016-53-cv

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 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 the 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, No. 5:08-cv-0060 (Hon. Lawrence E. Kahn)

BRIEF OF APPELLEE RAY HALBRITTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treaties

Other Authorities

STATEMENT OF THE CASE

The Central New York Fair Business Association, the Citizens Equal Rights Alliance and four individuals filed suit on June 21, 2008. Doc. 1 (complaint). The plaintiffs challenged a final decision by the Secretary of the Interior under 25 U.S.C. § 465 to accept a transfer of approximately 13,000 acres of land from the Oneida Nation of New York to be held in trust for the Nation. Doc. 1, ¶1; 73 Fed. Reg. 30144 (May 23, 2008) (announcing decision). The Record of Decision (ROD) is in the record at Doc. 90, Ex. 1.

The named defendants were the Secretary of the Interior, other officials and employees of the Department of the Interior, and Ray Halbritter "as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation." Doc. 1, caption & ¶23. The complaint, however, contained no allegation that Mr. Halbritter did or failed to do anything relevant to the litigation, and the prayer at the end of the complaint sought no relief as to him. Doc. 1. The seven claims in the complaint (Doc. 1, ¶¶94-165) challenged the Secretary's trust decision on various grounds – including claims that 25 U.S.C. § 465 did not authorize the trust decision or else is unconstitutional, that there were flaws in the administrative evaluation of the trust application, and that the trust decision violated the plaintiffs' civil rights and was actionable under 42 U.S.C. §§ 1981, 1983, and 1985.

On May 8, 2009, some of the plaintiffs filed an amended complaint that included an additional claim. Doc. 58. The additional claim challenged the General Services Administration's transfer of approximately 18 acres of excess land on a military base to the Department of the Interior to be held in trust for the Oneida Nation. Doc. 58, ¶¶149-186. The transfer occurred pursuant to 40 U.S.C. § 523, which mandates that excess military land located within the boundaries of an Indian reservation be transferred by GSA to DOI to be held in trust for the relevant Indian tribe. The administrative records relevant to that transfer are in the record. Doc. 67, Exs. 1-3.

All defendants moved to dismiss. Mr. Halbritter moved to dismiss on the ground that the doctrine of tribal sovereign immunity barred the official capacity suit filed against him. Doc. 23 & Doc. 63. The federal defendants moved to dismiss certain claims for failure to state a claim. Doc. 21 & 67.

On March 1, 2010, Judge Kahn granted Mr. Halbritter's motion. A-109-110. Judge Kahn ruled that tribal sovereign immunity barred suit to the extent that Mr. Halbritter was sued in his official capacity as Nation Representative. Judge Kahn noted the absence of allegations regarding Mr. Halbritter: "[I]t does not appear that Halbritter actually has been sued in either his individual or official capacity insofar as there are no allegations against him.… Whatever argument

Plaintiffs are seeking to advance as to the nature of their suit against Halbritter, the Court finds that it is without merit, and that there is no reason for Halbritter to remain a party. . . ." A-110. The plaintiffs had stated in briefing that "Mr. Halbritter is not an actual party," Doc. 65 at 1, a confusing remark noted by Judge Kahn. A-110.

Regarding the federal defendants, Judge Kahn dismissed several claims: that the Section 465 trust decision violated the Tenth Amendment; that Section 465 unlawfully delegates legislative authority to the executive; that the Section 465 trust decision violated 42 U.S.C. §§ 1981, 1983 and 1985; that the Section 465 trust decision violated the National Environmental Policy Act; that the Section 465 trust decision violated limits on trust authority imposed by the Indian Gaming Regulatory Act; that the Section 465 and Section 523 trust decisions were separation-of-powers violations; and that the Section 523 transfer did not meet the requirement that the land be within an Indian reservation. A-91-109.

Judge Kahn directed the parties to file motions for summary judgment in all of the cases challenging the Oneida trust decisions, including in a related case filed by the State of New York and two counties. Sept. 30, 2011 Text Order. The State and Counties' case was one of six related cases before Judge Kahn that challenged the Oneida trust decisions, and was the lead case. The State and the Counties

ultimately settled with the Oneida Nation, as explained in the Oneida Nation's amicus brief filed in pending appeals related to this one. *Upstate Citizens for Equality v. United States*, No. 15-1688cv (2d Cir.) (argued May 3, 2016).

On September 24, 2012, Judge Kahn addressed summary judgment motions, A-35-80, remanding the Record of Decision back to the Secretary of the Interior to determine whether the Oneida Nation was "under federal jurisdiction" in 1934 and thus eligible for Section 465 trust transfers. That issue arose because, while the six cases challenging the trust decisions were pending before Judge Kahn, the Supreme Court decided that the Indian Reorganization Act (of which Section 465 is a part) limits trust transfers under Section 465 to tribes under federal jurisdiction in 1934. *Carcieri v. Salazar*, 555 U.S. 379 (2009). Judge Kahn directed the Secretary of the Interior to decide on remand whether the Oneida Nation was under federal jurisdiction in 1934. A-35-80.

On remand, the Secretary determined that the Nation was under federal jurisdiction in 1934, as evidenced by a number of findings, including: that the United States had entered into a series of treaties with the Oneida Nation in the eighteenth and nineteenth centuries; that the United States had annually thereafter and up to the present delivered the cloth to the Nation that is required by one of the treaties; that the Oneida Nation maintained relations with the federal government at

all relevant times; that the United States sued on behalf of the Nation to regain lands for the Nation, *United States v. Boylan*, 265 F. 165 (2d Cir. 1920); and that the Department of the Interior formally determined just after passage of the IRA that the Oneida Nation had a right to vote under the Act and that such a vote occurred in 1936. The Secretary's Amended Record of Decision was filed in the District Court on February 19, 2014. Doc. 108 & Doc. 109, Ex. 1.

On March 26, 2015, Judge Kahn addressed the federal defendants' motion for summary judgment as to all of the plaintiffs' remaining claims. A-6-34. Judge Kahn ruled that the Secretary's *Carcieri* determination – that the Oneida Nation was under federal jurisdiction in 1934 – was "reasonable and supported by the record." A-25. Judge Kahn rejected the plaintiffs' various other arguments against federal power to take land into trust and against the process by which the Oneida trust decision had been made. A-25-33. On November 2, 2015, Judge Kahn denied the plaintiffs' motion for reconsideration. A-1.

The plaintiffs filed a notice of appeal on December 30, 2015. Doc. 132.

SUMMARY OF ARGUMENT

The plaintiffs' brief repeatedly complains that all of the plaintiffs' claims are foreclosed by circuit precedent. Consequently, this appeal is appropriate for disposition by summary order affirming the District Court.

The District Court correctly dismissed Mr. Halbritter as a defendant. Sued in his official capacity "as the Federally Recognized Leader of the Oneida Indian Nation," tribal sovereign immunity required that dismissal. The District Court correctly observed, moreover, that the plaintiffs made no allegations at all to indicate why Mr. Halbritter should be a defendant in any capacity. That is not surprising because the plaintiffs' challenges are to decisions made by federal agencies, not to decisions made by Mr. Halbritter or the Oneida Nation. If this Court were to affirm the District Court's rejection of the plaintiffs' challenges to the federal agency decisions, the correctness of the District Court's dismissal of Mr. Halbritter would be moot.

Finally, the District Court correctly ruled that the relevant statutes authorize the challenged trust transfers. As the Supreme Court directed: "Section 465 provides the proper avenue for OIN to reestablish sovereign authority last held by the Oneidas 200 years ago." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005). Section 523 authorized the transfer of the excess military land because it is within the boundaries of the Oneida reservation.

ARGUMENT

I. THE PLAINTIFFS CONCEDE THAT CONTROLLING CIRCUIT PRECEDENT REQUIRES AFFIRMANCE OF THE DISTRICT COURT'S DISMISSAL OF ALL THEIR CLAIMS.

The plaintiffs' brief repeatedly asserts that all the plaintiffs' claims are foreclosed by *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011), and *Oneida Indian Nation v. Madison County*, 605 F.3d 149 (2d Cir. 2010). In those decisions, this Court declared its earlier decision in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), to be binding precedent except to the extent reversed in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and thus rejected arguments that the Oneida reservation in New York never was a federally-protected Indian reservation and that it was disestablished in the nineteenth century.

The plaintiffs' concessions regarding controlling circuit precedent begin at page 1 of their brief, where they state that they "do not in any way blame Senior Judge Lawrence Kahn," who "attempted to be as impartial as the precedents of this Circuit allowed him to be." At page 2, they state that the Court's precedents "prevented the trial court from being able to fairly adjudicate this case."

The remainder of the plaintiffs' brief likewise concedes that the District Court followed circuit precedent and that the same precedent controls the outcome here. Page 10: "All of the arguments of plaintiffs-appellants in the District Court

were contradicted by the express findings of this Court in" the *City of Sherrill* and *Madison County* cases, "which prevented plaintiffs-appellants from having an impartial and fair forum." Pages 15-16: "[A]ll of these [the plaintiffs'] issues were tainted by the contradictory precedents of this Court. . . ." Page 16: "[P]laintiffs-appellants have no choice [on appeal] but to oppose the precedents of this Court." Page 28: "These decisions rendered the District Court powerless to alter these precedents from this Court."

Pages 28 through 32 end the brief with a long lament that circuit precedent controls the issues in this case. The plaintiffs argue at page 29 that adherence to circuit precedent will mean that "this Court has effectively abrogated its judicial review authority over this case." At page 30, the plaintiffs acknowledge that "[n]one of plaintiffs' facts were accepted as true because they contradicted the precedents of this Court" and that the "the District Court had no choice but to apply the precedent of this Court and decide that there were no remaining genuine issues of material fact."[1] Also at page 30, argument heading B asserts that "existing precedents also prevent a determination" of various claims. At pages 31-32: "This Court has already circumscribed its own judicial review authority and or

[1]From the plaintiffs' brief it is clear that the references to "facts" are to the plaintiffs' legal assertions – such as that there never was a federally-protected Oneida reservation, that any such reservation was disestablished, and that the relationship of the United States with the Oneidas ended in the nineteenth century.

impugned its neutrality to such a degree that it is futile for the [plaintiffs] to make their claims. . . ." The plaintiffs conclude at page 32 that "the District Court was shackled by these precedents" and that "this Court is shackled as well."

The plaintiffs' concessions make it appropriate to affirm by entry of a summary order pursuant to Local Rule 32.1.1 and IOP 32.1.1. Having conceded that the District Court complied with applicable precedent, the plaintiffs do not make any argument that this Court's *stare decisis* jurisprudence leaves them room to achieve any measure of success on appeal. Moreover, it would be a waste of the Court's time to try to unknot and evaluate the snippets of arguments that make up the plaintiffs' brief. The brief does not come close to setting forth and supporting contentions in the manner required by Federal Rule of Appellate Procedure 28(a)(8)(A). *See Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996) (issues waived if "not sufficiently argued" on appeal, with citations to the parts of the record relied on), *vacated on other grounds*, 521 U.S. 114 (1997).

II. THE DISTRICT COURT CORRECTLY DISMISSED THE ONEIDA NATION'S FEDERALLY RECOGNIZED REPRESENTATIVE, RAY HALBRITTER.

At page 6 of their brief, the plaintiffs list the District Court's sovereign-immunity dismissal of Mr. Halbritter as an issue presented. But their brief does not contain a word as to what Mr. Halbritter did or did not do, or should be required to do or not to do, that could be relevant to party status. At page 32, the

plaintiffs simply remark in passing that Mr. Halbritter "should be a named defendant as a real party in interest." The only other mention of Mr. Halbritter is at page 15 in the summary of the argument, where the plaintiffs assert that they "are entitled to sue Mr. Halbritter in his capacity as leader of his tribe." The plaintiffs never attempt to explain why Mr. Halbritter is needed as a defendant in a challenge to federal agency action. They likewise never attempt to explain why the doctrine of tribal sovereign immunity did not require the District Court to dismiss Mr. Halbritter.

The doctrine of tribal sovereign immunity bars suit against Mr. Halbritter in his capacity as leader of the Nation. The captions of the plaintiffs' complaints name Mr. Halbritter "as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation." Doc. 1 & Doc. 58. Thus, plaintiffs filed an "official capacity" suit against Mr. Halbritter. An official capacity suit is a suit against the sovereign itself, not a suit against the sovereign's official. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Lore v. City of Syracuse*, 670 F.3d 127 (2d Cir. 2010). Here, the sovereign was an Indian tribe, the Oneida Nation. The doctrine of tribal sovereign immunity bars suits against Indian tribes unless Congress has permitted suit or a tribe has waived immunity, neither being alleged here, and also bars suits against tribal officials as stand-ins for their tribes except in the *Ex parte Young* context. *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998); *Cayuga*

Indian Nation v. Seneca County, 761 F.3d 218 (2d Cir. 2014); *Chayoon v. Chao*, 355 F.3d 141 (2d Cir. 2004).

The recent Supreme Court case referenced by the plaintiffs at page 15 of their brief indicates only that some suits for injunctive relief against tribal officials may be permitted as analogous to *Ex parte Young* suits against state officials. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035 (2014). The plaintiffs here did not mention *Ex parte Young* below, Doc. 1 & Doc. 58, and do not mention it in their brief on appeal. Nor have they ever made the allegations that are requisites for an *Ex parte Young* action. *Cf. City of Sherrill*, 337 F.3d at 169 (affirming sovereign immunity dismissal of claims against Mr. Halbritter and other Nation officials and noting absence of *Ex parte Young* allegations).[2]

Judge Kahn thus correctly dismissed Mr. Halbritter as a defendant. This Court, however, need not reach that question if it concludes that Judge Kahn correctly entered judgment for the federal defendants on all of the plaintiffs'

[2]Judge Kahn was unsure whether the plaintiffs sued Mr. Halbritter individually, A-110, but their complaints, Doc. 1 & Doc. 58, are clear that they did not. The captions name Mr. Halbritter as the "Federally Recognized Leader of the Oneida Indian Nation." The complaints then state that all defendants, "except the real party in interest Halbritter, are being sued in their official *and individual* capacity. . . ." Doc. 1, ¶ 23 & Doc. 58, ¶22 (emphasis added). Even Mr. Halbritter's status as a defendant in his official capacity became unclear when the plaintiffs argued that he was "not an actual party" and that "the named federal defendants [were] representing his position." Doc. 65 at 1; *see* A-110.

claims. The plaintiffs asserted those claims to reverse federal agency actions. No claim arose from Mr. Halbritter's actions, and no relief sought on those claims depended on Mr. Halbritter's presence as a defendant.

III. THE DISTRICT COURT CORRECTLY REJECTED THE PLAINTIFFS' CHALLENGES TO THE SECTION 465 TRUST DECISION REGARDING ABOUT 13,000 ACRES OF ONEIDA NATION LAND AND TO THE SECTION 523 TRUST DECISION REGARDING ABOUT 18 ACRES OF EXCESS MILITARY LAND.

A. The District Court Correctly Ruled That The Federally-Acknowledged Oneida Reservation Was Not Disestablished.

The plaintiffs' central contentions are that there never was a federally protected Oneida reservation and, if there was, that it was disestablished. Based on these contentions, the plaintiffs challenge both the section 465 transfer of title to approximately 13,000 acres of land from the Oneida Nation to the Department of the Interior and the section 523 transfer of custody of approximately 18 acres of land from GSA to the Department of the Interior. The plaintiffs' challenges fail because, among other reasons, the plaintiffs' premises are wrong. Judge Kahn correctly ruled based on controlling circuit precedent that there is a federally acknowledged and protected Oneida Nation reservation and that it never was disestablished.

1. Federally Protected Oneida Reservation

The plaintiffs assert that "[t]he main thrust of plaintiffs-appellants case below" was the argument that the Oneida Nation ceded all of its land to the State of New York in the 1788 Treaty of Ft. Schuyler and did not retain or reserve any land. Br. 11; *see* Doc. 58 ¶2 (amended complaint). That argument overlooks the numerous post-1788 acknowledgements and protections of the Oneida reservation by the United States. 25 J. Cont'l Cong. 681, 687 (Oct. 15, 1783); Treaty of with the Six Nations (Ft. Stanwix), 7 Stat. 15 (Oct. 22, 1784); Treaty with the Six Nations (Ft. Harmar), 7 Stat. 33 (Jan. 9, 1789); Treaty with the Six Nations (Canandaigua), 7 Stat. 44 (Nov. 11, 1794). Moreover, the plaintiffs' argument is foreclosed by *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003).

In *Sherrill*, this Court described the same argument as "incorrect" and held that a 300,000-acre reservation was "a carve-out" from the Oneida Nation's cession "and represented the part of the Indians' aboriginal homeland that had not been conveyed to New York." *Sherrill*, 337 F.3d at 156 n.13. The Court cited to the page in *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 231 (1985), describing the 1788 treaty as a purchase by New York of "the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres. . . ." The Court also cited to Judge Kahn's explanation in other Oneida litigation for

rejecting the same argument that is made by the plaintiffs here regarding the 1788 treaty. *See Oneida Indian Nation v. New York*, 194 F. Supp.2d 104, 139-40 (N.D.N.Y. 2002).[3]

This Court's *Sherrill* decision is controlling precedent to the extent not reversed in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The Supreme Court reversed only as to this Court's conclusions regarding tribal sovereignty and tax immunity on reservation lands that the Nation bought back on the open market after a long period of dispossession. The Court "assume[d]" that "the Court of Appeals correctly resolved the major issues of fact and law" concerning the status of reservation lands that the Oneida Nation repurchased, *City of Sherrill*, 544 U.S. at 222 (Stevens, J. dissenting), and imposed an equitable bar to tribal sovereignty and tax immunity on such land. Only because of its

[3]Treaties like the 1788 treaty are read as defining the boundary between reserved and ceded lands, not as cessions of all land and then a retrocession of some lands. Because this Court has authoritatively construed the 1788 state treaty, we note only that the construction is supported by precedent and that the plaintiffs' statement (Br. 24) that the Supreme Court concluded in *Sherrill* that the treaty conveyed all Oneida land to New York is false. *See City of Sherrill*, 544 U.S. at 203 ("Of the vast area conveyed, '[t]he Oneidas retained a reservation of about 300,000 acres.'") (quoting an earlier Oneida decision); Op. Att'y Gen. (1795) (1788 state treaty did not extinguish Oneida rights in reserved lands); N.Y. Assembly Rep. No. 142, at 3 (May 24, 1878) (under 1788 treaty, Oneida reservation was reserved by Oneidas and not appropriated by New York to Oneidas); *see* Title to the Pottawatomie Reservations, 2 Op. Att'y Gen. 587 (1833) (same result under similar federal treaty); *United States v. Klamath & Moadoc Indians*, 304 U.S. 119, 122-23 (1938) (same); *United States v. Winans*, 198 U.S. 371, 377 (1905) (same); *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832) (same).

assumption did the Court need to address the effect of equitable considerations. This Court has pointed to the reversal on the equitable considerations ground and has held that those portions of its *Sherrill* decision not reversed by the Supreme Court "remain[] the controlling law of this circuit." *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 157 n.6 (2d Cir. 2010) (ruling as to existence of Oneida reservation is controlling law); *accord Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011) (reaffirming same conclusion).

Accordingly, Judge Kahn correctly ruled that the 1788 state treaty did not leave the Oneida Nation without a federally-protected reservation and that, in any event, the reservation came under federal protection by virtue of the Constitution in 1789 and by virtue of the 1794 Treaty of Canandaigua. A-20-21.

2. No Disestablishment Of The Oneida Reservation

Judge Kahn twice rejected the plaintiffs' argument that the federal 1838 Treaty of Buffalo Creek disestablished the Oneida reservation. In his first ruling, he concluded that the Supreme Court's *Sherrill* decision, 544 U.S. at 215 n.9, did not disturb this Court's *Sherrill* decision, 337 F.3d at 158-65, which held that the 1838 treaty did not disestablish the Oneida reservation. A-104-05. In his second ruling, Judge Kahn relied on this Court's decision in *Oneida Indian Nation*, 665 F.3d at 443, which affirmed that the Court's no-disestablishment holding in

Sherrill is controlling law in this circuit. A-21-22. Because both of Judge Kahn's rulings were required by controlling circuit precedent, they were correct.[4]

B. The District Court Correctly Held That The Secretary Of The Interior Has Authority To Accept A Transfer Of Oneida Lands And To Hold Them In Trust Under Section 465.

Judge Kahn rejected the constitutional arguments that the plaintiffs attempted to raise in their complaints regarding the Section 465 trust decision. A-91-92 (rejecting claim that Indian Commerce Clause does not support federal trust authority and that Tenth Amendment therefore forecloses it); A-92-96 (rejecting argument that Section 465 constitutes an unconstitutional delegation to executive branch), A-106 (rejecting separation of powers challenge to executive authority under federal statutes); A-25-27 (rejecting constitutional challenge under *Hawaii v. Office of Indian Affairs*, 556 U.S. 163 (2009), to creating federal and tribal jurisdiction over land).

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[4]This Court's no-disestablishment ruling is supported by a large body of legal authority. This Court's *Sherrill* decision, 337 F.3d at 158-65, fully explains why the relevant precedent compels the conclusion that the Oneida reservation was not disestablished, as does the Oneida Nation's Respondent's Brief filed in *Sherrill*, 2004 U.S. S. Ct. Briefs Lexis 648 (Sept. 30, 2004). The recent decision in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), further explains why a treaty like the Treaty of Buffalo Creek that merely authorizes land sales cannot be construed as having disestablished a reservation, even when non-Indians have bought and occupy much of the land in the reservation. Finally, although not controlling here, section V(E)(5) of the State of New York's settlement of its lawsuit challenging the same trust decisions challenged here provides: "The State hereby stipulates that the Reservation was not disestablished and that the Reservation is reservation land for purposes of state and federal statutes." Doc 319, Ex. 2, *New York v. Salazar*, No. 6:08-cv-00644-LEK/DEP (N.D.N.Y. March 4, 2011).

On appeal, the plaintiffs do not challenge these rulings by Judge Kahn and thus do not present any constitutional question as to the Section 465 trust decision, which is easy to understand. The Secretary's trust decision followed the path laid out in *Sherrill*: "Section 465 provides the proper avenue for OIN to reestablish sovereign authority last held by the Oneidas 200 years ago." 544 U.S. at 220-21. That path is perfectly consistent with plenary federal authority under the Indian Commerce Clause and the Treaty Clause over Indian relations, *United States v. Lara*, 541 U.S. 193, 200 (2004), and specifically with recognized federal power to acquire and hold land in trust for Indian tribes, *United States v. John*, 437 U.S. 634, 653 (1978). *See Citizens Against Casino Gaming v. Chaudhuri*, 802 F.3d 267, 274-75 (2d Cir. 2015) ("most newly acquired tribal lands today are held in trust," which "convert[s] fee lands owned by a tribe to trust status").

The plaintiffs vaguely suggest that there is a question on appeal regarding whether Section 465 authorizes the Secretary to accept a trust transfer of land that is not within an Indian reservation and that has been fully subject to state jurisdiction. Br. 6, 7, 8, 30. The plaintiffs' brief, however, contains no actual argument on any such question. The plaintiffs, therefore, should be deemed to have waived any such argument. There is, moreover, no support for such an argument.

Section 465 authorizes the Secretary of the Interior to acquire and to hold in trust land "within or without existing reservations." Section 465 further authorizes the Secretary to acquire "any interest in lands" "for the purpose of providing land for Indians." Section 465 contains only one proviso limiting that unqualified authority, and it applies only to the Navajo in Arizona and New Mexico. *See* 25 U.S.C. § 467 (land taken into trust can be proclaimed to be a new Indian reservation). The Supreme Court in *Sherrill* surely did not see Section 465 as inapplicable to the Oneida Nation's lands. 544 U.S. at 220-21 (pointing to the section 465 trust land process as the proper avenue for the Oneida Nation to follow in order to re-assert sovereignty over land).[5]

[5]Related appeals from Judge Kahn's dismissal of challenges to the Section 465 trust decision may resolve questions concerning federal authority under the Indian Commerce Clause to hold in trust land that previously has been fully subject to state sovereignty, and also concerning the applicability of Section 465 in New York. *Upstate Citizens for Equality v. United States*, No. 15-1688 (L) (2d Cir.) (argued May 3, 2016). Briefs filed in those appeals by the United States and by the Oneida Nation demonstrate that federal authority. As for the plaintiffs assertion at page 8 of their brief that "no fee land was ever taken into federal trust status before 1978," that is clearly wrong. *See United States v. John*, 437 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938).

C. Although The Plaintiffs Refer To The Secretary's Section 523 Decision To Hold Approximately 18 Acres Of Excess Military Land In Trust, They Have Not Appealed The District Court's Ruling That They Lack Standing To Challenge That Decision.

The plaintiffs refer to a question concerning the Secretary's acceptance from GSA of custody of excess military land that already had been owned and governed by the United States for years. Br. 6 & 15 (referring to "Verona radar station"). Although the plaintiffs do not mention the governing statute, it is 40 U.S.C. § 523. Section 523 mandates that the Administrator of General Services transfer "excess real property located within the reservation of any . . . tribe of Indians" and that the Secretary of Interior hold the property in trust for that tribe.

Judge Kahn dismissed the plaintiffs' claims concerning the Section 523 transfer due to the plaintiffs' lack of standing. "Plaintiffs fail to allege an injury-in-fact, much less causation, sufficient to demonstrate their standing. Indeed, Plaintiffs simply do not indicate how the DOI's acceptance of custody of land which has been transferred from a different federal agency and owned by the federal government for decades inflicts any harm upon a legally protected interest." A-108-09. The plaintiffs have not contested this standing ruling. Thus, no question concerning the transfer of custody between federal agencies of excess military land is actually presented in this appeal.

Judge Kahn alternatively ruled that the plaintiffs failed to state a claim that the excess land is not located within the Oneida reservation, A-109, or that the

transfer constituted a separation-of-powers violation. A-106-07. The reservation ruling was compelled by this Court's decisions, discussed *supra*, that the Oneida reservation was not disestablished. A-109. In the separation-of-powers ruling, Judge Kahn correctly explained why Section 523 adequately guides federal agency action. A-106-07. Indeed, once GSA transfers excess federal land, Section 523 mandates that the Secretary "shall hold" it in trust. Under the statute, the Secretary does not even make a decision.

D. The District Court Correctly Dismissed The Claim That The Oneida Nation Was Not Under Federal Jurisdiction In 1934.

Judge Kahn thoroughly analyzed the Secretary's determination that the Oneida Nation was "under federal jurisdiction" when the IRA was passed in 1934 and thus meets that requirement, as identified in *Carcieri v. Salazar*, 555 U.S. 379 (2009), for eligibility for Section 465 trust land. The findings identified by the Secretary and mentioned in Judge's Kahn's decision overwhelmingly establish that jurisdiction, and so Judge Kahn correctly granted judgment against the plaintiffs on their *Carcieri* claim. A-20-24.[6] Further, the plaintiffs' brief does not challenge

[6]Upon the IRA's passage in 1934, after determining that the Oneida Nation was eligible to vote to reorganize under the IRA, the Secretary organized and held an election by the Oneida Nation on that question in 1936. A-22-23. As the Secretary concluded, A-12 & A-19, that determination conclusively demonstrates federal jurisdiction over the Oneidas at the time of the IRA. Also, a short time before the IRA's passage, the United States sued on behalf of the Oneida Nation in *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), to protect Oneida land in New

those findings. And the plaintiffs' argument II(B) heading states that circuit precedents "prevent a determination of whether the Oneida tribe is eligible for the benefits of the IRA under *Carcieri v. Salazar*." (Br. 30). That concessionary heading is not followed by any argument regarding "under federal jurisdiction." Accordingly, and because the plaintiffs have not challenged any of the numerous findings on which the Secretary's *Carcieri* determination was based, the plaintiffs should be deemed to have waived any challenge to that determination.

E. The District Court Correctly Dismissed All Other Claims.

The plaintiffs' brief mentions other arguments that are offered without support and are generally hard to understand.

In the list of questions presented at page 6 of their brief, the plaintiffs mention a separation-of-powers challenge to the section 523 transfer of excess military land. They never offer any argument on the point. Because the transfer was mandated by statute, there could be no executive misappropriation of legislative power.

York, which reflected federal jurisdiction. A-19, A-22. The supplemental ROD details the additional evidence (not challenged on appeal) demonstrating the requisite federal jurisdiction as to the Oneida Nation. Doc. 109, Ex. 1. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 166 (2d Cir. 2003), holds on much the same evidence that "the trust relationship between the United States and the tribe has not been terminated or abandoned" and that neither federal recognition of the Nation nor its continuous existence has been interrupted.

As for other, vaguely-described, briefly-mentioned and unsupported issues, we rely on Judge Kahn's persuasive explanations that the Secretary's Section 465 decision was not arbitrary and capricious due to misapplication of Department of Interior trust regulations, A-23-28; that the plaintiffs did not state civil rights claims under 42 U.S.C. §§ 1981, 1983 and 1985, A-96-101; that the plaintiffs were not entitled to additional time for discovery, Doc. 72 (text order);[7] and that the plaintiffs' motion for reconsideration should be denied, A-1.

If the plaintiffs contend that they have raised issues that we have been unable to identify in their brief, the Court should treat them as waived for lack of proper presentation and briefing. That failing, we rely on Judge Kahn's explanations for rejecting plaintiffs' claims.

CONCLUSION

The judgment should be affirmed.

[7]The plaintiffs never have stated what discovery could be expected to produce and never filed the affidavit required by Fed. R. Civ. P. 56(d) in order to defer a summary judgment ruling. If the plaintiffs meant that they needed time to do historical research, the plaintiffs' motion to this Court to supplement the record with three irrelevant documents, which the Court denied, demonstrates that such research by the plaintiffs would not have been productive. The historical record concerning the Oneida Nation and its lands has been deeply mined and is reflected in the circuit precedent that the plaintiffs concede is controlling.

Dated: July 21, 2016

Respectfully submitted,

/s/ Michael R. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2016, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

s/ Michael R. Smith
Michael R. Smith