary judgment and dismiss Plaintiffs' complaint.

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Respectfully submitted,

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