16-53

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION; Citizens Equal Rights Alliance; David R. Townsend, New York State Assemblyman; Michael J. Hennessy, Oneida County Legislator; D. Chad Davis; Melvin L. Phillips, *Plaintiffs-Appellants*

v.

KENNETH L. SALAZAR, individually and in his official capacity as Secretary of the U.S. Department of the Interior; P. Lynn Scarlett, in her official capacity as Deputy Secretary of the U.S. Department of Interior; James Cason, in his official capacity as the Associate Deputy Secretary of the Interior; Franklin Keel, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs; James T. Kardatzke, Eastern Regional Environmental Scientist; Arthur Raymond Halbritter, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation, *Defendants-Appellees*

On Appeal from the U.S. District Court for the Northern District of New York, Nos. 5:08-cv-00660 (Hon. Lawrence E. Kahn)

RESPONSE BRIEF OF THE FEDERAL DEFENDANTS-APPELLEES

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APA	Administrative Procedure Act
IRA	Indian Reorganization Act
ROD	Record of Decision

INTRODUCTION

In 2008, the Secretary of the Interior determined that the United States would acquire title to approximately 13,000 acres of land in central New York and would hold that land in trust to benefit the Oneida Indian Nation of New York (the "Oneida Nation" or "Tribe"). The Secretary decided to acquire the land from the Oneida Nation itself under the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA").

Plaintiffs challenged the Secretary's decision in district court, arguing that the Secretary may acquire land in trust only if the land is under "federal jurisdiction," and that the Oneida Nation's land does not meet that requirement. Both halves of this argument are wrong. First, the IRA does not require the United States to demonstrate "federal jurisdiction" over land, much less a pre-existing Indian reservation, before acquiring it in trust. Therefore, Plaintiffs' argument about "land status," as a matter of law, cannot lead to the conclusion that the Secretary lacked authority for her decision here. And second, even if the status of the Oneida Nation's land were material, Plaintiffs acknowledge that their arguments are foreclosed by this Court's binding precedent, which holds that Congress never disestablished the Oneida Indian reservation where the land in question is located. The district court was right to reject Plaintiffs' arguments, both on the basis of this Court's precedent and the Plaintiffs' failure to identify any genuine dispute about *material* facts.

STATEMENT OF THE CASE AND JURISDICTION

The Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians," and to hold that land "in trust for the Indian tribe or individual Indian for which the land is acquired."

On May 20, 2008, the Secretary issued a Record of Decision ("ROD") that stated her final determination to acquire approximately 13,000 acres of land owned by the Tribe within its reservation in central New York. *See* ROD at 6 (App. 214). The Secretary amended her decision on December 22, 2013 (App. 290).

Many parties filed suit in the Northern District of New York to challenge this decision. Plaintiffs here, led by the Central New York Fair Business Association, sought to present facts to dispute this Court's and the Supreme Court's legal conclusions, reached in prior cases, regarding the status of the land in question. They also contended that the Secretary's decision was unconstitutional and sought review under the Administrative Procedure Act, 5 U.S.C. § 706, based on alleged violations of several statutes. The district court had federal-question jurisdiction over these claims under 28 U.S.C. § 1331.

The district court granted the United States' motion to dismiss certain claims on March 10, 2010 (App. 85), and denied reconsideration on December 6, 2010 (App. 81). The Court then granted summary judgment in favor of the United States on all

remaining claims on March 26, 2015 (App. 6), and denied reconsideration on November 2, 2015 (App. 1). Plaintiffs filed a timely notice of appeal on December 30, 2015. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs' statement of the issues presented in their appeal covers essentially all the contested issues that the district court decided below. *See* Pl. Br. at 5-6 (items 2(a) through 2(g)). However, the actual arguments that they present to the Court in their appeal brief are limited to the first point in their statement of issues presented. *Id.* at 6 (item 1). "Issues not sufficiently argued are in general deemed waived and will not be considered on appeal," including arguments mentioned in a statement of issues. *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996); *judgment vacated on other grounds*, 521 U.S. 1114 (1997). Plaintiffs present appellate argument only on their first-stated issue, which they view as a threshold issue. *See* Pl. Br. at 15-16. Their appeal raises the following questions:

1. The Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"),[1] authorizes the Secretary to acquire land and hold it in trust for the benefit of Indian tribes. Is the Secretary's authority under this section limited to the acquisition of

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[1] This brief describes statutory provisions using section numbers as codified in the U.S. Code. For example, 25 U.S.C. § 465 was originally Section 5 of the IRA, but is described as "Section 465" here for the sake of clarity.

land that is already "under federal jurisdiction" or part of an Indian reservation?

2. If the Secretary's authority to acquire land under the IRA is limited to land under "federal jurisdiction," did the district court correctly apply this Court's precedent in holding that the land in question here was part of the Oneida Indian reservation, which Congress has never disestablished?

RELATED CASES

The Secretary's authority to take land into trust in New York, and for the Oneida Nation in particular, is already before the Court in *Upstate Citizens for Equality v. United States*, No. 15-1688 (consolidated with *Town of Verona v. Jewell*, No. 15-1723). The *Upstate Citizens* case raises slightly different issues but presents a challenge to the same action of the Secretary of the Interior that Plaintiffs here challenge. The *Upstate Citizens* case is fully briefed and was argued to a panel of the Court (Judges Livingston, Chin, and Carney) on May 3, 2016.

LEGAL BACKGROUND AND STATEMENT OF FACTS

I. THE STATUTORY SYSTEM FOR TAKING LAND INTO TRUST

A. The United States' authority to take land into trust

The Constitution enumerates Congress's power to "regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3. This Indian Commerce Clause is "a broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy." COHEN'S HANDBOOK OF FEDERAL INDIAN

LAW § 1.02[3] (2012) ("COHEN"). The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 173 (2d Cir. 2005) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

The Indian Commerce Clause is the constitutional authority for the Indian Reorganization Act of 1934. The IRA "fundamentally restructured the relationship between Indian tribes and the federal government, reversing the Nineteenth Century goal of assimilation and embodying 'principles of tribal self-determination and self-governance.'" *Conn. v. U.S. Dep't of Interior*, 228 F.3d 82, 85 (2d Cir. 2000) (quoting *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992)). Its "overriding purpose" 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).

Section 465 of the IRA provides that:

> The Secretary of the Interior is authorized, in [her] discretion, to acquire, through purchase, relinquishment, gift, exchange or assignment, any interest in lands . . . within or without existing reservations, including trust of otherwise restricted allotments . . . for the purpose of providing land for Indians.
>
> …
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. This statute allows the Secretary to restore or replace the lands and related economic opportunities that were lost through government policies that sought to dispossess tribes of their ancestral lands. *See* COHEN § 15.07[1][a]; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); *South Dakota v. U.S. Dep't of Interior,* 423 F.3d 790, 798 (8th Cir. 2005). Taking land into trust "shields the land from involuntary loss" and "establishes it as Indian country." COHEN § 15.07[1][a]. Indian activities in "Indian country," as defined by 18 U.S.C. 1151, are generally not subject to state and local taxation. *See id.* § 8.03[1][a]; *Sherrill II*, 544 U.S. at 212-14.

Section 465 authorizes the Secretary to acquire land "for the purpose of providing land to Indians." 25 U.S.C. § 465. The IRA defines "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The Oneida Nation is "a federally recognized Indian Tribe and a direct descendant of the [historic] Oneida Indian Nation." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005) (*Sherrill II*). The criteria that the Tribe must be "now under federal jurisdiction" refers to their status in 1934, when Congress enacted that language as part of the IRA. *See Carcieri v. Salazar*, 129 S.Ct. 1058, 1061 (2009).

The Secretary has promulgated formal notice-and-comment regulations for the acquisition of land in trust to benefit Indians. *See* 25 C.F.R. part 151; *see also Connecticut*, 228 F.3d at 85. Those regulations, *inter alia*, further define "Indians"

eligible under Section 465, identify criteria necessary for land acquisition, and set out a process for trust acquisitions that begins with a formal request from a tribe to the Secretary. 25 C.F.R. §§ 151.2, .3, .9. The regulations also identify the criteria that the Secretary should consider in exercising her discretion to take land into trust. *Id.* §§151.10-.11.

II. FACTUAL BACKGROUND

A. The Oneida in New York State

The Oneida Nation's efforts to regain some control over part of its aboriginal homeland have generated decades of protracted litigation. The Supreme Court, which has several times reviewed those efforts, set out some of the Oneidas' history in its opinion in *Sherrill II*. In the 1788 Treaty of Fort Schuyler, the Oneida conveyed a "vast area" in central New York to the State, retaining a reservation of about 300,000 acres out of more than 6 million acres of its aboriginal homeland. 544 U.S. at 203; *see also Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230-32 (1985) ("*Oneida II*"). In 1790, after the ratification of the Constitution gave Congress power to regulate commerce with Indian tribes, the first Congress secured the Oneidas' right to those reserved lands in the Trade and Intercourse Act, 25 U.S.C. § 177, which bars the sale of tribal land without the consent of the federal government. The United States also recognized the Oneida Reservation in the 1794 Treaty of Canandaigua. *Sherrill II*, 544 U.S. at 204-05. Despite this protection, New York continued to purchase Oneida

land, in some cases over federal objections. *Id.* at 205. The land held by the Oneida dwindled to 5,000 acres in 1838, less than 1,000 acres in 1843, and only 32 acres in 1920. *Id.* at 206-07.

As this Court has held, however, the Tribe's original reservation of 300,000 acres was never disestablished. *See Oneida Indian Nation v. Madison Cty.*, 665 F.3d 408, 443-44 (2d Cir. 2011). The Supreme Court recognized that the Oneida had a federal common-law right to possess their aboriginal lands. *See Oneida*, 470 U.S. at 236. The lower courts held that the Tribe could, under some circumstances, obtain money damages for the violation of that right, but that they could not eject private landowners. *See Sherrill II*, 544 U.S. at 209 (describing the course of litigation).

In response to these decisions, the Oneida Nation began to acquire title to parcels of land on their reservation in open-market transactions and to operate businesses on those parcels. *Id.* at 211. The Tribe asserted in the *City of Sherrill* litigation that its acquisition of title to ancient reservation land had "unified fee and aboriginal title" so that it could "now assert sovereign dominion over the parcels," exempting those parcels from taxation. 544 U.S. at 213. The Supreme Court rejected that theory, holding that after so long a time, "longstanding observances and settled expectations" counseled against exempting those lands from taxation on the grounds of tribal sovereignty. *Id.* at 218. But the Court pointed to an alternate route for the Tribe to achieve the same end. It noted that Section 465 authorizes the Secretary to

take land into trust, that such lands are exempt from State and local taxation, and that "Section 465 provides the proper avenue for [the Tribe] to reestablish sovereign authority over territory last held by the Oneida 200 years ago." *Id.* at 220-21 (citing 25 U.S.C. § 465).

B. The Secretary's decision to take land into trust for the Oneida

Following the Supreme Court's suggestion, the Oneida Nation requested on April 4, 2005, that the Secretary take more than 17,000 acres of land into trust for the Tribe. The Tribe already owned all of that land, which contained the Turning Stone casino, the Nation's government, health, educational, and cultural facilities, member housing, businesses, hunting lands, and undeveloped lands. *See* ROD at 6 (App. 214).

Interior considered the Tribe's application in a thorough and open process that lasted several years. In addition to public hearings and an extended comment period, Interior prepared an Environmental Impact Statement, issued in 2008, that considered nine different alternative actions (including a no-action alternative in which the Secretary would not acquire title to any land). *Id.* at 6-10 (App. 214-18). The Secretary also conducted a parcel-by-parcel review of the 330 parcels that were included in the Tribe's request. *Id.* at 7 (App. 215).

In May 2008, the Secretary announced her decision to accept into trust approximately 13,000 acres. The Secretary found that this decision would "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," and that this would "promote the health, welfare and social needs of its members and their families." *Id.* at 36 (App. 244).

The Secretary noted in her decision that the Turning Stone casino "is situated within the Oneida reservation on Indian lands." ROD at 9 (App. 217). This was relevant to the question whether the Oneida Nation had been lawfully conducting Class III gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4), and whether the Secretary used the "on-reservation" or "off-reservation" process set out in the Department's land-into-trust regulations in making her decision.[2] But the authority that the Secretary cited for her land-into-trust decision did not depend on the reservation status of the land in question. *Id.* at 8 (App. 216).

III. DISTRICT COURT PROCEEDINGS

Plaintiffs here, among many other parties, challenged the Secretary's land-into-trust decision in district court. One of the most notable of these suits, by New York State and by the Counties of Madison and Oneida, has now been dismissed as part of a historic global settlement of the Tribe's and the State's various claims against each

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[2] The regulations implementing the IRA also provide a slightly different process for the Secretary's decision depending on whether the land in question is reservation land. *See* 25 C.F.R. § 151.10-11. Both processes are based on the same statutory authority, and Plaintiffs' challenge on appeal is not based on those regulations.

other. *See New York v. Jewell*, 2014 WL 841764, *1-*2 (N.D.N.Y. March 4, 2014) (upholding the entry of the settlement in New York's challenge to the Secretary's decision to take land into trust).

Plaintiffs' complaint presented a variety of different theories for the contention that the Secretary's land-into-trust decision was invalid. On March 1, 2010, the district court granted the United States' motion to dismiss several of Plaintiffs' claims. The court rejected the argument that principles of state sovereignty, expressed in the Tenth Amendment, render Section 465 unconstitutional to the extent it permits the Secretary to take land into trust in New York. "The Tenth Amendment is simply not implicated" by the Secretary's decision, the court held, "because the Secretary's authority to take the land into trust for Indians is derived from powers delegated to Congress in Article I." March 1, 2010 Order at 8 (App. 92). The court also rejected Plaintiffs' contention that the IRA is an unconstitutional delegation of legislative authority to the Secretary. *Id.* at 12 (App. 96). At the same time, the district court considered and dismissed Plaintiffs' claims based on civil rights statutes, *id.* at 12-17 (App. 96-101); the National Environmental Policy Act, *id.* at 17-18 (App. 101-02); , and the Indian Gaming Regulatory Act, *id.* at 20-21 (App. 104-05). Finally, the district court held that Plaintiffs could not directly sue Arthur Raymond Halbritter, the leader of the Oneida Nation. *Id.* at 26 (App. 110).

Judgment on Plaintiffs' remaining claims (and various claims in the related cases was then delayed due to the Supreme Court's 2009 decision in *Carcieri*. *See State of New York v. Salazar*, No. 6:08-cv-660 (N.D.N.Y. Sept. 24, 2012) at 8-10, 16-17 (App. 42-44, 50-51). The Secretary's Record of Decision had not addressed whether the Oneida Nation was under federal jurisdiction in 1934, and the district court therefore remanded the Secretary's decision to the agency for the necessary determination. *See id.* at 17, 27-28 (App. 51, 61-62). On remand, the Secretary determined in a thorough 40-page analysis that the Oneida Nation had been under federal jurisdiction in 1934. *See* Amended ROD (App. 290-331).

Finally, in March 2015, the district court entered summary judgment in the Secretary's favor on Plaintiffs' remaining claims. The court upheld the Secretary's determination under *Carcieri* that the Oneida Nation was under federal jurisdiction in 1934, holding that the Secretary has authority to interpret the statutory requirement of federal jurisdiction and that the Oneida Nation meets the definition that the Secretary reasonably adopted. *See* March 26, 2015 Opinion at 10-20 (App. 15-25). The court also held that taking land into trust under the IRA does not completely withdraw it from State jurisdiction or create a federal enclave. *Id.* at 20-21 (App. 25-26). Finally, the court rejected Plaintiffs' other arguments, finding (for example) that the Secretary had properly applied her own land-into-trust regulations in the case of the Oneida Nation. *Id.* at 22-28 (App. 27-32).

SUMMARY OF ARGUMENT

Plaintiffs focus their appeal on only one argument: That the land that the Secretary has taken into trust was under "state jurisdiction" or was a "state reservation," *see* Pl. Br. at 7, 17; and conversely that there was no federal jurisdiction or "federal interest" in that land, *see id.* at 12, 22, 27. They argue that if the district court had given them an opportunity to "prove that the Oneida Indian reservation was never under federal jurisdiction or was ever federal Indian country," that alleged fact would "refute the claim that the Secretary has the authority to place fee lands into trust." *Id.* at 5. The facts Plaintiffs seek to prove, however, are not material in the context of their APA challenge to the Secretary's decision to take land into trust. This is true for three reasons, each of which is separately sufficient to affirm the judgment of the district court.

First, Plaintiffs' theory of the "previous land status history," Pl. Br. at 24, is not material to the Secretary's authority to take land into trust under the IRA. That authority derives not from Congress's jurisdiction over land, but from its constitutional power to manage Indian affairs. The IRA, in turn, does not make the Secretary's authority to acquire land contingent upon any particular land status, nor does it require existing "federal jurisdiction" over land that is taken into trust.

Second, Plaintiffs' appeal ignores the principles of APA review, because it seeks to challenge findings that were not central to the Secretary's decision based on

documents that Plaintiffs did not provide to the agency. In a suit challenging agency action under the APA, this Court may only evaluate the Secretary's decision based on the legal rationale and factual findings stated in the decision, and in light of the administrative record that was before the agency. Here, the Secretary determined that she had authority to take land into trust for the Oneida Nation not because of the status of the *land*, but because the *Tribe* was "under federal jurisdiction" in 1934. Her principal rationale for this conclusion was that the Oneida Nation participated in a tribal election called by the Secretary in 1936. Plaintiffs do not challenge, or even address, this rationale, even though the Secretary said that it was sufficient to support her decision even without considering additional factors. Plaintiffs propose to present facts about nineteenth-century federal Indian policy that, even if they had been properly presented to the agency during its decision-making process, are therefore immaterial for summary judgment purposes.

Third, Plaintiffs admit that "[a]ll of the[ir] arguments" were foreclosed in the district court by this Court's holding in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), that an Oneida reservation exists in New York and that Congress has never disestablished it. Pl. Br. at 10; *see also Oneida Indian Nation v. Madison County*, 665 F.3d 408 (2d Cir. 2011) (affirming the relevant holding of *City of Sherrill*). In applying those holdings, the district court was not ignoring a genuine issue of material fact; it was following this Court's past legal analysis of the effect of particular treaties

on the legal status of the Oneida Nation's land. Those precedents do not deprive Plaintiffs of a fair forum to present their contrary views; they simply establish that those views are wrong under the law of this Circuit.

STANDARDS OF REVIEW

The district court dismissed some of Plaintiffs' claims and granted summary judgment in the Secretary's favor on others. This Court applies *de novo* review both to the district court's dismissal decision and to its decision to grant summary judgment. *See, e.g.*, *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 77 (2d Cir. 2006).

This appeal does not directly raise any of the issues decided in 2010 on motions to dismiss. Plaintiffs state without argument that the district court committed error in dismissing their separation-of-powers claim and their civil rights claims. *See* Pl. Br. at 6 (points d and e); March 1, 2010 Op. at 12-17, 22-23 (App. 96-101, 106-07). But any such claims are waived on appeal because Plaintiffs' brief does not contain any argument about those alleged errors. *See supra* p. 3. If the Court nonetheless finds it appropriate to review these issues, then Plaintiffs' allegations, when taken as true, must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action," "conclusory statements," and legal conclusions are inadequate to meet that standard. *Id.*

The district court granted summary judgment in 2015 on Plaintiffs' arguments under the APA. This Court reviews those arguments *de novo* based on the administrative record. *Karpova v. Snow*, 497 F.3d 262, 267-68 (2d Cir. 2007). Review of the Secretary's decision under the APA is "narrow," and the Court may overturn it only if the agency "relied on factors which Congress has not intended it to consider … offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 268 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court will uphold the agency's action if "the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made." *Id.* To reverse the district court's grant of summary judgment, therefore, it is not enough for Plaintiffs to persuade the court that their interpretation of historical events is better than the Secretary's interpretation. They must show that the Secretary could not reasonably interpret the facts in the administrative record to support her exercise of authority under the IRA.

ARGUMENT

I. "FEDERAL JURISDICTION" OVER LAND IS NOT MATERIAL TO THE SECRETARY'S AUTHORITY UNDER THE IRA.

Plaintiffs argue that because "the Oneida Indian reservation was never under federal jurisdiction or was ever federal Indian country," the Secretary had no

"authority to place fee lands into trust." Pl. Br. at 5. But that argument displays a fundamental misunderstanding of the Secretary's authority under the IRA, which does not depend on any question of "land status," *id.* at 17. Even assuming, contrary to this Court's precedent, that there "never has been a federal Indian reservation in the State of New York," *id.* at 26, the Secretary's action was still valid. The district court correctly granted summary judgment because the land status questions that Plaintiffs seek to raise are not material to the claims of their Complaint.

A. Congress has constitutional authority to take land into trust regardless of a pre-existing federal interest.

The district court held in this case that "the Indian Commerce Clause has received an expansive interpretation by the Supreme Court," and that the Secretary's "determination to take the contested land into trust for the [Oneida Nation] pursuant to Section 465 clearly fits within the broad scope of authority provided by the Clause." March 1, 2010 Order at 8 (App. 92). Plaintiffs do not challenge that holding here, nor do they renew their argument based on the Tenth Amendment. Any question as to the United States' constitutional authority to take land into trust must therefore be considered waived, and the Court need not reach it. *Yale-New Haven Hosp. v. Nicholls*, 788 F.3d 79, 88 n.8 (2d Cir. 2015).

Even if the Court were to reconsider the extent of Congress's constitutional power here, however, it must affirm the district court's conclusion that the United States has constitutional authority to take land into trust, regardless of any prior

interest in that land. The United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). This power derives from the Indian Commerce Clause of the Constitution, the Treaty Clause of the Constitution, and from "long continued legislative and executive usage and an unbroken current of judicial decisions." *Id.* at 45-46; *see United States v. Lara*, 541 U.S. 193, 200 (2004). Even as this principle has deep historical roots, it remains true today: "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (citing various other cases and a treatise noting Congress's "exceptionally great powers" under this clause).[3]

These powers allow Congress to limit State jurisdiction over Indians and Indian land in various ways. For example, criminal jurisdiction over offenses committed on an Indian reservation is governed by a "complex patchwork" of laws, and "Congress has plenary authority to alter these jurisdictional guideposts." *Negonsett v. Samuels*, 507 U.S. 99, 102-03 (1993); *see also Nevada v. Hicks*, 533 U.S. 353, 365 (2001) (noting that

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[3] This Court is currently considering a separate challenge to Congress's authority under the Indian Commerce Clause to enact Section 465, at least as it is applied in New York. *See supra* p. 4 (note on related cases).

State jurisdiction on reservations "can of course be stripped by Congress"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-43 (1980) (generally discussing the boundaries between State and tribal authority). This is true even if "there have been times" when a State's jurisdiction over a tribe "went unchallenged" and where "federal supervision over [a tribe] has not been continuous." *United States v. John*, 437 U.S. 634, 652-53 (1978). Moreover, "Congress – not the courts, not the states, not the Indian tribes – gets to say what land is Indian country subject to federal jurisdiction." *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 282 (2d Cir. 2015) (quoting *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1151 (10th Cir. 2010) (en banc)).

From the early days of the Republic, Congress's constitutional power to manage relations and commerce with Indian tribes has also been understood to include power over acquisition, sale, and ownership of Indian land. *See generally* COHEN §§ 5.02[4], 15.03; *see also Sherrill II*, 544 U.S. at 204 (describing the 1790 Indian Trade and Intercourse Act). As part of that power, Congress has also long had the authority to hold title to land in trust for the benefit of Indians. Congress also undoubtedly has the constitutional power, "essential to its independent existence and perpetuity," to purchase and own land to accomplish its public purposes. *Kohl v. United States*, 91 U.S. 367, 371-72 (1875). Given Congress's power of eminent domain,

it must *a fortiori* have the power to hold title to land in trust where that title is conveyed voluntarily by its Indian owners to accomplish a public purpose.

Congress's constitutional power to acquire land and to make rules governing that land does not vary based on the land's location or former "federal reservation" status. The first Congress understood that, under the Indian Commerce Clause and the Supremacy Clause, it had the power to prohibit the sale of Indian land to a State regardless of any other federal interest. In previous Oneida litigation, the Supreme Court considered the argument that Indian title in New York was solely a matter of State law because "the United States never held fee title to the Indian lands" in New York and because the State had held fee title to those lands. *Oneida Indian Nation of New York v. Cty. of Oneida*, 414 U.S. 661, 670 (1974). The Court agreed that the United States had never held fee title to Indian lands in the original thirteen States, but held that "this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Id.* This directly refutes Plaintiffs' contention that the Trade and Intercourse Act could only apply to the Oneidas' land "if the United States held the Indian title to the land." Pl. Br. at 24.

Those same constitutional sources of authority permitted Congress to enact Section 465 and to authorize the Secretary to acquire land in trust for Indians, regardless of State jurisdiction. Acquiring land and holding it in trust for the benefit

of Indians is an appropriate means to achieve Congress's goal of fostering self-sufficiency among Indian tribes. For that reason, although the Supreme Court in *Sherrill II* did not specifically decide the constitutionality of Section 465, it identified that statute as an appropriate means for the Oneida Nation to identified Section 465 as "the proper avenue" to regain control over its ancestral territory. 544 U.S. at 221.

Finally, Plaintiffs also raised a constitutional argument to the district court based on the nondelegation doctrine, but they district court rejected that argument, and Plaintiffs do not raise it on appeal. *See* March 1, 2010 Order at 8-12 (App. 92-96). However, every court to have considered that question has concluded that Section 465 is constitutional. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 98-99 (D.C. Cir. 2008); *South Dakota*, 423 F.3d 790, 797 (9th Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1136-37 (10th Cir. 1999).

B. The IRA grants authority to the Secretary to take land into trust regardless of a pre-existing federal interest.

Just as Congress has the general authority to acquire land in trust to benefit Indians, the Secretary had authority delegated from Congress under the IRA to make the particular land-into-trust decision here. The IRA says nothing about state or federal jurisdiction over land before the Secretary takes it into trust, nor does it make the Secretary's authority contingent upon any pre-existing federal interest in the land acquired.

The IRA is expansive in describing the lands that may be acquired and held in trust under Section 465. That section provides that the Secretary is authorized to acquire "any interest in lands, water rights, or surface rights to lands, *within or without existing reservations*, including trust or otherwise restricted allotments." 25 U.S.C. § 465. Congress included in the IRA some provisions that further define this power, most notably in defining "Indian" to mean (*inter alia*) the members of any tribe that were under federal jurisdiction as of June 1, 1934. *See id.* § 479; *Carcieri*, 129 S.Ct. at 1065; *see also* 25 U.S.C. § 473 (defining the geographic scope of the IRA). But none of those provisions limit the statutory language extending the Secretary's authority to acquire "any interest in lands . . . within or without existing reservations." 25 U.S.C. § 465. In addition, the IRA allows the Secretary to "proclaim *new* Indian reservations on lands acquired" pursuant to Section 465 – a provision that would make no sense if Congress had intended that only existing reservation lands could be acquired in trust. *See* 25 U.S.C. § 467 (emphasis added).

Plaintiffs argue that Section 465 "does not say anything about the Secretary taking fee lands under state jurisdiction into federal trust status." Pl. Br. at 7. But there was no need for Section 465 to address that issue explicitly, because its language is broad enough to encompass all lands that are within the scope of Congress's legislative power. The Supreme Court implicitly recognized this in *Sherrill II*. It recognized "the long history of state sovereign control over the territory" in rejecting

the Oneidas' claims, 544 U.S. at 214, but it simultaneously noted that the State's sovereign control was subordinate to Congress's authority to provide land for tribal communities through the IRA. *Id.* at 220-21. In any event, New York will retain sovereignty over the land taken into trust in several important respects. *See* ROD at 57 (App. 265).

There is accordingly no need for the Secretary to demonstrate that "the Oneida Indian reservation was in any way subject to the public land laws of the United States or the authority of Congress" before taking the land at issue here into trust. Pl. Br. at 25. The Supremacy Clause of the Constitution and Congress's plenary power over Indian affairs sufficiently establishes Congress's authority to acquire a new federal interest in that land, and the IRA likewise sufficiently delegates that authority to the Secretary.

II. "FEDERAL JURISDICTION" OVER THE ACQUIRED LAND IS NOT MATERIAL TO PLAINTIFFS' CLAIMS UNDER THE APA.

The second reason that Plaintiffs could not demonstrate a genuine issue of material fact is their challenge to the Secretary's decision arises under the APA. Therefore, the issue before the Court is the validity of the agency's *own* rationale for its action, not some other rationale ascribed to it by the courts or litigants. *See, e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). Plaintiffs do not describe the Secretary's reasoning or even provide the administrative decisions under review to the Court in their Appendix. This omission is fatal to their claims,

because "the grounds upon which the agency acted in exercising its powers" are the only grounds "upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

1. The Secretary's decision did not rely on territorial war powers.

The constitutional grounds for the IRA, as explained above, are the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause. The statutory basis for the Secretary's authority was the IRA, and she explicitly relied on that authority in her Record of Decision here. 25 U.S.C. § 465; *see* ROD at 8 (App. 216). The Secretary also cited her implementing regulations, codified at 25 C.F.R. Part 151, which are based on the her IRA authority. *See* ROD at 8, 9 n.1 (App. 216-17); "Land Acquisitions," 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980) (citing, inter alia, 25 U.S.C. § 465); "Land Acquisitions in the State of Alaska," 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014) (providing more detail about the legislative authority of the IRA).

Instead of focusing on the Secretary's own stated sources of authority, Plaintiffs attack a straw man. They argue that 43 U.S.C. § 1457 is the "true legal basis" for the Secretary's land-into-trust regulations, that this statute is actually an exercise of Congress's "territorial war power," and that it is unconstitutional "if it is applied to land under state jurisdiction without some emergency or exigent circumstance." Pl. Br. at 10, 14. They therefore contended below that the validity of the Secretary's decision "hinges on a factual determination of whether the

'reservation' of the Oneida Indians was a state or federal reservation." *See* Motion to Reconsider at 2 (Docket #78) (App. 282).

This argument, which requires several leaps of logic that Plaintiffs do not support in their brief, is not grounded in the record before the agency or the district court. Section 1457 concerns the internal organization of the United States government, delegating to the Secretary of the Interior broad areas of responsibility such as the Bureau of Land Management, the National Park Service and (generally) "Indians." The district court cited Section 1457 for the basic proposition that statutes pertaining to Indians, such as the IRA, are committed to the Secretary's administration and that she is entitled to deference in interpreting them. *See* March 26, 2015 Op. at 11 (App. 16) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). That correct holding has nothing to do with Congress's territorial war powers, and the Secretary never relied on those powers to demonstrate constitutional or statutory authority to take land into trust.[4]

As a result, the United States cannot (and does not) rely on Section 1457 or the territorial war power to defend her decision here. But conversely, Plaintiffs cannot establish an issue of material fact under the APA by arguing that those authorities –

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[4] The Secretary takes no position here on the legally irrelevant questions of the scope of Congress's war power within United States territory or whether the State or federal status of an Indian reservation might affect that power.

which the Secretary properly never considered – might have been insufficient to support her decision.

2. The Secretary's finding that the Oneida Nation was "under federal jurisdiction" in 1934 did not depend on the existence of a reservation.

The Secretary's decision to take land into trust for the Tribe was premised on a determination that the trust acquisition was consistent with the IRA's requirements for taking land into trust. The APA requires the Secretary to support that decision in the administrative record her decision, including by explaining why the statutory requirements were met. In order to obtain relief under the APA from this Court, Plaintiffs must show that the agency's rationale is inconsistent with the IRA or unsupported by the administrative record. They cannot make that showing on the record here.

As noted above, Section 465 does not require any particular land status or pre-existing federal interest before the Secretary can take that land into trust. *See supra* pp. 21-23. Instead, that statute permits the Secretary to take land into trust "for the purpose of providing land for Indians," and the IRA defines "Indians" (in part) as persons "who are members of any recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. §§ 465, 479 (emphasis added). In *Carcieri*, the Supreme Court held that the word "now" in the IRA's definition of "Indians" means "at the time the IRA was enacted" in 1934. *See* 555 U.S. at 391. On remand from the district court,

the Secretary found that the Oneida Nation was under federal jurisdiction in 1934 and therefore eligible to have land acquired in trust on its behalf. *See* Amended ROD at 2-3 (App. 293-94).

Plaintiffs propose that their land status argument is a way to contest that finding. *See* Pl. Br. at 13. Like their "territorial war powers" argument, however, their argument to the district court on this point failed to engage with the Secretary's actual rationale, which is the only appropriate object for this Court's review. Plaintiffs purport to identify the Secretary's "under federal jurisdiction" determination as one of the issues presented in their appeal, *see* Pl. Br. at 5 (issue 2(a)), 13 (citing *Carcieri*, 555 U.S. 379), but their brief does not include any argument about that determination, instead focusing on the irrelevant question of land status. Any challenge to the Secretary's "under federal jurisdiction" determination is therefore waived.

In any event, the district court was correct to uphold the Secretary's determination that the Oneida Nation was under federal jurisdiction in 1934 and therefore qualifies as an "Indian tribe" for IRA purposes. The Supreme Court in *Carcieri* did not provide any further guidance about the meaning of "under federal jurisdiction." Under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), if that phrase of the IRA is ambiguous, then the Secretary has discretion to interpret it. The Secretary has determined that the text of the IRA does indeed require interpretation, as it "does not define or otherwise establish the meaning of the phrase 'under federal

jurisdiction," nor does "the legislative history clarify the meaning of that phrase." Amended ROD at 3-4 (App. 294-95). The district court agreed that the IRA is ambiguous, *see* March 26, 2015 Op. at 13 (App. 18), and Plaintiffs do not contest that holding.

The Secretary, in her discretion, adopted a two-part test to determine whether a tribe was "under federal jurisdiction" in 1934 and therefore eligible to benefit from Section 465 of the IRA. First, the Secretary would determine whether there was a sufficient showing "in the tribe's history" that it had been under federal jurisdiction at some point prior to 1934. Amended ROD at 5 (App. 296). For example, jurisdiction might be shown through "an action or series of actions through a course of dealings or other relevant acts for or on behalf of the tribe . . . that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal government." *Id.* at 5-6 (App. 296-97). Second, the Secretary would determine whether that historic federal jurisdiction "remained intact in 1934." *Id.* at 6 (App. 297). The district court approved of this two-part test as a reasonable interpretation of the IRA, *see* March 26, 2015 Opinion at 13-14 (App. 18-19), and Plaintiffs also do not contest that holding in this appeal. *See also Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014) (concluding that the phrase "under federal jurisdiction" was ambiguous and upholding the Secretary's two-part test).

Finally, the Secretary concluded that "the Oneida Indian Nation was under federal jurisdiction in 1934 because the Oneidas voted in an election called and conducted by the Secretary of the Department of the Interior pursuant to Section 18 of the IRA [25 U.S.C. § 478] on June 18, 1936." Amended ROD at 2-3 (App. 293-94). The Secretary found that "this is sufficient to establish that the Nation was under federal jurisdiction in 1934" and specifically added that "no additional evidence is required." *Id.* at 3, 6 (App. 294, 297). On appeal, Plaintiffs do not challenge the Secretary's findings that this election established the federal government's jurisdiction over the Oneida Nation in 1934, thus making the Oneida eligible to convey their land to the United States to be held in trust under Section 465. In these circumstances, this Court may uphold the Secretary's decision and affirm the district court's grant of summary judgment solely on that basis – without any need to address the land status question that Plaintiffs seek to dispute.

Land status enters the litigation only because, for the sake of a thorough analysis, the Secretary also considered *additional* evidence of federal jurisdiction. One of the events that the Secretary discussed was a suit by the government on behalf of Oneida Indians to protect their possession of land. *See id.* at 15-16 (App. 306-07) (describing *United States v. Boylan*, 265 F. 165 (2d Cir. 1920)). In the *Boylan* litigation, the government argued (and this Court accepted) that the lands in question were part of the original Oneida Indian reservation and that the government could sue for

possession on the tribe's behalf. *See id.* In the Amended ROD, the Secretary cited this "suit by the United States as trustee for the Oneida" as further evidence of the government's jurisdiction over the Oneida Nation, and the district court agreed. Amended ROD at 16 (App. 307); March 26, 2015 Opinion at 17 (App. 22).

Plaintiffs wholly fail to recognize the limited context in which the Secretary discussed the issue of land status – a context that shows how remote their historical narrative is from any material issue in this case. They seek to demonstrate to this Court that the 1838 Treaty of Buffalo Creek disestablished the Oneidas' reservation in New York and (in their view) therefore extinguished federal jurisdiction over the tribe. Pl. Br. at 18. But the Secretary's conclusion that the Oneida Nation was under federal jurisdiction in 1934 did not depend upon the existence of a reservation; it was based on United States' representation of the Oneida in litigation in 1920 and evidence of regular interactions between the federal government and the Oneida Nation over the last 200 years. Amended ROD at 16 (App. 307).

Even assuming, as Plaintiffs argue, that those regular interactions fail to add much support to the conclusion that the Oneida Nation was under federal jurisdiction, the Secretary still provided adequate grounds for her decision. The APA allows the Court to uphold an administrative decision, even where it finds an error, if it is "confident that the [a]gency would reach the same conclusion absent any such error." *Karpova*, 497 F.3d at 269; *see also* 5 U.S.C. § 706 (incorporating the "rule of

prejudicial error"); *Watson v. Geren*, 587 F.3d 156, 164-65 (2d Cir. 2009) (Raggi, J., dissenting from the denial of rehearing en banc and discussing the harmless error standard). Even if the Secretary made an error in analyzing the *Boylan* litigation – which she did not – the record here presents an unusually clear example of why any such error would have made no difference. The Secretary explicitly stated that this additional analysis was not essential to her overall decision, because the Oneidas' participation in the 1936 election was itself sufficient to establish that they were under federal jurisdiction. *Id.* at 3 (App. 294).

Under these circumstances, Plaintiffs cannot show that their arguments to the district court presented a genuine issue of material fact. Plaintiffs' claim under the APA presents the legal questions of whether the Secretary had authority to make the decision under review and whether the administrative record supported that decision. Plaintiffs' historical narrative and theories about land status do not relate to the Secretary's own factual findings or decision rationale. There were no issues of material fact that required resolution, and the district court was right to grant summary judgment to the Secretary.

III. THE DISTRICT COURT'S CORRECT APPLICATION OF THIS COURT'S PRECEDENT DID NOT DEPRIVE PLAINTIFFS OF A FAIR HEARING.

A third independent and sufficient reason to affirm the district court's judgment is that the issues Plaintiffs seek to raise were already decided by this Court in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003) (*Sherrill I*).

Plaintiffs claim that the district court was constrained by this Court's case law in evaluating one argument – their claim that "any federal jurisdiction over the Oneidas was extinguished by the [1830] Removal Act and the [1838] Treaty of Buffalo Creek." March 26, 2015 Op. at 16 (App. 21). The district court held that "it remains the law in the Second Circuit that 'the Oneidas' reservation was not disestablished." *Id.* at 16-17 (App. 21-22) (quoting *Madison County*, 665 F.3d at 443). Plaintiffs admit that the district court was bound by that case law, *see* Pl. Br. at 1-2, and that concession alone is enough to refute their claims of legal error. But they also argue that they should have been permitted to present evidence to undermine this Court's factual conclusions about the Treaty of Buffalo Creek in *Sherrill I*. *See id.* at 2.

It is important to note again here that federal jurisdiction over the Oneida Nation, which is required to satisfy the first definition of "Indian" in the IRA, is different from federal jurisdiction over the land that constitutes the Nation's reservation, which is the focus of Plaintiffs' appeal. As discussed above, under the Secretary's unchallenged interpretation of the IRA, the existence of a reservation (whether federal or state) is not necessary to the finding that the Oneida Nation were under federal jurisdiction in 1934. Even if Plaintiffs were right, and Congress had disestablished the Oneidas' *reservation*, that would not demonstrate that United States lacked jurisdiction over the *tribe* for purposes of the IRA. *See supra pp.* 26-31. We nonetheless address this argument because the district court addressed and rejected

Plaintiffs' disestablishment argument in its opinion, and because Plaintiffs also urge this Court to reconsider its own case law on that question.

The first Congress in 1790 asserted federal authority over Indian lands in the Trade and Intercourse Act, which prohibited the alienation of Indian lands without federal approval and remains in effect today. *See* 25 U.S.C. § 177. Since that time, the boundaries of an Indian reservation may only be diminished or disestablished by Congress, and only on a showing of "substantial and compelling evidence of a congressional intention." *Solem v. Bartlett*, 465 U.S. 463, 472 (1984); *see Nebraska v. Parker*, 136 S.Ct. 1072, 1078-79 (2016). For example, Congress may show its intent by "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests" or a statutory provision "restoring portions of a reservation to 'the public domain.'" *Nebraska*, 136 S.Ct. at 1079 (quoting *Solem*, 465 U.S. at 470, and *Hagen v. Utah*, 510 U.S. 399, 414 (1994)). As this Court explained in *Sherrill I*, 337 F.3d at 159-60, that showing must generally be made using legal sources – a "textually grounded intention to diminish supported by legislative history." Diminishment may be further supported by other surrounding factual circumstances, *see id.*, but only if the evidence of congressional intent is unequivocal; the fact that land was opened to settlement is not enough. *Nebraska*, 136 S.Ct. at 1079-80. To the extent that Congress's intent to disestablish or diminish the Oneida reservation is

unclear, the courts must resolve "all ambiguities in the Oneidas' favor." *Sherrill I*, 337 F.3d at 165.

This Court in *Sherrill I* considered precisely the argument Plaintiffs attempt to raise here – whether "the 1838 Buffalo Creek Treaty . . . formally disestablished the Oneida reservation." *Id.* at 158. The Court rejected that argument because "[n]othing in [the treaty's] text provides 'substantial and compelling' evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation." *Id.* at 161. Although the Treaty of Buffalo Creek contains explicit cession language for the Seneca and Tuscarora Indians in New York, the language pertaining to the Oneida Nation was different. *Id.* Under the treaty, the Oneidas' removal was "conditioned on speculative future arrangements between the Indians and a third party, New York's governor," which "were never accomplished." *Id.* at 161-62. The Court also rejected the argument that the 1830 Removal Act disestablished Indian reservations, noting that the Act merely "permits the President to provide western lands to 'such tribes or nations of Indians as may *choose* to exchange the lands where they now reside, and move there.'" *Id.* at 163 (citing 4 Stat. 411) (court's emphasis).

The plaintiffs in *Sherrill I* sought to show that the factual circumstances of federal Indian removal policy in the 1830's demonstrated an intent to disestablish the reservation. But this Court found those facts irrelevant as a matter of law, holding that "this argument ignores both the requirement that removal language be 'clearly

expressed,' as well as the text of the Removal Act." *Id.* at 163. Arguments about general "federal Indian removal policy," "the subsequent treatment of the reservation," and judicial recognition of the Oneidas' rights in Kansas land were insufficient to overcome the lack of textual evidence for disestablishment in the Treaty of Buffalo Creek itself. *Id.* at 163-64.[5]

Plaintiffs here seek to introduce exactly the kind of factual evidence, unrelated to the text or legislative history of the Treaty of Buffalo Creek, that the *Sherrill I* Court found legally immaterial to the question of disestablishment. They argue that because the 1830 Removal Act authorized the government to provide land for Indians in federal territories, and because the 1838 Treaty of Buffalo Creek did provide such land for the Oneidas, the Treaty must have disestablished the Oneidas' New York reservation. Pl. Br. at 18-21. But as Plaintiffs acknowledge, the Treaty involved "many different bands of various tribes." Pl. Br. at 21. It contained different

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[5] The Supreme Court in *Sherrill II* reversed this Court's holding in *Sherrill I* that the Oneida Nation may assert sovereignty over land that it owns within the boundaries of its reservation. *See Sherrill II*, 544 U.S. at 212. But the Supreme Court did not reach the question of disestablishment, explicitly noting that it "need not decide" that question given its disposition of the case on equitable grounds. *Id.* at 215 n.9. This Court subsequently held that its "prior holding on this question – that the Oneidas' reservation was not disestablished – therefore remains the controlling law of this circuit." *Madison Cty.*, 665 F.3d at 443-44 (internal quotations marks and citations omitted).

language for each of them, and the section pertaining to the Oneidas omitted the explicit cession of territory that applied to other tribes. *Sherrill I*, 337 F.3d at 161, 163. Under this Court's binding interpretation of the Treaty of Buffalo Creek, based on the treaty's text, Plaintiffs' general arguments about the legislative context or background of that treaty cannot demonstrate the disestablishment of the Oneida reservation.

The specific documents on which the Plaintiffs base their claims of a genuine issue of material fact are also little help to them in demonstrating error by the district court or by this Court.

Documents in the district court record. The only document that Plaintiffs proffer to overturn this Court's precedent that they also actually presented to the district court is the "Nixon Memorandum," a discussion of federal Indian policy prepared for the White House in 1974. In Plaintiffs' view, this memorandum shows a "goal of unlimited federal power," and "implies that two major facts were omitted" during the 1974 litigation that resulted in the Supreme Court's decision that year in *Oneida Indian Nation*, 414 U.S. 661. Pl. Br. at 17-19. The *omission* of a discussion of the Treaty of Buffalo Creek in the Nixon Memorandum, Plaintiffs argue, is evidence of a thirty-year federal pattern of covering up any facts contrary to any Indian land claim. *Id.* at 18-19.

The Nixon Memorandum provides absolutely no support for Plaintiffs' theory that the Oneida Nation (with the assistance of the United States government)

deliberately omitted relevant facts in previous litigation before this Court. *See* Pl. Br. at 18-19, 27-28. On its face, the memorandum is a discussion-draft summary, prepared for internal U.S. government use, of potential Indian tribal sovereignty issues anticipated over the next decade. *See* App. 114, 118-19. The passage that Plaintiffs rely on, App. 136-38, is part of a very broad-brush discussion of the history of federal Indian policy, and it sheds absolutely no light on whether third parties made or omitted particular arguments and facts in unrelated litigation.

More importantly, the Nixon Memorandum also does not establish the intention of Congress in 1838, nor any error in this Court's interpretation of the Treaty of Buffalo Creek. The various state-government, local-government, and private parties opposing the Oneida Nation have had ample opportunity, in their many trips to the Second Circuit, to set the record straight. *Sherrill I* shows that this Court has taken those parties' arguments seriously and based its holdings on the relevant legal sources, rather than on an allegedly distorted understanding of historical fact. *See, e.g.*, *Sherrill I*, 337 F.3d at 158-67.

Documents not presented to the district court. Plaintiffs also rely on "three irrefutable federal documents explaining the history and application of the Treaty of Buffalo Creek," but that were not in the administrative record or the district court record. Pl. Br. at 13-14. Those documents cannot be considered in this APA challenge, because review of the Secretary's action is "confined to the full administrative record before

the agency at the time the decision was made … not some new record completed initially in the reviewing court." *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 82 (2d Cir. 2006) (quoting *Envt'l Def. Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981), and citing other cases). If Plaintiffs believe that these documents establish facts that would demonstrate that the Secretary had no authority to take land into trust in the particular case of the Oneida Indian Nation, then they were obligated to put those documents into the administrative record so that the Secretary could consider them in the first instance. *See NRDC v. FAA*, 564 F.3d 549, 559 (2d Cir. 2009).[6]

Furthermore, the three historical documents Plaintiffs seek to introduce would not change the Court's view of "Congress's intent in 1838." *Sherrill I*, 337 F.3d at 162. Documents created after the Treaty of Buffalo Creek itself do not "'unequivocally reveal' the intention necessary to demonstrate disestablishment" in that Treaty. *Id.* Here, Plaintiffs' additional documents were all created at least forty years after the Treaty of Buffalo Creek. *See* Pl. Br. at 19-20 (describing an 1878 Department of the Interior memorandum); *id.* at 22 (referring to an 1882 letter from the Department of the Interior to Congressman Haskell); *id.* at 23 (referring to an 1883 congressional

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[6] This Court issued an Order on May 3, 2016, denying Plaintiffs' motion to supplement the record on appeal with these newly-found documents. Plaintiffs have filed a Motion for Reconsideration, which the United States has opposed. The Court has not ruled on the Motion for Reconsideration as of the filing date for this brief.

record). But the "subsequent demographic history" of land, and its "subsequent treatment . . . by Government officials," has "limited interpretive value." *Nebraska*, 136 S.Ct. at 1082 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998)). These documents do not show Congress's intent in 1838, which this Court held to be the dispositive question, and therefore they cannot support Plaintiffs' claims. This is not because the Court has conclusively adopted a contrary view of the facts and precluded any dispute about those facts, but because, as a matter of law, this Court has specifically held facts of that type to be *irrelevant* to the legal question they raise. Even if the Court permitted Plaintiffs to reach back and contest the "facts" that they claim the *Sherrill I* court found incorrectly, those "facts" would not change the *Sherrill I* court's holding that, as a matter of law, the Treaty of Buffalo Creek does not demonstrate the necessary intent to disestablish a reservation.

The district court's application of *Sherrill I* and *Madison County* therefore did not deny Plaintiffs an opportunity to contest any material facts. *See* Pl. Br. at 29-30. The facts they proposed to present were not material to the question of disestablishment, and the question of disestablishment was not relevant to the validity of the Secretary's decision under the IRA and the APA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATES

I certify that this brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C).

This brief contains 9,907 words, excluding the portion exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii), and therefore conforms to the word limit of the Federal Rules. It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on July 21, 2016. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ J. David Gunter II