No. _____

In The
Supreme Court of the United States

TOWN OF VERNON, NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA, Individually and as Trustee of the Goods, Credits and Chattels of the Federally Recognized Indian Nations and Tribes Situated in the State of New York, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tribe that opted out of the Indian Reorganization Act can have its status under the Act revived under the Indian Land Consolidation Act, 25 U.S.C. § 2202, even though the United States did not hold land in trust for that tribe at the time the tribe sought a land-in-trust acquisition.

2. Whether the land-in-trust provision of the Indian Reorganization Act, 25 U.S.C. § 5108, exceeds Congress' authority under the Indian Commerce Clause, Art. I, § 8, cl. 3.

3. Whether § 5108's standardless delegation of authority to acquire land "for Indians" is an unconstitutional delegation of legislative power.

4. Whether the federal government's control over state land must be categorically exclusive for the Enclave Clause, Art. I, § 8, cl. 17, to prohibit the removal of that land from state jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner is the Town of Vernon, New York. Respondents are the United States of America, Individually and as Trustee of the Goods, Credits and Chattels of the Federally Recognized Indian Nations and Tribes Situated in the State of New York, Sally M.R. Jewell, in her Official Capacity as Secretary of the United States Department of the Interior, Michael L. Connor, in his Official Capacity as Deputy Secretary of the United States Department of the Interior and exercising his delegated authority as Assistant Secretary of the Interior for Indian Affairs, Elizabeth J. Klein, in her Official Capacity as the Associate Deputy Secretary of the United States Department of the Interior and exercising her delegated authority as Assistant Secretary of the Interior for Indian Affairs, and the United States Department of the Interior.

Town of Verona, Abraham Acee, and Arthur Stife, all Plaintiffs before the district court and the Second Circuit, are not parties to this Petition.

RULE 29.6 STATEMENT

The Town of Vernon, New York, represents that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 841 F.3d 556 and reproduced at App. A-1 to 44. The opinions of the district court are not reported but are available at 2015 WL 1400291 (N.D.N.Y. March 26, 2015), reproduced at App. B-1 to 24 and 2009 WL 3165556 (N.D.N.Y. Sept. 29, 2009), reproduced at App. C-1 to 29. The opinion in the consolidated case, *Upstate Citizens for Equality, Inc., et al. v. United States, et al.*, is not reported but is available at 2015 WL 1399366 (N.D.N.Y. March 26, 2015), reproduced at App. D-1 to 31.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 2016. The Town of Vernon's petition for panel rehearing or, in the alternative, for rehearing *en banc* was denied on January 27, 2017. This Court granted an extension to file the Petition on April 17, 2017 and a second extension on May 15, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, § 8, Clause 3 of the Constitution gives Congress the authority "[t]o regulate Commerce . . . with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5108 (formerly § 465), provides, in pertinent part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

The provisions of 25 U.S.C. § 5108 are reproduced in full at App. E-1.

Article I, § 8, Clause 17 of the United States Constitution provides:

> Congress shall have the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of

the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

25 U.S.C. § 2201(1) provides as follows:

"Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds land in trusts.

25 U.S.C. § 2202 provides as follows:

The provisions of section 5108 of this title shall apply to all tribes notwithstanding the provisions of section 5125 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

INTRODUCTION

This litigation arises from the federal government's decision to remove 13,000 acres of land from the sovereign taxing and regulatory jurisdiction of the State of New York and its local governments, and to place that land under the sovereign jurisdiction of the United States, in trust for the Oneida Indian Nation ("OIN"). The Second Circuit's approval of this massive

land grab raises four questions of federalism and congressional authority that warrant this Court's immediate review.[1]

The first question involves the interplay between the Indian Reorganization Act ("IRA") and the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202. The IRA does not apply to a tribe that votes to reject the IRA's application. 25 U.S.C. § 5125. But the ILCA later applied § 5 to dissenting "tribes," 25 U.S.C. § 2202, defined as any "Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States *holds lands in trust*." 25 U.S.C. § 2201(1) (emphasis added). Here, it is undisputed that the OIN (1) affirmatively voted to reject the IRA, and (2) had no lands held in trust by the federal government before the disputed transaction at issue. The Second Circuit's approval of the Oneida land-in-trust application rewrites this plain, statutory language.

The second two questions presented emanate from § 5 of the IRA, which authorizes the Secretary of the Interior to extinguish state sovereignty over land and to take it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. There are two fundamental problems with § 5. First, the land-in-trust power exceeds the federal government's limited power "[t]o regulate commerce . . . with the Indian tribes" under the

[1] There is a separate petition pending in this case that presents additional questions. *Upstate Citizens for Equality, Inc., et al.* v. *United States, et al.*, No. 16-1320. The United States requested additional time to respond, and the brief in opposition in that case is now due July 3, 2017.

Indian Commerce Clause, Art. I, § 8, cl. 3. Although some have characterized that federal power as "plenary," the text of the Clause does not say that. And it is inconceivable that the constitutional ratifiers envisioned the federal government using the Indian Commerce Clause to remove from state and local jurisdiction massive tracts of land – both on and off historic reservations – that wealthy tribes have purchased using casino revenues.

Second, § 5 delegates this extraordinary land-in-trust power with no parameters whatsoever, simply directing that land be taken "for Indians" in the "discretion" of the Secretary. 25 U.S.C. § 5108. Although the notion that Congress cannot delegate its legislative power to the executive branch has fallen out of favor in recent years, circuit courts and Justices of this Court alike have questioned whether § 5 is a bridge too far. *E.g.*, *South Dakota* v. *United States DOI*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996) ("*South Dakota I*"); *Florida* v. *United States Dep't of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985); *Michigan Gambling Opposition* ("*MICHGO*") v. *Kempthorne*, 525 F.3d 23, 37 (D.C. Cir. 2008) (Brown, J., dissenting); *South Dakota I*, 519 U.S. at 920-23 (Scalia, J., dissenting from remand) (Justices Scalia, Thomas, and O'Connor urged the Court to resolve § 5's constitutionality). Over the last several years, 24 states have raised the same concern.[2] A review of § 5's constitutionality –

[2] *See Shivwits Band of Paiute Indians* v. *Utah*, No. 05-1160 (Utah; *amici curiae* brief of Rhode Island, Alabama, Arkansas, Colorado, Idaho, Iowa, Kansas, Louisiana, Michigan, Missouri,

which this Court once deemed necessary in *South Dakota I* but never completed due to the United States' post-acceptance maneuvering which resulted in the case being remanded with no decision – is long overdue.

The fourth question involves a circuit split regarding the Enclave Clause, Art. I, § 8, cl. 17, which limits the federal government's authority to remove lands from a state's sovereign jurisdiction. The First Circuit has held that a land-in-trust acquisition is not within the Enclave Clause's scope. *Carcieri* v. *Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 379 (2009). The Second Circuit here held the Enclave Clause *is* applicable to such a transaction but declined to apply the Clause because the placement of land in trust for a tribe does not eliminate absolutely *all* state and local regulatory authority, relying on *Nevada* v. *Hicks*, 533 U.S. 353 (2001). This Court should reject the Second Circuit's expansion of the federal government's power to confiscate state lands.

These questions are not merely academic. Just since 2009, the federal government has removed more than half-a-million acres from local jurisdiction via land-in-trust transactions. These transactions feed a tribal casino industry that exceeds $30 *billion* per year, revenue that is then used to purchase more land to

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Nevada, New York, North Dakota, Ohio, South Dakota, and Wyoming); *Carcieri* v. *Salazar*, No. 07-526 (2008) (Rhode Island; *amici curiae* brief of Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah).

take in trust. Petitioner does not question the policies underlying this cycle of casinos and land acquisitions. But they must be implemented within the limits of federal law. These issues are important and recurring. The Petition should be granted.

STATEMENT OF THE CASE

A. The Land Grab

This case stems from the OIN's attempt to extinguish state taxation and regulatory controls over 13,000 acres of land (an area greater than one-third of the entire District of Columbia), purchased with casino revenues. On April 4, 2005, this Court rejected the tribe's claim of tribal sovereignty over fee land it purchased in open market purchases that had been under state and local jurisdiction for two centuries. *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 (2005). Less than one week later, the tribe asked the Secretary of Interior to take that same land in trust under IRA § 5, including the land on which the tribe's Turning Stone Casino is located. The tribe's present attempt to extinguish 200 years of state and local jurisdiction over these lands is no less burdensome to local governments and neighboring land owners than the original attempt this Court rejected in 2005.

B. The Indian Reorganization Act

In 1934, Congress enacted the IRA, significantly changing federal policy toward Indians. Before the

IRA, the federal government had pursued a policy established by the Indian General Allotment Act, Ch. 119, 24 Stat. 388, which sought "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The IRA ended the allotment policy by prohibiting further allotments of reservation land. 25 U.S.C. § 5101. In addition, IRA § 5 allowed the Secretary, in his or her "discretion," to acquire new lands "for Indians." 25 U.S.C. § 5108.

C. The Indian Lands Consolidation Act

Section 18 of the IRA contained a provision that allowed tribes to vote against the application of the IRA to their tribe. 25 U.S.C. § 5125 (formerly § 576). Tribes that opted out of the IRA were ineligible to use § 5 to have land placed into trust for their benefit.

Nearly 50 years later, Congress enacted the ILCA. The ILCA allowed the Secretary to use IRA § 5 for the benefit of an opt-out "tribe," 25 U.S.C. § 2202, but it defined "tribe" narrowly to include only an "Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States *holds lands in trust*." 25 U.S.C. § 2201(1) (emphasis added). So if a tribe opted out of the IRA and now wishes the Secretary to use § 5 land-in-trust power, the tribe must first demonstrate that it had land held in trust for its benefit at the time of submitting its fee-to-trust

application. It is undisputed that the OIN (1) affirmatively voted to disavow the IRA's application, and (2) did not hold land in trust at the time it submitted its present fee-to-trust application.

D. Proceedings in the District Court

In 2008, the Town of Vernon and other plaintiffs, in separately filed cases, challenged the Secretary's decision to take more than 13,000 acres of land into trust for the Tribe. The plaintiffs challenged the Secretary's ability to take the land into trust asserting, among other things, that the decision violated the United States Constitution and the Tribe was not eligible to have land placed in trust pursuant to § 5 of the IRA, even if it was constitutional. The district court granted the United States' motions for summary judgment in both cases, ruling that the IRA was constitutional and that the tribe was eligible to have its land placed into trust under § 5 so as to avoid state and local jurisdiction. App. B-1 to 24; App. C-1 to 29; and App. D-1 to 31.

E. Second Circuit's Opinion

The Second Circuit consolidated the two lawsuits and affirmed. It held that despite the tribe's previous vote to reject the IRA, the tribe's eligibility for a § 5 land-in-trust transaction was later revived under § 2202 of the ILCA. App. A-1 to 44. Although it is undisputed that the tribe did not have "lands in trust" at the time it submitted its application, the Second Circuit ruled that the "land in trust" requirement was

only applicable to an Indian "community" and that a "tribe" needs to make no showing at all. App. A-41.

The Second Circuit also concluded that "[n]either principles of state sovereignty nor the Constitution's Enclave Clause – which requires state consent for the broadest federal assertions of jurisdiction over land within a state – prevents the federal government from conferring on the Tribe jurisdiction over these trust lands." App. A-4. The Second Circuit believed that the Indian Commerce Clause gave plenary power to the federal government relative to Indian affairs and the IRA is, therefore, constitutional. App. A-1 to 44. With respect to the Enclave Clause, the Second Circuit ruled that state consent to the loss of its regulatory authority is needed only when the federal government takes "exclusive" jurisdiction over land within a state. App. A-29. Because federal control over land placed in trust pursuant to the IRA is not exclusive, said the court, the Enclave Clause is inapplicable to the land-in-trust transaction at issue here. App. A-1 to 44.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition to Correct the Second Circuit's Rewriting of the Indian Lands Consolidation Act.

The federal government did not force the IRA on any tribe. Instead, the government gave each tribe the opportunity to disavow the IRA's application by vote. 25 U.S.C. § 5125. The OIN did just that in 1936. 841

F.3d 556, 574, App. A-1 to 44. Absent a different governing rule, the tribe is ineligible for an IRA § 5 land-in-trust acquisition.

The federal government relies on the ILCA for that different governing rule. The ILCA allows disclaiming tribes like the Oneida to still take advantage of IRA § 5. 25 U.S.C. § 2202. But the ILCA defined "tribe" very specifically, to include only an "Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States *holds lands in trust*." 25 U.S.C. § 2201(1) (emphasis added). So the ILCA's restorative power is limited to those tribes for which the United States held "land in trust" at the time of the § 5 fee-to-trust application.

It is undisputed that at the time the Oneida tribe submitted its § 5 application, it had no land in trust. 841 F.3d 556, 574, App. A-1 to 44. That should have been dispositive. But the Second Circuit discarded the plain language of § 2201(1) and rewrote it so that the phrase "holds lands in trust" applies only to an Indian "community," not a tribe. App. A-41. To reach that result, the court applied the last-antecedent rule, which states that a qualifying word or phrase refers to the language immediately preceding the qualifier unless common sense shows it was meant to apply differently. App. A-1 to 44; *see Barnhart* v. *Thomas*, 540 U.S. 20, 27-28 (2003) (describing the rule).

But here, common sense points in the opposite direction. The terms "tribe," "band," "group," "pueblo,"

and "community" are essentially synonymous; all are entities eligible for a land-in-trust acquisition. There is no policy or other reason why an Indian "community" would be treated any differently than an Indian "tribe." Accordingly, the last-antecedent rule does not apply.

The situation here is no different than the Secretary's interpretation of 25 U.S.C. § 5130(a) (formerly § 479). In that provision, Congress defined the term "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." As in ILCA, there is no comma after the word "community," and the last-antecedent rule might suggest that the phrase "that the Secretary of the Interior acknowledges to exist as an Indian tribe" applies only to the last word in the series: "community." Instead, the Secretary interprets the acknowledgement requirement to *every* term in the list. *See* List of Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 47 Fed. Reg. 53, 130 (1982). Section 2201(1) should be interpreted exactly the same way. Otherwise, ineligible tribes that voluntarily opted out of the IRA will continue to invoke § 5 as though the IRA still applied to them.

What the Secretary appropriately did in interpreting § 5130(a) was to apply a different canon of statutory construction: the series-qualifier principle. *See, e.g.*, *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920). Under the series-qualifier principle, when "there is a straightforward, parallel construction

that involves *all* nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thompson/West 2012).

This Court's precedents identify two signals indicating when the series-qualifier principle applies rather than the last-antecedent rule. First, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920). Second, the "modifying clause appear[s] . . . at the end of a single, integrated list." *Jama* v. *Immigration and Customs Enf't*, 543 U.S. 335, 344 n.4 (2005). When both signals are present, the series-qualifier rule produces a "natural" reading. *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014).

Section 2201(1) contains both signals. The modifying phrase "for which, or for the members of which, the United States holds lands in trust" applies seamlessly to every word in the series (tribe, band, group, pueblo, or community). And the modifying phrase appears at the end of a single, integrated list; the nouns in the list are all "integrated" in function and content. Moreover, no incongruity results from applying the modifying phrase to every term in the list; conversely, it makes no sense at all to apply the modifying phrase only to an "Indian . . . community."

In addition to grammatical analysis, applying the modifier to the entire list is consistent with Congress' previously expressed desire to limit the applicability of IRA § 5. As the Court has held, only tribes under federal jurisdiction in 1934 are eligible for fee-to-trust acquisitions pursuant to the IRA. *Carcieri*, 555 U.S. at 395. Both the IRA's temporal requirement and the ILCA's existing trust-land requirement are designed to prevent exactly what is occurring here: groups with limited relationships with the federal government, decades after these laws were enacted, purchasing huge tracts of land, both on and off historic reservations, and seeking to place that land outside of all state and local jurisdiction. Both statutes allow the federal government to take land in trust only for tribes with a close and continuous relationship with the United States. Under the ILCA, tribes that opted out of the IRA can demonstrate that close relationship by showing it has at least some land under federal supervision at the time it seeks to place additional land in trust.

As this Court has already determined, "[t]he appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory. From the early 1800's into the 1970's, the United States largely accepted, or was indifferent to, New York's governance of the land in question. . . ." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 (2005). Congress had similar concerns when it enacted both the IRA and the ILCA and placed appropriate limits on their application. This Court should grant the Petition and correct the Second Circuit's rewriting of § 2201(1).

II. The Court Should Grant the Petition to Decide Whether § 5 of the Indian Reorganization Act Exceeds Congress' Power Under the Indian Commerce Clause.

When the Secretary takes land in trust for Indians, that action precludes states from asserting fundamental aspects of their sovereignty on what is then deemed Indian Country. *Alaska* v. *Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1988); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). "Land held in trust is generally not subject to (1) state or local taxation, *see* 25 U.S.C. § 5108; (2) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); or, (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction, *see* 25 U.S.C. §§ 1321(a), 1322(a)." *Connecticut ex rel. Blumenthal* v. *United States DOI*, 228 F.3d 82, 85-86 (2d Cir. 2000). Furthermore, "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states.'" *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 985 (10th Cir. 2005) ("[S]tates are permitted to enforce regulations when Congress explicitly delegates authority to do so."). *Id.* In other words, IRA § 5 is extraordinarily destructive to states. If they are to retain any jurisdiction, it is at the mercy of the federal government and only when "Congress explicitly delegates" such authority.

The Second Circuit nonetheless upheld § 5 as within Congressional authority under the Indian Commerce Clause. The Second Circuit cited *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) for the proposition that the Indian Commerce Clause grants Congress plenary authority over all Indian affairs. But the word "plenary" (or any synonym to it) appears nowhere in the Clause's actual text; the Clause states only that Congress has the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3.

In addition, it is implausible to say that the power to "regulate Commerce . . . with the Indian Tribes" somehow vests the federal government with plenary authority over Indian affairs. If so, then Congress must also enjoy a plenary power over all foreign nations as well, since Congress can regulate commerce with them, too. Worse, if Congress has plenary power over Indian affairs, then it must also have plenary power over the states, because Congress possesses the power to regulate commerce among them. *Ibid.*

Add to this the fact that there is no historical evidence supporting the view that the original meaning of the Indian Commerce Clause granted Congress a plenary power over Indian tribes. To the contrary, even the Continental Congress' much broader power (to regulate trade and manage all affairs relating to Indians) was never understood as granting a plenary power.

Finally, it is well understood that the Commerce Clause itself is not plenary. *E.g.*, *United States* v. *Morrison*, 529 U.S. 598, 619 (2000) (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) (Commerce Clause did not authorize a federal criminal conviction for violation of the Gun-Free School Zones Act of 1990). It is anomalous to say that while the Commerce Clause does not grant the federal government plenary power over the states, it does grant Congress a general police power over the country's Indian tribes.

"At one time, the implausibility of this assertion [of plenary authority] at least troubled the Court, see, *e.g.*, *United States* v. *Kagama*, 118 U.S. 375, 378-379, 30 L. Ed. 228, 6 S. Ct. 1109 (1886) (considering such a construction of the Indian Commerce Clause to be "very strained")." *United States* v. *Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring). This Court has even concluded that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977), *citing United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946).

The Court has also placed some limits on the Indian Commerce Clause. For example, the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) ("IGRA"), passed by Congress under the Indian Commerce Clause, imposes upon the states a duty to negotiate in good faith with an Indian tribe toward the formation of a

compact, 25 U.S.C. § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a state in order to compel performance of that duty. 25 U.S.C. § 2710(d)(7); *Seminole Tribe* v. *Fla*., 517 U.S. 44, 47 (1996). Notwithstanding Congress' clear intent to abrogate the states' sovereign immunity in the IGRA, this Court held "the Indian Commerce Clause does not grant Congress that power." *Id. Accord*, *e.g.*, *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552, 2565-67 (2013) (Thomas, J., concurring) ("neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power"); *United States* v. *Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) ("I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'") (quotation omitted).

It is well past time to revisit the question of Congress' power under the Indian Commerce Clause, because the IRA § 5 power is so destructive to federalism. As far back as 1995, when this Court first accepted, but never decided, a petition for review in a case addressing the constitutionality of the IRA, thousands of applications were pending before the Secretary to acquire additional lands pursuant to § 5. *See* 64 Fed. Reg. 17574, 17580 (1999) (in 1996, 6941 applications were filed with the Secretary to place lands in trust). More recently, with the explosion of tribal gaming, the Bureau of Indian Affairs ("BIA") has processed 2,265 trust applications and restored 542,000 acres of land into trust since 2009 alone. Press Release: Obama

Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands, Oct. 12, 2016. And in 2016, the National Indian Gaming Commission confirmed tribes are now generating nearly $30 billion a year in gaming revenue.[3]

Casino profits are not the only source of tribal revenue enabling tribes to purchase massive amounts of land for the purpose of removing it from state and local jurisdiction. The United States Department of Health and Human Services – FY 2016 Funding states: "The President's Fiscal Year (FY) 2016 budget proposes $20.9 billion, a $1.5 billion (8%) increase over the 2015 enacted level, across a wide range of Federal programs that serve Tribes including education, social services, justice, health, infrastructure, and stewardship of land, water, and other natural resources."[4]

A recent Government Accountability Office ("GAO") report also noted a federal investigation into two separate agreements between groups of tribes and two BIA regional offices, designed to expedite the processing of the applications submitted by the tribes that paid money to their regional BIA office. U.S. Gov't Accountability Office, GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications* (2006) at p. 20. Extraordinarily, these tribes

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[3] https://www.nigc.gov/commission/gaming-revenue-reports

[4] https://www.ihs.gov/redesign/includes/newihstheeme/display_objects/documents/HHSTribalFY2016Budget.pdf

were actually paying the salaries of the BIA staff "dedicated to processing consortium members' land in trust applications." *Id*.

Petitioner does not suggest that this kind of impropriety occurred here. Rather, the growth of tribal gaming resulting in millions of acres being purchased by tribes to be placed into trust, and the extreme rubberstamping of fee-to-trust applications, beg for closer scrutiny. That scrutiny should begin at the foundation of the process, namely, whether Congress had authority under the Indian Commerce Clause to enact IRA § 5.

III. The Court Should Grant the Petition and Decide Whether IRA § 5 Is an Unconstitutional Delegation of Power.

The non-delegation doctrine is one of the cornerstones of separation of powers jurisprudence, *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989), existing since the days of Locke. *See* John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The legislat[ure] can have no power to transfer their authority of making laws, and place it in other hands."). The doctrine is codified in the Constitution's text, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. Art. 1, § 1, and the "text permits no delegation of those powers. . . ." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). To avoid an unconstitutional delegation when conferring decision-making authority on an agency,

Congress is required to articulate, "by legislative act," an intelligible principle to direct the person or body authorized to act. *Id*. at 472 (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

It has been nearly 82 years since this Court last struck down a statute on non-delegation grounds, *see Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp* v. *United States*, 295 U.S. 495 (1935), leaving the doctrine's continuing viability in doubt. But the present case – which involves a statute enacted by the same depression-era Congress that enacted the unconstitutional legislation in *Panama Refining* and *A.L.A. Schechter* – provides the ideal vehicle to affirm the doctrine's continued vitality. As the Eighth Circuit observed in *South Dakota* v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"): "It is hard to imagine a program more at odds with separation of powers principles" than § 5 of the IRA. 69 F.3d at 885.

In *South Dakota I*, 519 U.S. 919, the question presented to, and accepted by this Court, was "[w]hether section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 5108, which authorizes the Secretary of the Interior to acquire interest in real property 'for the purpose of providing land for Indians,' is an unconstitutional delegation of legislative power." That is the exact question at issue in this case. Unfortunately, because of last minute maneuvering by the federal government, this Court in *South Dakota I* never answered that question.

It is the complete lack of any discernible intelligible principle in § 5's text that distinguishes this statute from others this Court has upheld over nondelegation challenges in the past 82 years. *MICHGO*, 525 F.3d at 34 (Brown, J., dissenting). Section 5 does not contain even the very broad "public interest," "public health," "fair and equitable," or "just and reasonable" standards that have previously represented the outer limits of a constitutional delegation of legislative power. *See, e.g.*, *Whitman*, 531 U.S. at 475-76 (statute required EPA "to set air quality standards at the level that is 'requisite' . . . to protect the public health with an adequate margin of safety"); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (statute directed agency to set prices that are "fair and equitable"); *Federal Power Comm'n* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 600-01 (1944) (statute directed agency to set rates that are "just and reasonable"); *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (statute directed agency to grant broadcast licenses in the "public interest").

Instead, § 5 simply identified the beneficiaries on whose behalf the government should hold the land: "for Indians." 25 U.S.C. § 5108. "[W]hen Congress authorize[d] the Secretary to acquire land in trust 'for Indians,' it [gave] the agency no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." *South Dakota I*, 69 F.3d at 883.

The Eighth Circuit in *South Dakota I* was the first appellate court to consider § 5's constitutionality.

Unable to discern an intelligible principle, the court was forced to conclude that § 5 "define[s] no boundaries to the exercise of this [land acquisition] power." 69 F.3d at 882. "Indeed," the court observed, § 5 would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* "The result is an agency fiefdom." *Id.* at 885. Before the Eighth Circuit's ruling, the Secretary of the Interior had taken the position that IRA land acquisitions were not subject to judicial review. *South Dakota I*, 519 U.S. at 920 (Scalia, J., dissenting). Following the decision, the Department of the Interior promptly changed course and promulgated a new regulation providing for judicial review. The United States then petitioned this Court to vacate and remand the Eighth Circuit's decision, and this Court granted that request. *Id.* at 920-21.

In dissent, Justice Scalia, joined by Justices Thomas and O'Connor, urged the Court to hear the merits of the non-delegation challenge, finding it "inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals." *Id.* at 922-23. As 16 state *amici* noted in support of the petition for certiorari in *Carcieri*, "No other court has challenged [the Eighth Circuit's conclusion in *South Dakota I*], or found any significant limitation on the trust power in the text of the IRA." Brief of the States of Alabama, *et al.* as Amici Curiae Supporting Petitioners, *Carcieri* v. *Kempthorne*, No. 07-526, at 21 (Nov. 21, 2007).

On remand, a different Eighth Circuit panel upheld § 5's constitutionality. *South Dakota* v. *United States Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) [*South Dakota II*]. The *South Dakota II* panel invoked the same suspect historical and statutory "context" and legislative history that Judge Brown thoroughly discredited in her dissenting opinion in *MICHGO*. *Id.* at 797-99. And a primary motivator appeared to be the fact that this Court has struck down only two statutory provisions on non-delegation grounds, and not since 1935. *Id.* at 795. In fact, one or more of the threads of this questionable analytical triumvirate – historical/statutory context, legislative history, and the length of time since the last successful non-delegation challenge – can be found in every circuit decision holding § 5 constitutional. *United States* v. *Roberts*, 185 F.3d 1125, 1137 (1999); *Carcieri*, 497 F.3d at 42-43.

In *Florida* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), the Eleventh Circuit expressly held that § 5 was an unreviewable exercise of discretion because the statute "does not delineate the circumstances under which exercise of this discretion is appropriate. . . ." *Id.* at 1256. Though not specifically resolving a non-delegation challenge, the Eleventh Circuit's decision in *Florida* is wholly consistent with the reasoning of *South Dakota I* and Judge Brown's dissent in *MICHGO*, and conflicts with the decisions of numerous other circuits which have rejected the non-delegation challenge to § 5. *Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007); *South Dakota* v.

United States Dep't of Interior, 423 F.3d 790, 799 (8th Cir. 2005) ("*South Dakota II*"); and *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). Certiorari is warranted.

Ironically, as originally proposed, IRA contained standards which very likely would have rendered it constitutional.[5] While the original bill tried to articulate basic policy choices and impose real boundaries, the bill was rejected because legislators could not agree on its purpose. *Compare* House Hearings at 1-14 *with* 48 Stat. 984 (1934).[6] Given Congress thereafter, deliberately eliminated all intelligible standards

[5] The original draft of the bill provided for Indian lands in Title III. *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 8 (1934) (hereinafter "House Hearings"). Section 1 set out a detailed declaration of policy. *Id.* Section 6 required the Secretary to "make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals" and to make "such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands." *Id.* at 8-9. The Secretary was further required to classify areas which were "reasonably capable of consolidation" and to "proclaim the exclusion from such areas of any lands not to be included therein." *Id.* at 8. Section 8 allowed the tribe to acquire the interest of any "non-member in land within its territorial limits" when "necessary for the proper consolidation of Indian lands." *Id.* at 9.

[6] The detailed statement of general policy for the Act as a whole was eliminated. Section 1 was entirely deleted. Section 7, the predecessor to 25 U.S.C. § 5108, was stripped of standards and renumbered Section 5.

from the original bill's text, and enacted a full bill substitute, it can hardly be said that Congress articulated such standards in the 1934 legislative history. While Congress is empowered to enact legislation to address societal problems, it is Congress' responsibility to devise solutions that pass constitutional muster, and to specify those solutions in the statutory text, rather than ceding that authority to the Executive branch.

The need to define boundaries within which the Secretary must act, is also highlighted by the fact that despite the 25 C.F.R. § 151 regulations relating to the criteria the BIA is supposed to consider before accepting land into trust, the BIA almost always accepts the applications without question. For example, from 2001 through 2011, 100% of the proposed fee-to-trust acquisitions submitted to the Pacific Region BIA were granted. Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 PEPP. L. REV. 1 (2013), at 278. Additionally, for all 111 decisions, the BIA did not conclude that a single § 151 factor weighed against acceptance of the land into trust. *Id*. Clearly, the system is broken.

Petitioner acknowledges that it did not directly raise the non-delegation issue to the lower courts. In the companion case, however, which was consolidated with this case for the purpose of appeal, the plaintiffs did specifically argue "that § 5 of the IRA violates the non-delegation doctrine." *Upstate Citizens for Equal., Inc.* v. *Jewell*, 2015 WL 1399366, *2, App. D-6. And the extraordinary ramifications of the federal government's attempt to remove these 13,000 acres from state

and local jurisdiction justify consideration of all arguments. As this Court recognized in *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005), "[w]e resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus 'fairly included' within, the questions presented." *Id.* at 214, n.8. Moreover, the Secretary's conclusion that § 5 applies even to wealthy casino tribes no longer in need of federal assistance, in one of the original 13 colonies, for which there never was a federal reservation, and whose "condition [was] entirely peculiar," begs for restraints on the Secretary's authority to place land in trust.

The non-delegation argument also goes to the "fundamental principles of the structure of the federal government" and the separation of powers, a subject certainly justifying Supreme Court review regardless of when the issue was first raised. Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1582-83 (2012), *citing Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962). This is especially true when the interpretation of the applicable statutory provisions requires no factual analysis whatsoever. *Id.* at 1563, *citing Kimes* v. *Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). Instead, the non-delegation argument relates directly to an issue of constitutional magnitude. This too has been determined to be the proper area of

review of an issue not raised to the lower courts. *Id.* at 1564, *citing Real Estate Ass'n for Mass., Inc.* v. *National Real Estate Information Services*, 608 F.3d 110, 125 (1st Cir. 2010).

The non-delegation argument is also not a new claim but rather a new argument as to why § 5 is unconstitutional. As the Court noted in *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90 (1991), "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* at 99. That is especially true where, as in this case, the exact issue was raised and briefed to the district court.

Finally, the non-delegation issue is of public interest and likely to return to this Court given the proliferation of tribal gaming and the wealth it creates for tribes to purchase tremendous quantities of land. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988). In short, all of the factors which would counsel toward the Court accepting an issue, regardless of its treatment below, are present here.

IV. The Court Should Grant the Petition and Resolve a Circuit Conflict Regarding the Scope of the Enclave Clause.

The Enclave Clause, Art. I, § 8, cl. 17, allows Congress to exercise authority over certain property, but only with the consent of the affected state. The First Circuit in *Carcieri* v. *Kempthorne*, 497 F.3d 15 (1st Cir.

2007), *rev'd on other grounds*, 555 U.S. 379 (2009), held that the Clause does not apply to a land-in-trust transaction, no matter the extent of a state's loss of its jurisdiction.

Here, the Second Circuit concluded that the Clause *was* generally applicable to the land-in-trust transaction. But it nonetheless upheld the federal government's action because, in the Circuit's view, the Clause only applies when the federal government takes *exclusive* jurisdiction over land within a state. App. A-1 to 44 (*citing Paul* v. *United States*, 371 U.S. 245, 263 (1963)).

Yet only a year earlier, the Second Circuit had concluded that tribal jurisdiction "is a combination of tribal and federal jurisdiction over land, to the *exclusion* of the jurisdiction of the state." *Citizens Against Casino Gambling* v. *Chaudhuri*, 802 F.3d 267, 279-80 (2d Cir. 2015) (emphasis added). That is because the Constitution "vests *exclusive* legislative authority over Indian affairs in the federal government" and that when it comes to dealing with Native Americans, "there is no room for state regulation." *Id.* (emphasis added, *citing* Cohen's *Handbook of Federal Indian Law*, § 6.03(1)(a) (Nell Jessup Newton Ed. 2012). The Second Circuit's conclusion in *Chaudhuri* is consistent with that of other circuits, which have routinely held that the federal government and tribe have "exclusive" jurisdiction over Indian land. *E.g.*, *Oneida Tribe of Indians of Wis.* v. *Village of Hobart*, 732 F.3d 837, 841 (7th Cir. 2013); *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 658, 666 (9th Cir. 1975); *see also*

Oneida Nation v. *Village of Hobart*, Case No. 1:16-cv-01217-wcg, Decision and Order, Doc. 46, p. 15 (state regulatory authority is extinguished in Indian country).

This Court should grant the Petition, resolve the circuit conflict, and hold either that (1) the Enclave Clause applies to a land-in-trust transaction because jurisdiction over the trust lands is exclusively in the federal government and tribe, or (2) the Clause applies notwithstanding any residual jurisdiction exercised by a state.

V. The Issues This Case Presents Are of National Importance.

It is difficult to overstate the jurisprudential importance and practical significance of the federal government's land-in-trust scheme. That is because trust lands are used to build and operate tribal casinos, and tribal-casino revenues are used to purchase even more land that a tribe will then seek to take in trust at the expense of state and local governments.

Casino gambling is "one of the nation's fastest growing industries." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 CORNELL L. REV. 798, 800 (1999). From 1996 to 2015, annual tribal gambling revenue skyrocketed from $6.3 billion to $30 billion, according to the National Indian

Gaming Commission.[7] And the stratospheric growth shows no sign of slowing, as hundreds of tribes seek federal recognition, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts. Iver Peterson, *Would-Be-Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1.

As tribal gaming has become more widespread, so have the costs. "[S]tates now facing the biggest budget deficits are also the states with the largest number of tax-exempt Indian casinos and tax-evading tribal businesses." Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule.*, The American Enterprise, Sept. 2004, at 31. Like many state-based governments, entirely located within historic reservations, the Towns of Vernon and Verona, as well as the City of Sherrill face eventual extinction. They have no way to survive the ever-growing tribal purchases of land, with ever growing casino revenue, followed by fee-to-trust applications. Eventually, the loss of the Towns' and City's ability to tax and regulate, will be fatal. *See* App. F Maps of Oneida Reservation, Town of Verona, Town of Vernon, and City of Sherrill.

And the legal issues at stake are significant in their own right. "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded. . . ." *Mistretta* v. *United States*, 488 U.S. 361,

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[7] *See* https://www.nigc.gov/commission/gaming-revenue-reports.

415 (1989). That is why commentators have continued to urge this Court to revitalize the non-delegation doctrine, to remind Congress that its powers under the Commerce Clause were in fact limited. *E.g.*, Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated. . . . A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior."); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351 (2002); *see also* Petition for Writ of Certiorari, *United States* v. *Roberts*, No. 99-9911174, at 28 (Jan. 12, 2000) ("The importance of [whether § 5 violates the non-delegation doctrine] is beyond cavil.").

The same importance has been ascribed to the validity of § 5. In its petition for certiorari in *South Dakota I*, the United States told this Court that the IRA is "one of the most important congressional enactments affecting Indians," "the cornerstone of modern federal law respecting Indians." Petition for Writ of Certiorari, *South Dakota* v. *U.S. Dept. of the Interior*, No. 95-1956 at 15-16 (June 3, 1996). That statement is undeniably true. Because of IRA, the BIA manages more than 50 million acres of land on behalf of more than 567 recognized Indian tribes. The United States

in *South Dakota I* also rejected as "unpersuasive" the state's argument that § 5's constitutionality lacks "national importance." Reply Br., *South Dakota* v. *U.S. Dep't of the Interior*, No. 95-1956 at 1 (Aug. 30, 1996). Again, that statement is undeniably true. When the Secretary takes land in trust, he strips away the host state's sovereignty and jurisdiction and places them in the hands of a competing sovereign, insulating the land from state and local taxation, 25 U.S.C. § 5108, ¶ 4, and from state regulation, *see Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996). In the United States' own words, "This Court has the overarching responsibility for determining conclusively whether Congress has overstepped constitutional limitations." Petition for Writ of Certiorari, *South Dakota* v. *U.S. Dep't of the Interior*, No. 95-1956 at 4 (June 3, 1996).

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CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 2017

APPENDIX A

841 F.3d 556
United States Court of Appeals,
Second Circuit.

Upstate Citizens for Equality, Inc., David Brown Vickers, Richard Tallcot, Scott Peterman, Daniel T. Warren, Town of Vernon, New York, Town of Verona, Abraham Acee, Arthur Strife, Plaintiffs-Appellants,

v.

United States of America, individually, and as trustee of the goods, credits and chattels of the federally recognized Indian nations and tribes situated in the State of New York, Sally M.R. Jewell, in her official capacity as secretary of the U.S. Department of the Interior, Michael L. Connor, in his official capacity as Deputy Secretary of the U.S. Department of the Interior and exercising his delegated authority as assistant Secretary of the Interior for Indian Affairs, Elizabeth J. Klein, in her official capacity as Associate Deputy Secretary of the Interior for Indian Affairs, United States Department of the Interior, Defendants-Appellees.*

Docket Nos. 15-1688, 15-1726
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August Term, 2016
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* The Clerk of Court is directed to amend the caption as shown above.

Argued: May 3, 2016
|
Decided: November 9, 2016

Attorneys and Law Firms

DAVID BROWN VICKERS, Fayetteville, NY, for Upstate Citizens for Equality, Inc., David Brown Vickers, Richard Tallcot, Scott Peterman and Daniel T. Warren.

CORNELIUS D. MURRAY, O'Connell and Aronowitz, Albany, NY, for Town of Vernon, Town of Verona, Abraham Acee and Arthur Strife.

J. DAVID GUNTER II (John C. Cruden, Steven Miskinis, Jennifer Turner, on the brief), United States Department of Justice, Washington, DC, for United States of America, individually, and as trustee of the goods, credits and chattels of the federally recognized Indian nations and tribes situated in the State of New York, Sally M.R. Jewell, in her official capacity as Secretary of the U.S. Department of the Interior, Michael L. Connor, in his official capacity as Deputy Secretary of the U.S. Department of the Interior and exercising his delegated authority as Assistant Secretary of the Interior for Indian Affairs, Elizabeth J. Klein, in her official capacity as Associate Deputy Secretary of the Interior for Indian Affairs, United States Department of the Interior.

Before: Livingston, Chin, and Carney, Circuit Judges.

Opinion

Susan L. Carney, Circuit Judge:

This case is the latest in a long line of lawsuits in our Circuit regarding the efforts of the Oneida Indian Nation of New York ("the Tribe") to assert tribal jurisdiction over a portion of its indigenous homeland in central New York State.[1] After the Supreme Court rejected the Tribe's claim to existing, historically-rooted jurisdiction over a portion of the homeland, *see City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005), the Tribe requested that the United States take approximately 17,000 acres of Tribe-owned land into trust on its behalf in procedures prescribed by § 5 of the Indian Reorganization Act of 1934. The entrustment that the federal government approved in 2008 gave the Tribe jurisdiction over approximately 13,000 acres of land in central New York, allowing the Tribe, among other things, to continue to operate its Turning Stone casino in Verona, New York.

Plaintiffs-Appellants – two towns, a civic organization, and several residents of the area near the trust land – filed these lawsuits in an attempt to reverse the land-into-trust decisions. They now appeal from judgments of the Northern District of New York (Lawrence E. Kahn, *J.*), granting the summary judgment

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[1] We will use the term "Tribe" in this Opinion to refer only to the Oneida Indian Nation of New York, the federally-recognized tribe based in central New York. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 144 n.1 (2d Cir. 2003), *rev'd*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). We use "Oneidas" or "the Oneida Nation" to refer to the historic tribe of which the present-day Tribe is a descendant. *Id.* at 146.

motions of Defendants-Appellants, the United States and several federal officials.[2] The District Court rejected Plaintiffs' claims that the land-into-trust procedures are unconstitutional and that certain provisions of the Indian Land Consolidation Act ("ILCA"), adopted in 1983, bar the United States from taking land into trust for the Tribe.

We agree with the District Court that the entrustment procedure generally, and this entrustment in particular, lie within the federal government's long-recognized "plenary" power over Indian tribes: Neither principles of state sovereignty nor the Constitution's Enclave Clause – which requires state consent for the broadest federal assertions of jurisdiction over land within a state – prevents the federal government from conferring on the Tribe jurisdiction over these trust lands. We further hold that the Oneida Nation of New York is eligible as a "tribe" within the meaning of 25 U.S.C. §§ 465 and 2201(1) for land to be taken into trust on its behalf.[3] Accordingly, we AFFIRM the judgments of the District Court.

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[2] The Tribe is not a party to either of these cases. It moved, however, for leave to file an amicus brief in this consolidated appeal. *Upstate Citizens for Equality v. United States*, No. 15-1688, Doc. 124 (filed Jan. 29, 2016). The motion is hereby granted.

[3] Effective September 1, 2016, certain provisions from Chapter 14 of Title 25 of the United States Code have been reorganized and transferred to three new chapters at the end of the Title. *See* Office of the Law Revision Counsel, *Editorial Reclassification Title 25, United States Code*, http://uscode.house.gov/editorialreclassification/t25/index.html. Consistent with the parties' briefs, the District Court's opinions, and prior opinions in this area, we use the original numbering of the Chapter 14 subsections. For the reader's

BACKGROUND

I. Land-into-Trust Procedures (§ 5 of the Indian Reorganization Act)

The origins of this dispute lie in the evolution of federal Indian policy in the late 19th and early 20th centuries. Beginning in the late 19th century, Congress began to partition tribal lands and allocate parcels to individual Indians in a policy known as "allotment." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-54, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). As the Supreme Court has described, "[t]he objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254, 112 S.Ct. 683. In the years in which the allotment policy was followed, Congress also stripped tribes of their authority to govern themselves, instead providing that Indians residing on allotted lands would eventually be subject to state civil and criminal jurisdiction. *Id.* at 254-55, 112 S.Ct. 683.

Because Indians could still sell their allotted lands to non-Indians, however, "many of the early allottees quickly lost their land through transactions that were unwise or even procured by fraud." *Id.* at 254, 112 S.Ct. 683. For this and other reasons, the allotment policy "came to an abrupt end in 1934." *Id.* at 255, 112 S.Ct. 683. The Indian Reorganization Act of 1934 ("IRA") –

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reference, 25 U.S.C. § 465 is now codified at 25 U.S.C. § 5108; 25 U.S.C. § 478 is now codified at 25 U.S.C. § 5125; and 25 U.S.C. § 479 is now codified at 25 U.S.C. § 5129.

including its § 5, originally codified at 25 U.S.C. § 465 – "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.'" *Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 85 (2d Cir. 2000) ("*Connecticut*") (quoting *Cty. of Yakima*, 502 U.S. at 255, 112 S.Ct. 683). The IRA repudiated the allotment policy and aimed to restore to tribes, or replace, the lands and related economic opportunities that had been lost to them under it. *See* Felix S. Cohen, *Handbook of Federal Indian Law* § 15.07[1][a] (2012) ("Cohen, *Handbook*").

The IRA therefore authorized the Secretary of the Interior, in her discretion, to acquire land and other property interests "within or without existing reservations . . . for the purpose of providing land for Indians." Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934) (codified at 25 U.S.C. § 465).[4] "Title to any lands or rights

[4] Early uses of the term "reservation" in the field of Indian law referred to land reserved for Indian use from an Indian cession to the federal or state government. Cohen, *Handbook* § 3.04[2][c][ii]. The term's use later grew to encompass federally protected Indian tribal lands without regard to their legal origins. *Id.* Tribal jurisdiction – that is, the rights of the tribe and the federal government to assert jurisdiction over territory, largely displacing state government – generally follows from the land's reservation status. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27& n.1, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). But the legal implications of the term vary: The Supreme Court has held that a state's long-standing exercise of jurisdiction over reservation land can preclude a tribe from reasserting its

acquired pursuant to this Act," it provides, "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." *Id.* Land held by the federal government in trust for Indians under this provision "is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or, (3) state criminal and civil jurisdiction [over Indians], unless the tribe consents to such jurisdiction." *Connecticut*, 228 F.3d at 85-86 (citations omitted). Under the IRA as passed in 1934, tribes were entitled to opt out of its provisions, including the land-into-trust provisions of § 5, by majority vote.[5] *See* Pub. L. No. 73-383, § 18, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 478).

The IRA's implementing regulations, promulgated by the U.S. Department of the Interior, create a process by which tribes and individual Indians can request that the Department take land into trust on their behalf. *See* 25 C.F.R. § 151.9. Upon receiving such a request, the Secretary must provide notice to state and local governments whose rights would be affected by the acquisition and give them an opportunity to respond. *See* § 151.10. In making her final decision, the Secretary is to consider enumerated criteria, including the tribe's need for land "to facilitate tribal self-determination, economic development, or Indian housing," § 151.3(a)(3), and "the impact on the State

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right to exercise tribal jurisdiction on that reservation land. *See Sherrill*, 544 U.S. at 216-19, 125 S.Ct. 1478.

[5] As we will discuss below, in 1936 the Oneidas elected to opt out of the IRA by a tribal vote.

and its political subdivisions resulting from the removal of the land from the tax rolls," § 151.10(e). The Secretary is also directed to consider jurisdictional problems and conflicts of land use that would be created by an entrustment. *Id.*

II. Factual Background[6]

For more than four decades, the Tribe has clashed with state and local governments and residents in upstate New York over its efforts to regain governmental authority with respect to a portion of its extensive indigenous homeland. Prior opinions of this Court and the Supreme Court have detailed the complex history of the relationship between New York and the Tribe, and in particular their disputes regarding the Tribe's jurisdiction over its reservation in central New York. *See Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 663-65, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) ("*Oneida I*"); *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230-32, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) ("*Oneida II*"); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203-11, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005) ("*Sherrill*"); *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 146-52 (2d Cir. 2003) ("*Oneida III*"), *rev'd*, *Sherrill*, 544

[6] The relevant facts of this case are undisputed, and the appeal presents only questions of law. We draw this account of the Oneidas' history largely from prior opinions of the Supreme Court and our Court.

U.S. at 221, 125 S.Ct. 1478. We offer only a brief summary of that history here, to provide context for our decision.

The Tribe is a federally recognized Indian tribe and "a direct descendant of the [Oneida Nation], 'one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution.'" *Sherrill*, 544 U.S. at 203, 125 S.Ct. 1478 (quoting *Oneida II*, 470 U.S. at 230, 105 S.Ct. 1245). The "aboriginal homeland" of the Oneida Nation "comprised some six million acres in what is now central New York." *Id.* But under the 1788 Treaty of Fort Schuyler, the Oneida Nation ceded "all their lands" – save for a reservation of about 300,000 acres – to New York State in exchange for payments in money and in kind. *Id.*

In a pivotal development, "[w]ith the adoption of the Constitution, Indian relations came exclusively under federal authority." *Oneida III*, 337 F.3d at 146. In the 1790 Nonintercourse Act, Congress prohibited selling tribal land without the acquiescence of the federal government. *Id.* at 146-47; *see also* 25 U.S.C. § 177 (restricting alienability of Indian land). Then, in 1794, the federal government entered into the Treaty of Canandaigua with the Six Iroquois Nations. The Treaty "acknowledge[d] the Oneida Reservation as established by the Treaty of Fort Schuyler and guaranteed the Oneidas' free use and enjoyment" of the reservation. *Sherrill*, 544 U.S. at 204-05, 125 S.Ct. 1478.

Notwithstanding the Nonintercourse Act and the Canandaigua Treaty, however, New York State continued to purchase land from the Oneidas, largely without federal interference. *Id.* at 205, 125 S.Ct. 1478. Beginning in 1838, the federal government for a while encouraged the Oneidas to relocate to a new reservation in Kansas. Although the Tribe never completely relocated to that site, *id.* at 206, 125 S.Ct. 1478, the Oneidas who remained in New York by 1920 owned only 32 acres of the reservation's original 300,000. *Id.* at 207, 125 S.Ct. 1478. Nonetheless, the Oneidas' original reservation was never officially "disestablished." *See Oneida Indian Nation of N.Y. v. Madison Cty.*, 665 F.3d 408, 443-44 (2d Cir. 2011).[7]

In the 1990s, the Tribe began to repurchase New York reservation land in open-market transactions and to use those lands for various commercial enterprises. In those years, the Tribe took the position that because the purchased parcels lay within the boundaries of the reservation originally occupied by the Oneidas, the properties were exempt from local property taxes. The Tribe opened and operated the Turning Stone Resort Casino on a portion of the newly-purchased land.

The Town of Sherrill eventually moved to evict the Tribe from land within the Town's boundaries for nonpayment of property taxes. In response, the Tribe

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[7] Congress may "disestablish" a reservation by enacting a law that makes designated tribal land fully alienable. *See Alaska*, 522 U.S. at 532-33, 118 S.Ct. 948.

sought an injunction barring both the eviction and the assessment of property taxes. The District Court held, and our Circuit agreed, that the Tribe's land was exempt from property taxes because it lay within the boundaries of the reservation established for it by the Fort Schuyler and Canandaigua treaties. *See Oneida Indian Nation of N.Y. v. City of Sherrill, New York*, 145 F.Supp.2d 226, 266 (N.D.N.Y. 2001), *aff'd by Oneida III*, 337 F.3d at 167.

But the Supreme Court rejected the Tribe's claim, reasoning that the Oneidas had as a practical matter lost rights to their land more than two hundred years earlier. *See Sherrill*, 544 U.S. at 216-17, 125 S.Ct. 1478. During those two centuries, state and local governments continuously exercised sovereignty over the putative reservation land, and the character of the land changed dramatically. *Id.* As a result, the Court held, equitable considerations precluded restoration of the Tribe's sovereign rights over land since purchased on the market. *Id.* at 221, 125 S.Ct. 1478. The Court pointed out, however, that an alternative was available to the Tribe: "Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." *Id.* at 220, 125 S.Ct. 1478. Describing the land-into-trust provisions enacted in § 5 of the IRA, the Court suggested that § 5 offered "the proper avenue for [the Tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 221, 125 S.Ct. 1478.

On April 4, 2005, almost immediately after the Supreme Court's decision in *Sherrill* and in accordance with the Court's suggestion, the Tribe requested that the Secretary of the Interior take more than 17,000 acres of land in central New York into trust for the Tribe. All of the land was already owned by the Tribe. Its government, health, educational, and cultural facilities were located in the tract, as were tribal housing, businesses, and hunting lands, and the Tribe-operated Turning Stone casino.

Three years later, in May 2008, and over the objection of state and local governments, the Department of the Interior announced its decision to accept into trust for the Tribe approximately 13,000 of the 17,000 acres requested. *See* U.S. Dep't of the Interior, Record of Decision: Oneida Indian Nation of New York Fee-to-Trust Request (May 2008) ("Record of Decision"), Joint Appendix ("J.A.") 550-621. The Secretary found that the entrustment was necessary to support tribal self-determination, tribal housing, and economic development. Record of Decision, J.A. 551, 585. It acknowledged that the acquisition "may negatively impact the ability of state and local governments to provide cohesive and consistent governance," *id.*, J.A. 570, and would incrementally increase the demand for local government services, *id.*, J.A. 573. But it concluded that those negative effects did not warrant denying the entrustment. *Id.*

III. Procedural History

Plaintiffs-Appellants moved quickly in 2008 to challenge the Secretary's land-into-trust decision in federal district court. *See Upstate Citizens for Equality, Inc. v. United States*, No. 5:08-cv-633, 2008 WL 2841386 (N.D.N.Y., filed June 16, 2008); *Town of Verona v. Salazar*, No. 6:08-cv-647 (N.D.N.Y., filed June 19, 2008).[8] Invoking federal jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, Plaintiffs contended that the statutory land-into-trust mechanism exceeds the federal government's constitutional authority and unlawfully infringes on state sovereignty. The Verona and Vernon Plaintiffs also argued that the Department's statutory authority does not extend to taking land into trust for the Tribe.

In the following year, while the challenges were still pending, the Supreme Court issued its decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). In *Carcieri*, the Court held that only tribes "under federal jurisdiction" when the land-into-trust law was passed in 1934 are eligible to avail themselves of the entrustment procedures. *Id.* at 381, 129 S.Ct. 1058. The District Court in the litigation now

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[8] New York State and Madison and Oneida Counties filed a similar challenge to the agency's decision. That lawsuit was settled in 2014. *See New York v. Jewell*, No. 6:08-cv-644, 2014 WL 841764, at *8-12 (N.D.N.Y. March 4, 2014) (approving settlement). Plaintiffs in this case unsuccessfully sued in state court to invalidate the *Jewell* settlement, *see Town of Verona v. Cuomo*, 22 N.Y.S.3d 241, 246, 136 A.D.3d 36 (2015), *leave to appeal denied by Town of Verona v. Cuomo*, 27 N.Y.3d 908, 36 N.Y.S.3d 622, 56 N.E.3d 902 (2016).

before us accordingly remanded these cases to the Department for an initial determination of whether the Oneidas were "under federal jurisdiction" in 1934. *New York v. Salazar*, No. 6:08-cv-644, 2012 WL 4364452, at *14 (N.D.N.Y. Sept. 24, 2012). And, in December 2013, the agency issued an addendum to its Record of Decision on the Tribe's entrustment request, ruling that the Oneidas were indeed "under federal jurisdiction" in 1934. J.A. at 810.[9]

The government moved for summary judgment in both cases, asserting the legality of the land-into-trust decision under both the Constitution and the applicable statutes, and its availability with respect to the Tribe. The District Court granted the motions. *Town of Verona v. Salazar*, No. 6:08-cv-647, 2009 WL 3165556, at *2-4 (N.D.N.Y. Sept. 29, 2009); *Upstate Citizens for Equality v. Jewell*, No. 5:08-cv-0633, 2015 WL 1399366, at *7 (N.D.N.Y. March 26, 2015). The court ruled that Congress's power under the Indian Commerce Clause encompassed taking the land into trust for the Tribe, and that principles of state sovereignty did not prevent the action. The court further held that New York's consent to the entrustment was not needed because the federal government did not fully oust the state of jurisdiction over the entrusted lands, and therefore the Constitution's Enclave Clause was not implicated. *Jewell*, 2015 WL 1399366, at *8-9. The court rejected the Verona Plaintiffs' argument that the federal government could not take land into trust for the Tribe

[9] Plaintiffs contested that determination before the District Court, but do not press the challenge on appeal.

because the Oneidas had opted out of qualifying for that remedy in 1936. *Salazar*, 2009 WL 3165556, at *9-11. And the court held that Plaintiff Upstate Citizens for Equality ("UCE") lacked standing to dispute the legitimacy of the Tribe's leadership in the context of its legal attack on the land-into-trust decision. *Jewell*, 2015 WL 1399366, at *9.

The instant appeals followed.

DISCUSSION

Plaintiffs challenge the Secretary's decision to take land into trust on behalf of the Oneida Tribe of New York as violative of the Constitution, the Indian Removal Act, and the Indian Land Consolidation Act. We review *de novo* the District Court's rejection of those legal arguments on summary judgment. *See Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 279 (2d Cir. 2015).

I. Standing

As a threshold matter, the government contends that Plaintiff UCE lacks standing to challenge the land-into-trust decision on appeal because it has dropped some of the claims it pursued before the District Court, where its standing was undisputed.[10]

[10] The government makes no challenge to the standing of the Towns or the individual Plaintiffs-Appellants.

Standing is an "irreducible constitutional minimum" that must be satisfied for a federal court to exercise jurisdiction over a case. *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 201 (2d Cir. 2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). To establish standing, a plaintiff must show (1) that it "suffered an injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 (internal quotation marks omitted). An "injury in fact" consists of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560, 112 S.Ct. 2130 (internal citations and quotation marks omitted).

UCE asserts that it has standing to challenge the Secretary's action based on harms that it contends are or will be caused to its members by the Tribe's assertion of jurisdiction over the entrusted land. Among other harms, its complaint asserts that the casino's continued operation on the entrusted land will cause its members "loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site," "loss of tax revenue currently generated by the agricultural land that comprises the casino site," and "the loss of business and recreational opportunities, such as retail stores and restaurants, that will be forced out by the casino." UCE First Am.

Compl. ¶ III.18, J.A. 292. As relief it seeks, among other remedies, an injunction requiring the government to "take enforcement action" against unlawfully operating casinos – presumably including Turning Stone. *Id.* ¶ VI.18, J.A. 343.

The government argues that these alleged injuries no longer confer standing on UCE because the group has now abandoned its claim that the Turning Stone casino operates in violation of the Indian Gaming Regulatory Act ("IGRA").[11] On appeal, UCE challenges only the Secretary's decision to take land into trust on behalf of the Tribe. The casino's operation will be lawful regardless of whether the underlying land is taken into trust, the government argues, and therefore UCE lacks standing to pursue this appeal: The casino's operation – on which UCE's asserted harms rest – will be undisturbed no matter how the entrustment decision is resolved.

We disagree with the government that the lawfulness of the casino's operations will not be affected by the result in this case. Under the IGRA, Turning Stone is a Class III casino, meaning that it may offer a wide range of gaming activities. 25 U.S.C. § 2703(8). The IGRA allows Class III gaming activities to be conducted "on Indian lands," however, only if the activities are authorized by "the governing body of the Indian

[11] In the District Court, UCE raised a number of claims under the IGRA, *see Upstate Citizens for Equality, Inc. v. United States*, No. 5:08-cv-633, Doc. 35 at 41-49 (N.D.N.Y. filed Jan. 29, 2009) (amended complaint). On appeal, it has not pursued arguments related to those claims.

tribe *having jurisdiction over such lands*." 25 U.S.C. § 2710(d)(1)(A)(i) (emphasis added). Thus, as we recently observed, "[A]ny tribe seeking to conduct gaming on land must have jurisdiction over that land." *Chaudhuri*, 802 F.3d at 279. "Jurisdiction," in this context, means "tribal jurisdiction" – "a combination of tribal and federal jurisdiction over land," to the exclusion (with some exceptions) of state jurisdiction. *Id.* at 279-80; *see infra* 571-72 n.19.

The Supreme Court has already rejected the Tribe's claim that it may exercise tribal jurisdiction over the Turning Stone land without the Department first taking the land into trust on the Tribe's behalf. *See Sherrill*, 544 U.S. at 220-21, 125 S.Ct. 1478. Indeed, among the stated purposes of the Department's land-into-trust decision is to "provid[e] a tribal land base and homeland that . . . is subject to tribal sovereignty." Record of Decision, J.A. 557.[12] If the land-into-trust decision is reversed, the Tribe will be stripped of tribal jurisdiction over the Turning Stone casino site, and the Tribe's operation of the casino may become unlawful.

Because UCE's attack on the land-into-trust decision will have repercussions for the lawfulness of the Turning Stone casino's operations, and because the organization has plausibly alleged that the casino's operations cause them injury-in-fact (allegations that the government does not dispute), we conclude that UCE

[12] In this context, we understand "tribal sovereignty" to imply "tribal jurisdiction" over the land. *See* Record of Decision, J.A. 570, 604 (discussing effects of restoring tribal jurisdiction over trust land).

has standing to pursue this appeal, and we turn to the merits of the parties' substantive arguments.

II. Constitutionality of Land-into-Trust Procedures

A. Scope of Constitutional Authority

UCE contends that the federal government lacks authority under the Constitution to take this land into trust for the Tribe pursuant to § 5 of the IRA. Their position is, primarily, that the Indian Commerce Clause does not permit the federal government to take action with respect to tribes when that action would take place entirely within a single state.[13]

UCE's argument is at odds with the Supreme Court's longstanding general view that the federal government's power under the Constitution to legislate with respect to Indian tribes is exceptionally broad. *See United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ("[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.'" (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979))); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 62, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("[T]he States . . . have been divested of virtually all

[13] The Indian Commerce Clause grants Congress the power to regulate "Commerce . . . with the Indian Tribes." U.S. Const. art. I § 8, cl. 3.

authority over Indian commerce and Indian tribes."). This expansive power has been understood to originate in two Constitutional provisions: the Indian Commerce Clause, U.S. Const., Art. I § 8, cl. 3, and the treaty power, Art. II § 2, cl. 2. *Lara*, 541 U.S. at 200, 124 S.Ct. 1628. Thus, the "central function of the Indian Commerce Clause is to provide Congress with *plenary* power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989) (emphasis added). The treaty power, pursuant to which the executive branch entered into treaties with Indian tribes – until 1878, when Congress prohibited the practice – has been construed to give Congress the related authority to legislate in furtherance of those treaties that were lawfully consummated. *Lara*, 541 U.S. at 201, 124 S.Ct. 1628. Congress has long used the powers arising under these provisions to legislate extensively in the matter of Indian affairs, including with respect to tribal property rights. *See, e.g.*, *id.* at 202, 124 S.Ct. 1628; *see also* Cohen, *Handbook* § 5.01.

UCE urges us to disregard that lengthy line of authority, however, and instead to import restrictions developed with respect to the *Interstate* Commerce Clause into the Indian Commerce Clause context. In particular, UCE contends that Congress's "plenary" authority to legislate with respect to Indian tribes – analogous to Congress's power vis-à-vis interstate commerce – is limited to the regulation of trading activities that cross state borders. Under UCE's theory, if an Indian tribe's lands are (like the Tribe's) located

entirely within the boundaries of a single state, then that tribe is subject to state legislation only.

This argument has some superficial appeal. The two commerce-related provisions are tightly intertwined in the constitutional text:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I § 8, cl. 1, 3. And some historical research suggests that the contemporaneous understanding may have been that Congressional authority over Indian affairs was not so expansive as the word "plenary" suggests. *See Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S.Ct. 2552, 2569-70, 186 L.Ed.2d 729 (2013) (Thomas, *J.*, concurring) (arguing that ratifiers of Constitution understood Indian Commerce Clause to regulate only "trade with Indian tribes living beyond state borders"); Robert Natelson, *Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 243-44 (2007) (arguing that Indian Commerce Clause confers power only to regulate trade with Indian tribes).

But the Supreme Court has already rejected the proposed correspondence between the Interstate and Indian Commerce Clauses. In its 1989 decision in *Cotton Petroleum Corp.*, the Court observed that the purpose of the Interstate Commerce Clause was to "maintain[] free trade among the States even in the absence of implementing federal legislation," whereas

the purpose of the Indian Commerce Clause was to "provide Congress with plenary power to legislate in the field of Indian affairs." 490 U.S. at 192, 109 S.Ct. 1698. Consistent with those purposes, the Court explained, Interstate Commerce Clause case law "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Id.* On this reasoning, the Court concluded that the Indian Commerce Clause does not contain an implicit "interstate" limitation. Although Justice Thomas has urged a more restrictive reading of the Clause in recent concurrences, *see, e.g.*, *Adoptive Couple*, 133 S.Ct. at 2569-70 (Thomas, *J.*, concurring); *Lara*, 541 U.S. at 224-26, 124 S.Ct. 1628 (Thomas, *J.*, concurring), the Supreme Court majority has continued to adhere to the view that the Indian Commerce Clause vests Congress with plenary power over Indian tribes and that this power is not delimited by state boundaries.[14]

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[14] UCE makes a related argument that, even if the Indian Commerce Clause permits land to be taken into trust in some states, it does not apply in New York because of the nature of New York's pre-Constitution dealings with Iroquois tribes. UCE Br. at 33. This position was rejected by the Supreme Court in *Oneida I*, however. *Oneida I* made clear that, for Indian Commerce Clause purposes, the Court will draw no distinction between the federal government's power vis-à -vis the original states (and New York in particular) and all other states. *See Oneida I*, 414 U.S. at 670, 94 S.Ct. 772; *see also New York Indians*, 72 U.S. (5 Wall.) 761, 771-72, 18 L.Ed. 708 (1866) (voiding New York's taxation of Seneca reservation land).

UCE argues in the alternative that § 5 is unconstitutional because the acquisition of land for Indian use is not a "regulat[ion] [of] commerce" within the meaning of the Indian Commerce Clause. Again, however, precedent deprives this argument of any traction. The Supreme Court has ruled that Congress may purchase or exercise eminent domain over land within state boundaries as an exercise of its general constitutional power to regulate commerce. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 335-37, 13 S.Ct. 622, 37 L.Ed. 463 (1893); *Cherokee Nation v. S. Kansas Ry. Co.*, 135 U.S. 641, 656-59, 10 S.Ct. 965, 34 L.Ed. 295 (1890). Further, the Court has established that, when exercising Indian Commerce Clause powers, the federal government may, by acquiring land for a tribe, divest a state of important aspects of its jurisdiction, even if a state previously exercised wholesale jurisdiction over the land and even if "federal supervision over [a tribe] has not been continuous." *United States v. John*, 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (limiting state criminal jurisdiction over reservation land); *see also* Cohen, *Handbook* §§ 5.02[4], 15.03. We therefore reject this alternative argument as well.

B. State Sovereignty

Both groups of Plaintiffs contend that, even if permitted under Congress's broad Indian Commerce Clause powers, the land-into-trust procedures violate

underlying principles of state sovereignty.[15] When the federal government takes land into trust for an Indian tribe, the state that previously exercised jurisdiction over the land cedes some of its authority to the federal and tribal governments. The parties disagree about whether, by implicitly requiring that cession, the entrustment unconstitutionally infringes on New York's sovereign rights.

Principles of state sovereignty do impose some limits on Congress's power, otherwise plenary, over Indian affairs. Thus, in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court considered whether Congress could permit Indian tribes to sue a state and its officials in federal court to enforce the state's duty to negotiate with the tribe "in good faith" regarding a tribal-state gambling compact. *Id.* at 50, 116 S.Ct. 1114. The state maintained that to allow such a federal-court remedy would violate the Eleventh Amendment's directive that "[t]he Judicial power of the United States shall not be construed to extend to any suit . . . commenced

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[15] As noted above, New York State has settled its own challenge to the lawfulness of the land-into-trust decision and no longer contends that the entrustment violates its sovereignty. *See New York v. Jewell*, 2014 WL 841764, at *8-12. This development does not eliminate Plaintiffs' standing to raise these arguments, however, because "an individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Bond v. United States*, 564 U.S. 211, 222, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011).

or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. The Court agreed: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72, 116 S.Ct. 1114.

The linchpin of the decision in *Seminole Tribe*, however, was the Eleventh Amendment's express protection of the states from the unconsented-to exercise of federal judicial power. No equivalent constitutional provision shields the states' exercise of jurisdiction over Indian land within their borders. To the contrary, "[t]he States' inherent jurisdiction on reservations can of course be stripped by Congress." *Nevada v. Hicks*, 533 U.S. 353, 365, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (citing *Draper v. United States*, 164 U.S. 240, 242-43, 17 S.Ct. 107, 41 L.Ed. 419 (1896)); *see also* 18 U.S.C. § 1152 (creating exclusive federal and Indian jurisdiction for criminal offenses committed in "Indian country"[16]).

[16] As used in § 1152, the phrase "Indian country" means, in sum: all land on any Indian reservation that is under federal jurisdiction, whether or not the fee owner is an Indian; dependent Indian communities; and Indian allotments whose Indian titles have not been extinguished. *See* 18 U.S.C. § 1151 (defining "Indian country" for certain criminal law purposes); *Cty. of Yakima*, 502 U.S. at 260, 112 S.Ct. 683.

The Supreme Court's 1978 decision in *United States v. John* is instructive in this regard. *John* concerned whether the federal government, the Mississippi state government, or both, had jurisdiction to prosecute a Choctaw man for a violent crime committed against a non-Indian on a Choctaw reservation in Mississippi. *John*, 437 U.S. at 635-38, 98 S.Ct. 2541. The dispute arose because the federal government had in the 19th century removed many – although not all – of the Choctaws from their traditional homeland in Mississippi. *Id.* at 639-41, 98 S.Ct. 2541. Following the removals, the state of Mississippi exercised civil and criminal jurisdiction over the tribe's former territory and those Choctaws who remained there. *Id.* at 639-40, 98 S.Ct. 2541. Decades later, in the 1920s, the federal government began to purchase land in Mississippi for use by those remaining Choctaws, eventually declaring that the land thus acquired would be held "in the United States in trust for" the tribe and proclaiming the land to be a "reservation." *Id.* at 644-46, 98 S.Ct. 2541. Despite the federal proclamation, Mississippi claimed continuing criminal jurisdiction over the Choctaw lands. *Id.* at 651-52, 98 S.Ct. 2541.

In an argument similar to that made by Plaintiffs here – although not framed precisely in terms of state "sovereignty" – Mississippi asserted that the federal government lacked the power to displace state criminal law authority over the new reservation lands. It contended that "since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and . . . the Federal

Government long ago abandoned its supervisory authority over these Indians." *Id.* at 652, 98 S.Ct. 2541. As a result, Mississippi urged, the state had established an irrevocable right to exercise criminal jurisdiction over the tribe's former territory. *Id.*

The Supreme Court conclusively rejected this argument. "[T]he fact that federal supervision over [the Choctaws] has not been continuous" does not "destroy[ ] the federal power to deal with them," it declared. *Id.* at 653, 98 S.Ct. 2541. Because the land had once been "set apart for the use of the Indians as such, under the superintendence of the Government," *id.* at 649, 98 S.Ct. 2541, the federal government retained the power (the Court held) to oust the state of criminal jurisdiction over the territory and to assert federal criminal jurisdiction there. *Id.* at 654, 98 S.Ct. 2541.

The Court's reasoning in *United States v. John* comports with its later favorable assessment – albeit in *dicta* – of the land-into-trust procedure and the procedure's "sensitiv[ity] to the complex interjurisdictional concerns that arise" when land is transferred from state to tribal authority. *Sherrill*, 544 U.S. at 220-21, 125 S.Ct. 1478. We therefore conclude that underlying principles of state sovereignty do not impair the federal government's power under the IRA to acquire land on behalf of the Tribe even if, by doing so, New York's governmental power over that land is diminished.

C. The Enclave Clause

Plaintiffs' final constitutional challenge rests on text that is known as the Enclave Clause. This rarely invoked constitutional provision provides that Congress has the following power:

> [to] exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.

U.S. Const. art I § 8, cl. 17.[17] The clause is intended to ensure that "places on which the security of the entire Union may depend" are not "in any degree dependent on a particular member of it." *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 530, 5 S.Ct. 995, 29 L.Ed. 264 (1885) (quoting The Federalist No. 43 (James Madison)). Plaintiffs argue that, in its essence, the clause requires Congress to obtain the state legislature's express consent – as it typically does when establishing a military base in a state, for example – before it can

[17] Although the clause speaks of land to be "purchased" by the federal government, the clause's reach is not cabined to land that is "purchased . . . in the narrow trading sense of the term." *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369, 372, 84 S.Ct. 857, 11 L.Ed.2d 782 (1964). Instead, "the crucial question" in assessing the legality of such an acquisition is whether the state freely ceded its jurisdiction over the land. *Id.*

take state land into trust for Indians. Although in deciding whether to take land into trust, the Department of the Interior must take into account the effects of the entrustment on state and local government, *see* 25 C.F.R. § 151.10, neither the IRA nor its associated regulations currently require the state's express consent to the entrustment.

Case law construing the clause instructs that state consent is needed only when the federal government takes "exclusive" jurisdiction over land within a state. *See Paul v. United States*, 371 U.S. 245, 263, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963). "Exclusive" jurisdiction for Enclave Clause purposes is equivalent to the sweeping power that Congress exerts over the District of Columbia, the first subject of the clause. *Id.* After exclusive jurisdiction is assumed, newly-enacted state laws have no effect on the federal enclave.[18] *See Pacific Coast Dairy, Inc. v. Dep't of Agric. of Cal.*, 318 U.S. 285, 294, 63 S.Ct. 628, 87 L.Ed. 761 (1943). But federal control is not exclusive – and state consent is *not* needed – when the state in which the federal property sits is, for instance, "free to enforce its criminal and civil laws on those lands." *Kleppe v. New Mexico*, 426 U.S. 529, 543, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976).

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[18] State laws in place at the time of the federal government's acquisition of the land may remain in effect, however, as long as they do not interfere with "the carrying out of a national purpose." *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-04, 60 S.Ct. 431, 84 L.Ed. 596 (1940). This saving principle ensures "that no area however small will be left without a developed legal system for private rights." *Id.* at 100, 60 S.Ct. 431.

When land is taken into trust by the federal government for Indian tribes, the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands. *See Surplus Trading Co. v. Cook*, 281 U.S. 647, 650-51, 50 S.Ct. 455, 74 L.Ed. 1091 (1930) (Indian reservation is not federal enclave because state civil and criminal laws still apply to non-Indians); *see also Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007) (Enclave Clause does not bar application of IRA land-into-trust procedures), *rev'd on other grounds*, *Carcieri*, 555 U.S. at 395-96, 129 S.Ct. 1058. States retain some civil and criminal authority on reservations, subject to the caveat that in exercising that authority they may not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 386, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (per curiam). States may, for instance, require Indians to collect state sales taxes on goods sold on the reservation to nonmembers. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 159-60, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). Also, their agents may enter the reservation to execute a search warrant related to off-reservation conduct. *Hicks*, 533 U.S. at 364-65, 121 S.Ct. 2304.[19]

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[19] Plaintiffs assert that our recent decision in *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267 (2d Cir. 2015), holds that the state retains no jurisdiction at all over land taken into trust, and thereby means that the consent requirement of the Enclave Clause must apply to the taking of land into trust. Verona Reply Br. at 8-9. In *Chaudhuri*, quoting language from the

State jurisdiction is thus only reduced, and not eliminated, when the federal government takes land into trust for a tribe. Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to § 5 of the IRA, the Enclave Clause poses no barrier to the entrustment that occurred here.

III. Tribe's Eligibility for Land-into-Trust Procedures

Plaintiffs' remaining arguments challenge the government's interpretation of the terms "Indians" and "tribe" in the IRA and related statutes. In their view, the Oneida Indians of New York are not a "tribe" eligible to be the beneficiary of land taken into trust by

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Cohen *Handbook*, we observed that "[b]ecause of plenary federal authority in Indian affairs, there is no room for state regulation." *Id*. at 280 (quoting Cohen, *Handbook* § 6.03[1][a]). Although read literally this declaration appears to be unqualified, the *Handbook* makes clear that it is in fact subject to exceptions, including that states may continue to regulate the activities of nonmembers on tribal land, and that states may demand assistance from tribal members in the exercise of that regulatory authority. *See* Cohen, *Handbook* § 6.03[1][b]; *see also Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (upholding state regulation requiring smoke shops located on Indian reservation to collect cigarette tax from sales to non-Indians). We do not read *Chaudhuri* to suggest otherwise. The relevant portion of our decision in *Chaudhuri* concerned whether a particular piece of land was subject to tribal jurisdiction *at all*, not the extent or existence of the state's authority on tribal land. For that reason, we decline to treat the quoted portion of *Chaudhuri* as dispositive of the Enclave Clause question at issue here.

the United States, both because they are excluded from the benefits of the IRA by the terms of that 1934 statute, and because the language of the 1983 Indian Land Consolidation Act does not reach them.

A. Definitions of "Tribe"

We begin by reviewing the applicable statutes. As noted above, § 5 of the IRA authorizes the Secretary of the Interior to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The statute defines "Indians" for purposes of this section as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"; it defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479.[20] At the time of its enactment, tribes could opt out of the IRA's provisions, including § 5, by vote at a special election. *See* 25 U.S.C. § 478. As we have mentioned, the Oneidas did so in 1936 by a tribal vote.

In 1983, however, acting in response to requests by tribes that had earlier opted out but since changed their views, Congress overrode the tribes' opt-out votes with the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, 96 Stat. 2517 (1983) (codified at 25 U.S.C. §§ 2201, *et seq.*). The ILCA directs that § 5 of the IRA "shall apply to *all tribes* notwithstanding the

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[20] The requirement that a tribe be "now under federal jurisdiction" refers to its status in 1934, when Congress enacted that language as part of the IRA. *See Carcieri*, 555 U.S. at 395, 129 S.Ct. 1058.

[opt-out] provisions of section 478." 25 U.S.C. § 2202 (emphasis added). The ILCA further defines "tribes" as "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." § 2201(1).

B. Applicability of the 1934 IRA to New York Indians

In Plaintiffs' view, Congress did not intend in 1934 to make the New York Indian tribes eligible for the § 5 land-into-trust procedures established by the IRA. Those procedures, they assert, were intended to remedy the specific effects of the 19th-century allotment policy – and in particular, the Dawes Act of 1887.[21] The Dawes Act authorized the President to transfer ownership of Indian tribal lands from the tribes to individual Indians in "allotments," in furtherance of the policy we described above. *See* 24 Stat. 388 § 1 (1887). In 1934, responding to the ill effects of the Act, Congress repudiated the allotment policy by adopting the IRA and creating the land-into-trust procedures, giving the federal government a tool with which to reestablish tribal land holdings. *See* Cohen, *Handbook* § 16.03[2][c].

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[21] The law was formally entitled, "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." 24 Stat. 388 (1887).

The Oneidas lost their land not through the Dawes Act or the allotment policy, but rather through repeated land sales made by the tribe to New York State in violation of federal law. *See Sherrill*, 544 U.S. at 206-07, 125 S.Ct. 1478. But nothing in the IRA's text limits its remedial reach to tribes affected by the Dawes Act. Indeed, the IRA's definition of "Indians" is notably far-reaching: It covers "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. When Congress intended to exclude a geographic area or a particular tribe from the statute's reach, it did so explicitly. For example, the IRA land-into-trust procedures by their terms do not apply to land in "the Territories, colonies, [and] insular possessions of the United States," except for the then-territory of Alaska. 25 U.S.C. § 473. It also excludes certain named Indian tribes (not including the Oneidas) from some of its provisions. *Id.* That, in contrast, Congress excluded neither New York nor any of its tribes from the statute's reach implies that Congress in fact intended the IRA – including § 5 – to embrace New York and tribes located there, including the Oneidas. *See Doe v. Bin Laden*, 663 F.3d 64, 70 (2d Cir. 2011) (applying *expressio unius est exclusio alterius* canon of construction in declining to read additional exceptions into statute). We comfortably conclude that the IRA unambiguously permits the United States to take land into trust for tribes unaffected by the Dawes Act, including tribes in New York.

In reaching this conclusion, we do not rely on the IRA's legislative history, but we note that so much of it

as is available provides further confirmation of our conclusion. As UCE points out in its brief, the New York Indians were shut out of the IRA's land-into-trust provisions in an early draft of the bill. *See Hearings Before the Committee on Indian Affairs on H.R. 7902*, 73rd Cong. 133 (1934) (statement of John Collier, Comm'r of Indian Affairs). Commissioner Collier testified that the New York Indians were omitted from the draft because they "[did] not want [land reform] and their condition [was] entirely peculiar." *Id.* But that provision was removed from the bill as "unnecessary and inadvisable" later in the legislative process and replaced with the voluntary opt-out procedure of 25 U.S.C. § 478, which was made available to *all* tribes. *Id.* at 198. The legislative record is thus consistent with our conclusion, based on the text and scheme of the IRA, *see Hess v. Cohen & Slamowitz LLP*, 637 F.3d 117, 120 (2d Cir. 2011), that the IRA contains no implicit exclusion of the New York tribes. *See Doe v. Chao*, 540 U.S. 614, 622-23, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004).

C. Effect of the ILCA

Even if the IRA as passed applied to the Oneidas, Plaintiffs argue, the ILCA does not override opt-out votes except as to "tribes" "for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). Observing that the United States did not hold land in trust for the Tribe in 2008 when the Secretary made the land-into-trust decision, Plaintiffs contend that the Oneidas' 1936 opt-out vote is still

valid and that the Tribe is therefore not eligible for the IRA's land-into-trust procedures.

The United States interprets the IRA and the ILCA differently. The government first contends that the "tribes" referred to in § 2202 of the ILCA (overriding past opt-out votes) should not be limited to groups meeting the narrowest definition of "tribes" presented in § 2201(1) because that reading would incongruously undermine the ILCA's broad remedial purpose. Section 2201, it says, should instead be governed by the definition of "tribes" set forth in § 479. It further asserts that its view is embraced by agency interpretations that are entitled to this Court's deference. *See* 25 C.F.R. § 151.2(b); U.S. Dep't of the Interior, Office of the Solicitor, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, at 21 (March 12, 2014); *New York v. Acting E. Reg'l Dir., Bd. of Indian Affairs*, 58 I.B.I.A. 323, 331-34 (2014) (applying broader definition in context of related land-into-trust decision).[22] The government argues second and in

[22] The government also urges us to affirm the District Court's decision on the basis that, between 2008 (when this lawsuit was filed) and 2013 (when the Department issued its Amended Record of Decision (*see* J.A. 1571)), the United States took land into trust for the Tribe under the "excess real property" provisions of 40 U.S.C. § 523. *See* Gov't Br. 62-65. Thus, the government submits, even under Plaintiffs' interpretation of § 2201(1), by 2013 the Tribe was eligible for additional land to be taken into trust pursuant to § 5 of the IRA. Although we are free to affirm on grounds "not relied upon by the district court," *Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275 (2d Cir. 1998) (internal quotation marks omitted), we elect not to do so here, and we express no view on the merits of this alternative argument.

the alternative that construing § 2202 in light of a broader reading of § 2201(1) would similarly restore the Tribe's eligibility for the land-into-trust procedures of § 465. It rejects Plaintiffs' reading of § 2201(1) and instead construes the last clause of § 2201(1) to apply only to the word "community."

i. Deference to Agency Interpretations

We first consider what, if any, deference we owe to the agency pronouncements presented in support of the first argument. We may defer to an agency's interpretation of the statute it administers only if the statute is ambiguous in relevant part. *Estate of Landers v. Leavitt*, 545 F.3d 98, 104-05 (2d Cir. 2009). If, however, the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). An interpretive regulation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Estate of Landers*, 545 F.3d at 105.

The agency interpretations identified by the government as bearing on the question do not, upon closer examination, actually address the interplay of the definitions at issue here, even were we to consider them

ambiguous. First, the United States contends that it has promulgated its view – that § 2201(1)'s definition of "tribe" does not limit the effect of § 2202 – in a regulation adopted pursuant to statute and through notice-and-comment rulemaking, *see* 45 Fed. Reg. 62,034 (Sept. 18, 1980), and therefore that the interpretation is entitled to *Chevron* deference. *See* 25 C.F.R. § 151.2(b) (defining "tribe" for purposes of land-into-trust regulation as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"). This definition does not, however, purport to define the *scope* of the agency's land-into-trust authority; indeed, the next section of the agency's regulations acknowledges that "[l]and not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status *when such acquisition is authorized by an act of Congress*." 25 C.F.R. § 151.3 (emphasis added).

The origins of the regulation further support our understanding that § 151.2(b) does not interpret the effect of § 2201(1) on the scope of the agency's land-into-trust authority. The regulatory definition of "tribe" set forth in § 151.2(b) has not changed since it was promulgated in 1980, *before* the ILCA's passage in 1983. *See* 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980). Moreover, although the DOI has amended the C.F.R. Part 151 "Land Acquisition" regulations on one occasion, in 1995, that amendment did not affect § 151.2(b), and the DOI has not revisited Part 151 regulations in

light of § 2202. *See* Land Acquisitions, 45 Fed. Reg. 62,034 (Sept. 18, 1980); 60 Fed. Reg. 32,874 (June 23, 1995). Tellingly, in the Record of Decision, the DOI seemed to rely on the language of § 2202 itself, rather than on any regulation. No one disputes that, in 1980, the government could not take land into trust for tribes that, like the Oneidas, had opted out of the IRA. Accordingly, we decline to treat § 151.2(b) as reflecting a statutory interpretation to which we owe deference.

Second, we find similarly inapt the Solicitor's legal opinion of March 2014 and the decision of the Interior Board of Indian Appeals to which the government also points. Both of these analyses focus on the meaning of "under Federal jurisdiction" in the IRA's definitional provision and the effect of *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), on the agency's authority to take land into trust. *See* U.S. Dep't of the Interior, The Meaning of "Under Federal Jurisdiction" at 16-20; *State of New York*, 58 I.B.I.A. at 331-34. The analyses presented in these documents simply do not address the ILCA's definition of "tribe" in § 2201(1) or whether that definition might cabin the effect of the ILCA on the IRA's entrustment procedures.

ii. Interpreting "Tribe"

Because the agency's proffered interpretations do not answer the question before us in this litigation, we interpret the statutes *de novo*.

In general, "statutory definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129, 128 S.Ct. 1572, 170 L.Ed.2d 478 (2008) (internal quotation marks omitted). In the ILCA, therefore, absent any indication that this general rule does not hold, *see Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 201, 69 S.Ct. 503, 93 L.Ed. 611 (1949), § 2201(1) defines "tribe" for purposes of § 2202, *cf. Carcieri*, 555 U.S. at 394 n.9, 129 S.Ct. 1058 ("[Section] 2201 is, by its express terms, applicable only to Chapter 24 of Title 25 of the United States Code [*i.e.*, the ILCA]."). Thus, a group that lost its eligibility for the land-into-trust procedures of § 465 through its § 478 vote has its land-into-trust eligibility restored by § 2202 – which states that § 465 "shall apply to all tribes notwithstanding" § 478 – if and only if the group meets the definition of "tribe" in § 2201(1).

As noted above, Plaintiffs argue that the ILCA's definition of "tribe" in § 2101(1) – "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust" – should be read so that "for which . . . holds land into trust" applies to "tribe, band, group, [and] pueblo," not just "community." Under this reading, a purported tribe would only have its land-into-trust eligibility restored if, at the time the group is seeking to have the United States take land into trust on its behalf, the United States *already* holds land in trust for that group.

We agree with the government that Plaintiffs' reading of § 2201(1) is inconsistent with the ILCA

scheme and would produce anomalous results. As the Supreme Court has explained, § 2202, "by its terms[,] simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe." *See Carcieri*, 555 U.S. at 393-94, 129 S.Ct. 1058. Limiting the ILCA's remedial effect to groups for which the United States already held land in trust would be a very strange outcome in light of the ILCA's restorative aim. Plaintiffs' interpretation would mean that the ILCA restores land-into-trust eligibility only to those tribes that, despite having voted under § 478 to *reject* land-into-trust eligibility, somehow did have land held in trust by the government on their behalf.

Instead, we read "for which, or for the members of which, the United States holds lands in trust" in § 2201(1) to apply only to "community." This reading is supported by the last-antecedent rule, most recently reaffirmed in *Lockhart v. United States*, ___ U.S. ___, 136 S.Ct. 958, 962, 194 L.Ed.2d 48 (2016). The District Court relied on this rule to reach the same reading – correctly, we believe. To hold otherwise would both give inadequate weight to the apparent grammar of the sentence, with a serial comma separating "community" from "Indian tribe, band, group, [and] pueblo," and undercut the ILCA's intended effect of restoring land-into-trust eligibility.

To be sure, a tribe that opted out of the IRA must satisfy both the requirements of § 2201(1) and § 465 to have its land-into-trust eligibility restored. And, under

our preferred reading, § 2201(1) affords a broader definition of "tribe" than does its counterpart in the IRA, § 479. Section 479 defines "tribe" as "any Indian tribe, organized band, pueblo, or Indians residing on one reservation," but limits the term "Indian" to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." This definition of "Indian" restricts § 465's application. *See Carcieri*, 555 U.S. at 388, 129 S.Ct. 1058 ("The parties are in agreement, as are we, that the Secretary's authority to take the parcel in question into trust [pursuant to § 465] depends on whether the Narragansetts are members of a 'recognized Indian Tribe now under Federal jurisdiction.'"). Section 2201(1) does not repeated this date-sensitive federal jurisdiction requirement. In § 2202, however, Congress took care to note that "nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)." *Id.* § 2202. Accordingly, the Secretary must also apply § 479 in determining whether a tribe that has opted out, with that opt-out effectively nullified pursuant to § 2202, is eligible for a land-into-trust arrangement pursuant to § 465. Because the ILCA defines "tribe" and "Indian" more broadly than does the IRA, however, this two-step analysis should not prevent any otherwise eligible tribe, *i.e.*, any recognized tribe under federal jurisdiction at the time of the IRA's enactment, from requesting a land-into-trust arrangement pursuant to § 465.

We therefore conclude that the United States did not exceed its statutory authority by taking land into trust for the Tribe – a tribe that indisputably qualifies as a "tribe" within our reading of § 2201(1) and, since it was under federal jurisdiction in 1934, within the meaning of § 465 as well.

IV. Authority of Tribal Leadership

Finally, we reject UCE's cursory argument that the United States may not take land into trust on behalf of the Tribe because of what Plaintiffs allege to be the Tribe's illegitimate leadership. According to UCE, tribal leader Arthur Raymond Halbritter has improperly restructured tribal governance to protect his power base. Plaintiffs do not, however, detail how this assertion bears on their claim that the United States may not take land into trust for the Tribe. They do not, for example, question the validity of the Tribe's request that land be entrusted on its behalf. Moreover, even if the legitimacy of the tribal government were somehow related to Plaintiffs' current claims regarding the entrustment, federal courts "lack authority to resolve internal disputes about tribal law." *Cayuga Nation v. Tanner*, 824 F.3d 321, 327-28 (2d Cir.2016). When there is such a dispute, we will "defer to the BIA's recognition of an individual as authorized to act on behalf of the Nation." *Id.* at 330. Here, the agency received and acted on the Tribe's request that it take land into trust, implicitly recognizing – at least for these purposes – the legitimacy of tribal leadership. That ends our inquiry.

CONCLUSION

In sum, we conclude that the federal government's plenary power over Indian affairs extends to taking historic reservation land into trust for a tribe. That the entrustment deprives state government of certain aspects of jurisdiction over that land does not run afoul of general principles of state sovereignty, the Indian Commerce Clause, or the specific guarantees of the Enclave Clause. The Tribe became eligible for such an entrustment in 1983, when Congress invalidated the Oneidas' earlier decision to opt out of the land-into-trust regime, and the Department of the Interior's 2008 decision (reaffirmed in 2013) to take the land into trust for the Tribe lies within that agency's statutory authority. For these reasons, we **AFFIRM** the judgments of the District Court.

APPENDIX B

2015 WL 1400291

United States District Court,
N.D. New York.

TOWN OF VERONA; Town of Vernon;
Abraham Acee; and Arthur Strife, Plaintiffs,
v.
Sally M.R. JEWELL,[1] in her official capacity as
United States Secretary of the Interior; United
States Department of the Interior, Defendants.

No. 6:08-cv-0647 (LEK/DEP).
|
Signed March 26, 2015.

Attorneys and Law Firms

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Steven Miskinis, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM-DECISION and ORDER

LAWRENCE E. KAHN, District Judge.

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[1] Sally M.R. Jewel, as Secretary of the United States Department of the Interior, was substituted as a defendant for Kenneth L. Salazar on April 8, 2014, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

Plaintiffs the Town of Verona, the Town of Vernon, Abraham Acee, and Arthur Strife (collectively, "Plaintiffs"), commenced this action to challenge a May 20, 2008, Record of Decision issued by the Department of the Interior ("DOI") acquiring over 13,000 acres of land in Central New York into trust for the benefit of the Oneida Indian Nation of New York ("OIN" or the "Nation"). Dkt. No. 1 ("Complaint") ¶ 1. Presently before the Court are Plaintiffs' Motion for summary judgment and Defendants' Cross-Motion for summary judgment. Dkt. Nos. 64 ("Motion"); 65 ("Cross-Motion"). For the following reasons, Defendants' Motion is granted and Plaintiffs' Motion is denied.

II. BACKGROUND

A. Legal Framework

The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 *et seq.*, was the centerpiece of New Deal Indian policy, which sought to enable tribes "to interact with and adapt to modern society as a governmental unit," and repudiated an era in which federal Indian policy had encouraged cultural assimilation. F. Cohen, *Handbook of Indian Law* § 1.05, at 81 (Newton ed.2012). The IRA ended allotment, *see* General Allotment Act of 1887 ("GAA"), 24 Stat. 388, where tribal lands had been broken up and distributed to individual Indians, and instead "facilitat[ed] tribes' acquisition of additional acreage and repurchase of former tribal domains," *Handbook of Indian Law* § 1.05, at 81.

To that end, § 5 of the IRA empowers the Secretary of the DOI (the "Secretary") to acquire land in trust for Indian tribes, such that the land is exempt from state and local taxation. 25 U.S.C. § 465. A tribe is qualified to have land taken into trust under § 5 if it meets the IRA's definition of "Indian," which includes, *inter alia*, "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction." *Id.* § 479. DOI has promulgated regulations at 25 C.F.R. Part 151, which establish procedures for the acquisition of land in trust under § 5. These include criteria the Secretary must consider in making an acquisition, depending on whether the acquisition is on-reservation, 25 C.F.R. § 151.10, or off-reservation, *id.* § 151.11.

B. Factual Background

"OIN is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation," which historically occupied what is now central New York, although the tribe's land holdings and population have fluctuated significantly over time. *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). On April 4, 2005, OIN submitted a request to DOI under § 5 of the IRA requesting that the Secretary acquire approximately 17,370 acres in Madison County and Oneida County, New York in trust status for OIN.[2] Dkt. No. 1-1 ("ROD")

[2] For further background on the history of OIN and the events leading to OIN's fee-to-trust request, *see generally City of Sherrill*, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386.

at 6. The request comprised properties that were re-acquired by OIN in open-market transactions, two centuries after they had last been possessed by the Oneidas. *Id.* The land is the location of OIN's Turning Stone Resort & Casino ("Turning Stone"), a Class III casino under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*; various other commercial enterprises, such as gas stations and golf courses; and OIN's government and cultural facilities. ROD at 6. OIN intends to continue existing uses of the land. *See id.* at 8, 31.

Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, DOI issued a draft Environmental Impact Statement ("EIS") regarding the proposed fee-to-trust request on November 24, 2006. *Id.* at 6. The purpose of the proposed action was "to help address the Nation's need for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth." *Id.* at 8. Public comments were solicited until February 22, 2007, and public hearings were held on December 14, 2006, and February 6, 2008. *Id.* at 6-7. DOI issued its final EIS on February 22, 2008. *Id.* at 7.

In the final EIS, DOI analyzed the environmental and socioeconomic impacts of the proposed action – acquiring the full 17,370 acres requested in trust – and eight reasonable alternatives. *Id.* at 6-7. On March 20, 2008, DOI issued its decision to accept approximately 13,003.89 acres in trust for the Nation. *Id.* at 7. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a

sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping." *Id.* at 19. Under the selected alternative, 4,284 of the requested acres would not be placed into trust. *Id.* The selected lands are centered around Turning Stone in Oneida County and OIN's 32-acre territory in Madison County. *Id.* The decision included lands in the Towns of Verona and Vernon, both located in Oneida County. Compl. ¶¶ 1, 4, 5.

C. Procedural Background

Plaintiffs commenced this action on June 19, 2008, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.[3] Compl. ¶ 1. The named Defendants are: Sally M.R. Jewel, United States Secretary of the Interior; DOI; and Mark Filip, in his official capacity as Acting Attorney General of the United States (collectively, "Defendants").

Plaintiffs' Complaint raises the following claims: (1) § 5 of the IRA, as applied to the State of New York, violates the Tenth Amendment; (2) the IRA does not apply to the lands for which OIN requests trust status

[3] Several other parties also filed suit challenging the ROD. *State of New York, et al. v. Salazar, et al.*, No. 6:08-cv-0644; *City of Oneida v. Salazar, et al.*, No. 5:08-cv-0648; *Upstate Citizens for Equality, Inc., et al. v. United States, et al.*, No. 5:08-cv-0633; *Central New York Fair Business Association, et al. v. Salazar, et al.*, No. 6:08-cv-0660; and *Niagra Mohawk Power Corp. v. Kempthorne, et al.*, No. 5:08-cv-0649.

because the lands were never the subject of allotment under the GAA, OIN was neither federally recognized nor under federal jurisdiction in 1934, and OIN voted not to have the IRA apply to it; and (3) DOI's determination was arbitrary, capricious, an abuse of discretion, and otherwise not accordance with the law because it was based on the erroneous assumption that Turning Stone is legally operated under the IGRA and failed to consider various factors under the applicable regulations. *See generally id.*

On September 22, 2008, Defendants filed a Motion seeking partial dismissal of Plaintiffs' Complaint. Dkt. No. 10. On November 18, 2008, Plaintiffs filed a Motion seeking summary judgment with respect to their second claim. Dkt. No. 18. In a Memorandum-Decision and Order dated September 29, 2009, the Court granted Defendants' Motion – dismissing Plaintiffs' claim under the Tenth Amendment, Plaintiffs' claims related to the IGRA, and all claims against the Attorney General of the United States – and denied Plaintiffs' Motion. Dkt. No. 38 ("2009 Memorandum-Decision and Order").

On November 15, 2011, the parties both moved for summary judgment on the remaining claims in Plaintiffs' Complaint. Dkt. Nos. 46; 47. A newly central issue raised in the case was whether OIN was eligible to have land taken into trust under the IRA in light of the Supreme Court's recent decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). In *Carcieri*, the Supreme Court determined that the word "now" in the definition of "Indian" in the IRA –

"all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" – meant the date of the IRA's enactment in 1934. *Carcieri*, 555 U.S. at 381. Thus, to be eligible to have land taken into trust under the IRA, a tribe must have been under federal jurisdiction in 1934. Since *Carcieri* had not been addressed in the ROD, the Court issued a Memorandum-Decision and Order dated September 24, 2012, denying all motions for summary judgment across the related cases, and remanding to DOI to establish a record and determine in the first instance whether OIN was under federal jurisdiction in 1934. Dkt. No. 56.

On February 19, 2014, after the parties had an opportunity to submit evidence for DOI to consider, DOI filed an Amendment to the ROD applying *Carcieri* to OIN, consistent with the Court's remand. Dkt. No. 61-1 ("Opinion"). The Opinion concluded that OIN "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 on June 18, 1936." *Id.* at 3. The Opinion determined that while the vote alone was sufficient, there were a number of other federal actions which, "either in themselves or taken together," establish that OIN was under federal jurisdiction in 1934. *Id.*

III. STANDARD OF REVIEW

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure instructs a court to grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant bears the burden of informing the court of the basis for the motion and of identifying those portions of the record that the movant claims will demonstrate the absence of a genuine issue of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). If the movant has shown that there is no genuine dispute as to any material fact, the burden shifts to the non-moving party to establish a genuine issue of fact by "citing to particular parts of materials in the record." FED. R. CIV. P. 56(c). This requires the non-moving party to do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

"The question whether an agency's decision is arbitrary and capricious . . . is a legal issue," and is thus, "amenable to summary disposition." *Noroozi v. Napolitano*, 905 F.Supp.2d 535, 541 (S.D.N.Y.2012) (quoting

Citizens Against Casino Gambling in Erie Cnty. v. Stevens, 945 F.Supp.2d 391, 399 (W.D.N.Y.2013)). "When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." *State of Conn. v. U.S. Dep't. of Commerce*, No. 04-cv-1271, 2007 WL 2349894, at *1 (D.Conn. Aug.15, 2007) (citing *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C.Cir.2001)); *see also James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C.Cir.1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.").

B. Administrative Procedure Act

Under the APA, a district court may set aside an agency's findings, conclusions of law, or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In reviewing agency action, [a] [c]ourt may not 'substitute its judgment for that of the agency.'" *Natural Res. Def. Council v. EPA*, 658 F.3d 200, 215 (2d Cir.2011) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). Rather, a reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416; *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d

377 (1989). Courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 664, 658 (2007) (internal quotations and citations omitted).

Nevertheless, a reviewing court's "inquiry must be searching and careful." *Natural Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 555 (2d Cir.2009) (internal quotation marks and citations omitted). An agency decision may be deemed arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, 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. *Motor Vehicle Mfrs. Ass'n of U.S., Ind. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Yale New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir.2006).

Further, courts "do not hear cases merely to rubber stamp agency actions. To play that role would be 'tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act.'" *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 755 (D.C.Cir.2000) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C.Cir.1995)); *see also Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir.2008) ("This is not to suggest that judicial review of agency action is merely perfunctory. To the contrary, within the prescribed narrow sphere, judicial inquiry must be

searching and careful.") (internal quotation marks and citations omitted). In order for an agency's decision to survive judicial review, the agency must have articulated "a rational connection between the facts found and the choice made." *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir.1996) (internal quotation marks omitted).

IV. DISCUSSION

Defendants move for summary judgment on the following claims remaining in Plaintiffs' Complaint: (1) OIN is not eligible to have lands taken into trust under the IRA because it was neither federally recognized nor under federal jurisdiction in 1934; (2) the IRA does not apply to the lands OIN has requested be taken into trust because those lands were never subject to allotment; and (3) DOI's determination was arbitrary, capricious, and an abuse of discretion because it failed to properly consider the requisite criteria. The parties have both moved for summary judgment on Plaintiffs' arbitrary and capricious claim. Dkt. Nos. 64-9 ("Plaintiffs Memorandum") at 3; 65-1 ("Defendants Memorandum") at 12. Defendants have also moved for summary judgment on Plaintiffs' *Carcieri* and allotment claims. Defs. Mem. at 11-12.

A. *Carcieri* Claim

Defendants argue that to the extent Plaintiffs make a claim premised on *Carcieri*, summary judgment is appropriate in light of the Opinion adopted by DOI. Defs. Mem. at 13. Defendants argue that DOI's

interpretation of "under federal jurisdiction" and "recognized" are entitled to *Chevron* deference. *Id.* Defendants further argue that DOI's determination that the Oneidas were under federal jurisdiction in 1934 is reasonable. *Id.* Plaintiffs have not briefed the *Carcieri* issue in either their Response to Defendants' Motion for summary judgment, nor in their own Motion for summary judgment. *See generally* Dkt. No. 67 ("Plaintiffs Response"); Pls. Mem. Plaintiffs state, however, that they have "preserved" the issue in the Complaint. Pls. Mem. at 2. As stated in the Complaint, the entirety of the claim is that "[u]pon information and belief, OIN was neither Federally recognized nor under Federal jurisdiction in 1934 at the time of the enactment of the IRA." Compl. ¶ 85.

An agency's decision is accorded a "presumption of regularity," *Overton Park*, 401 U.S. at 416, and the party challenging the decision has the burden of proof, *Coal. on W. Valley Nuclear Wastes v. Bodman*, 625 F.Supp.2d 109, 116 (W.D.N.Y.2007) (quoting *Cnty. of Seneca v. Cheney*, 12 F.3d 8, 12 (2d Cir.1994)). Defendants, on remand, determined that the Secretary was authorized to acquire land in trust for the OIN under the IRA because the Oneidas were under federal jurisdiction in 1934. *See* Op. This determination is presumed to be reasonable absent a showing by Plaintiffs to the contrary. Plaintiffs have not made any arguments as to why this determination was arbitrary, capricious, or otherwise not in accordance with law, aside from a bald assertion that the Oneidas were not under Federal jurisdiction in 1934. However, a party "must

present evidence that the agency did not consider a particular factor; [they] may not simply point to the end result and argue generally that it is incorrect." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir.2005). In the absence of any argument by Plaintiffs, the Court finds that Plaintiffs have failed to meet their burden of proof, and that to the extent they make a claim premised on *Carcieri*, summary judgment in favor of Defendants is therefore appropriate.

B. Allotment Claim

Defendants also move for summary judgment on Plaintiffs' claim that the IRA does not apply to the lands which are the subject of the trust application because those lands were never subject to allotment. Defs. Mem. at 23. This argument has already been rejected by the Court in a related case and is rejected here for the same reasons. *See City of Oneida v. Salazar*, No. 08-cv-0648, 2009 WL 3055274, at *5 (N.D.N.Y. Sept.21, 2009) (Kahn, J.). First, the IRA is explicit that its application is general. *See* 25 U.S.C. § 473. Second, the legislative history makes clear that the IRA was intended to apply to New York State. *See, e.g.*, 78 Cong. Rec. S11124, S11125. Accordingly, summary judgment is granted in favor of Defendants on Plaintiffs' claim that the IRA only applies to lands that were subject to allotment.

C. Arbitrary and Capricious Claim

Plaintiffs claim that DOI's determination was arbitrary and capricious because it failed to properly consider the requisite criteria under the applicable regulations. Compl. ¶¶ 101, 103, 107. Specifically, Plaintiffs claim that DOI has not: (1) considered the purposes for which the land will be used and have rewarded unlawful behavior; (2) taken account of the jurisdictional problems that acquiring the land will create; and (3) considered the impacts of the decision on small business.

1. On-Reservation and Off-Reservation Regulations

As a threshold issue, the parties dispute whether Defendants appropriately applied the on-reservation regulations. Pls. Mem. at 17-19; Dkt. No. 68 ("Defendants Response") at 20-21. Plaintiffs argue that Defendants were required to apply the off-reservation regulations, Pls. Mem. at 18-19, which require the Secretary to give "greater scrutiny to the tribe's justification of anticipated benefits," and "greater weight" to the jurisdictional concerns of local governments, 25 C.F.R. § 151.11(b).

An acquisition is considered "on-reservation," when "the tribe is recognized by the United States as having governmental jurisdiction" over the area of land acquired. 25 C.F.R. § 151.2(f). Plaintiffs argue that the Supreme Court's holding in *City of Sherrill*

that OIN "cannot unilaterally reassert sovereign control" over the lands in question means that OIN does not have governmental jurisdiction over those lands. Pls. Mem. at 18. The *City of Sherrill* Court, however, clearly distinguished between questions of right and questions of remedy; its holding was that equitable considerations bar OIN from reasserting sovereign control. *See City of Sherrill*, 544 U.S. at 213-14. The *City of Sherrill* Court reserved judgment on whether the Oneidas' reservation still exists, 544 U.S. at 215 n. 9, and as the Court has acknowledged, it remains the law in the Second Circuit that the OIN reservation has not been disestablished, *see Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 165 (2d Cir.2003); *see also* 2009 MDO at 11-12 ("[T]he Second Circuit's holding in *Oneida Indian Nation* that the OIN reservation has not been disestablished remains binding precedent on this Court."). Therefore, the United States does recognize OIN as having governmental jurisdiction over the land in question, and, accordingly, Defendants correctly applied the on-reservation regulations.

2. Purposes for which the Land will be Used

25 C.F.R. § 151.10(c) requires the Secretary to consider "[t]he purposes for which the land will be used" in making a fee-to-trust decision. Plaintiffs claim that Defendants' decision to acquire the land in trust "inappropriately rewards unlawful behavior" because OIN's operation of Turning Stone is illegal. Compl. ¶ 98. The

Court has already concluded that to the extent Plaintiffs make claims premised on the legality of gaming at Turning Stone, those claims are without merit and must be dismissed. *See* 2009 MDO. Thus, since Plaintiffs' claim that Defendants did not consider "the purposes for which the land will be used" is premised on the legality of Turning Stone, that claim is dismissed.

3. Jurisdictional Impacts of Acquiring the Land

25 C.F.R. § 151.10(f) requires the Secretary to consider the "[j]urisdictional problems and potential conflicts of land use which may arise" from a trust acquisition. Plaintiffs generally assert that Defendants' determination was arbitrary and capricious because the ROD inadequately considered the negative jurisdictional impacts of the acquisition and ignored alternatives that would have reduced jurisdictional conflicts. Pls. Mem. at 14.

Plaintiffs argue that the acquisition will cause lost tax revenue and complicate Plaintiffs' provision of services. *Id.* at 10-13. The lost tax revenue, Plaintiffs argue, will strain the ability of local governments to provide services, and will increase the burden on taxpaying landowners. *Id.* at 11. For example, the Vernon-Verona-Sherrill school district, which educates OIN and non-Indian children alike, will lose an important source of revenue. *Id.* Plaintiffs assert that the acquisition will complicate Plaintiffs' provision of services insofar as OIN refuses to participate in local planning

processes. *Id.* at 11-12. For example, in order to provide fire protection services at Turning Stone, the towns have incurred additional expenses through special training and increased insurance costs. *Id.* at 12. Similarly, the consumption of water at Turning Stone has exceeded permitted levels, which has created difficulties in distributing the cost of system upgrades. *Id.* at 1112. Finally, OIN has undertaken numerous projects without participating in the towns' planning, permitting, zoning processes, or complying with local environmental regulations. *Id.* at 13, 17.

Section 151.10(f) only requires the Secretary to consider potential jurisdictional and land use conflicts; it does not mandate an outcome minimizing jurisdictional problems. *South Dakota v. U.S. Dep't of Interior*, 401 F.Supp.2d 1000, 1009 (D.S.D.2005) (citing *South Dakota v. U.S. Dep't of Interior*, 314 F.Supp.2d 935, 945 (D.S.D.2004)). The Court finds that Defendants properly considered the jurisdictional concerns raised by Plaintiffs and rationally evaluated such concerns in light of the facts found.

Defendants thoroughly analyzed the impacts of removing the land from State and local tax rolls in the ROD and final EIS.[4] Plaintiffs do not point to specific flaws in Defendants' analysis, but simply refer to the revenue losses Plaintiffs argue they will suffer. Pls. Mem. at 10, 20. Plaintiffs' argument appears to be that Defendants have not properly weighed these losses.

[4] The Secretary is required to consider the impacts of removing land from local tax rolls under § 151.10(e), not § 151.10(f).

The Court finds that Defendants have reasonably considered the impacts of lost tax revenues on local government. Defendants' analysis estimated the tax revenues that would be lost by each affected jurisdiction under various scenarios, given uncertainty about the resolution of ongoing tax litigation. ROD at 45-46. Defendants concluded that, "based on taxes actually assessed and paid," the benefits of the acquisition to OIN outweighed the tax impacts on local governments. *Id.* at 50. Defendants' analysis further balanced lost tax revenue against the economic and tax benefits produced by OIN's business activities, and found that the net economic impact on almost every jurisdiction was positive, even assuming, *arguendo*, that OIN does not prevail in the ongoing tax litigation. *Id.* at 49-50. Considering the foregoing, Defendants ultimately concluded that the impact of removing the land from the tax rolls was not significant when balanced with the benefits to OIN. *Id.* at 50.

Defendants similarly addressed Plaintiffs' concerns about the disruptive effects of the trust decision on Plaintiffs' provision of water and fire-protection services and implementation of land use and zoning controls. Plaintiffs again do not point to specific flaws in Defendants' reasoning, but generally allege that Defendants inadequately weighed these concerns. *See* Pls. Mem. at 11-13. The Court finds that Defendants' discussion of these impacts and the conclusions Defendants reach are reasonable. In response to Plaintiffs' concern about the provision of services, the ROD notes that OIN has entered into agreements with local

governments to defray costs of municipal services. ROD at 57. Thus, OIN has provided funds to the Town of Verona Fire Department and participated in the creation of an emergency response plan in the event of a significant fire at Turning Stone. *Id.* at 58. Likewise, OIN has financed a multi-million dollar water and sewer line, which it conveyed to the Town of Verona, and offered to contribute $10 to $11 million for the development of a new water system in Oneida County. *Id.* Defendants concluded that these agreements demonstrated OIN's "willingness and ability to cooperate," *id.* at 57, and Plaintiffs have not presented any evidence that contradicts that conclusion.

Defendants also responded to Plaintiffs' contention that the trust acquisition would disrupt Plaintiffs' planning and zoning processes. Defendants found that although OIN has not submitted to local zoning processes, OIN has developed its lands in a manner that is generally consistent with local zoning regulations. ROD at 59. Defendants specifically found that OIN's land use in the Town of Vernon and the Town of Verona was generally consistent with those towns' zoning regulations. *See* Final EIS at 3-542 to 3-544, AR020837-39;[5] Final EIS 3-552 to 3-554, AR020847-49. "In the municipalities where the Nation owns property, approximately 90% of the land usage is agricultural, residential, or vacant." ROD at 59. The most significant non-conforming use is Turning Stone, which Defendants acknowledged, but emphasized was essential to

[5] The administrative record was filed with the Court on disks. Dkt. No. 43.

OIN's "self-sufficiency." *Id.* Defendants concluded that any effect on the ability of local governments to zone consistently would likely be minimal, "[i]n view of the Nation's past and current management and use of its lands." *Id.* at 21. Plaintiffs argue that Defendants' reliance on OIN's past management practices is a "non-sequitur," but do not elaborate on why it is unreasonable. Mot. at 15; Compl. ¶ 15. Defendants are not, as Plaintiffs suggest, required to speculate about future development that OIN might undertake. *See City of Lincoln City v. U.S. Dep't of Interior*, 229 F.Supp.2d 1109, 1123-24 (D.Or.2002) (denying claim that DOI should have considered possibility that tribe might "substitute some other use in the future").

Plaintiffs also claim that Defendants' conclusion that the trust acquisition will not have a "direct impact" on the natural environment is clearly erroneous because OIN has repeatedly undertaken projects without complying with local environmental regulations. Pls. Mem. at 17. However, the final EIS does not say that the acquisition will not cause environmental impacts, but rather that the change in jurisdiction will not in itself cause environmental impacts. Final EIS at 4-362, AR021349. Defendants acknowledge that the trust acquisition will have indirect environmental impacts insofar as OIN would no longer be subject to local and State regulations. *See* ROD at 29. The land, however, would still be subject to Federal law and OIN law. Final EIS at ES-45, AR020195. Defendants again considered OIN's past management of the lands, and finding no significant adverse environmental impacts,

concluded the environmental impacts would be insignificant. ROD at 29-30. Plaintiffs have not made any argument that would contradict that conclusion.

Finally, the Court rejects Plaintiffs' contention that Defendants' decision is arbitrary and capricious because the alternative selected will cause more jurisdictional conflicts than other alternatives considered. Pls. Mem. at 15. NEPA is "a procedural statute that mandates a process rather than a particular result." *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 118 (2d Cir.2013) (quoting *Stewart Park & Reserve Coal., Inc. v. Slater*, 352 F.3d 545, 557 (2d Cir.2003)). The ROD shows that Defendants adequately considered the various alternatives, and balanced the purpose and need for action with the interests of the State and local governments. Thus, Defendants selected one of the alternatives where jurisdictional impacts would be least conspicuous, because the majority of the properties "form highly contiguous and compact groupings." ROD at 21. Moreover, Defendants determined that those alternatives with fewer jurisdictional impacts would not have met the purpose of providing a land base for OIN. *See id.* at 21, 30. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping than the Proposed Action." *Id.* at 19.

In view of the discussion *supra*, the Court finds that Defendants reached a rational decision regarding Plaintiffs' jurisdictional concerns.

4. Economic Impacts of the Trust Acquisition

Plaintiffs claim that the trust acquisition will grant OIN an unfair advantage in allowing it to operate a business in direct competition with local small businesses, without being subject to State and local laws. Compl. ¶¶ 106-07. Plaintiffs fail to state a legally cognizable claim because they are essentially objecting to the fee-to-trust mechanism that Congress established in the IRA to promote tribal self-governance, and not to Defendants' decision in the ROD. Furthermore, Plaintiffs ignore Defendants' discussion of this concern, which notes that "[p]lacement of the lands into trust would not prevent the State from enforcing lawfully applicable sales and excise taxes if in the future it determines to do so." *See* ROD at 24-25. Thus, to the extent that tribal businesses do enjoy a competitive advantage, it is for the State to decide whether to apply sales and excise taxes to tribal businesses.

5. Summary

Plaintiffs have failed to meet their burden under the APA. The Record demonstrates that Defendants reached a reasonable decision that took account of the applicable regulatory factors. Moreover, Defendants considered and responded to the objections raised by

Plaintiffs. Accordingly, the Court finds Defendants' decision to acquire the land in trust was not arbitrary and capricious, and that summary judgment is warranted in favor of Defendants on Plaintiffs' arbitrary and capricious claims.

D. State and Counties Settlement

Plaintiffs argue that the settlement between the State and Oneida and Madison counties on the one hand, and OIN on the other, represents a changed circumstance that the Court should take into account. Pls. Mem. at 22-24; Pls. Resp. The settlement agreement was approved by the Court in *New York v. Salazar*, No. 08-cv-644, 2014 WL 841764 (N.D.N.Y. Mar.4 2014) (Kahn, J.). Plaintiffs have challenged the settlement in New York Supreme Court, Albany County, and now have appealed to the Appellate Division, Third Department. Dkt. Nos. 73-3; 73-4. Plaintiffs specifically argue that the Court should defer ruling on the present summary judgment motions pending resolution of that litigation. Pls. Mem. at 22-24. Plaintiffs further argue that the settlement reveals OIN's intention to submit a new fee-to-trust application, which Defendants must consider in approving OIN's current fee-to-trust application. Pls. Resp.

With respect to Plaintiffs' first argument, the Court finds no reason to defer ruling on the present summary judgment motions on account of challenges to a settlement agreement in a separate proceeding.

Plaintiffs do not draw any connection between the settlement agreement and this proceeding.

The Court also rejects Plaintiffs' argument that Defendants must assess the settlement agreement in approving OIN's fee-to-trust application. Under the APA, judicial review is generally subject to the "record rule"; "a court reviewing an agency decision is confined to the administrative record complied by that agency when it made the decision." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir.1997) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)). The settlement agreement is not part of the administrative record – because it was entered five years after the ROD was issued – and therefore will not be considered by the Court.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Plaintiffs' Motion (Dkt. No. 64) for summary judgment is **DENIED**; and it is further

ORDERED, that Defendants' Motion (Dkt. No. 65) for summary judgment on all remaining claims is **GRANTED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

APPENDIX C

2009 WL 3165556

United States District Court,
N.D. New York.

TOWN OF VERONA; Town of Vernon;
Abraham Acee; and Arthur Strife, Plaintiffs,
v.
Kenneth SALAZAR, in his Official Capacity
as United States Secretary of the Interior;
United States Department of the Interior; and
Mark Filip, in his Official Capacity as Attorney
General of the United States, Defendants.

No. 6:08-CV-647 (LEK/GJD).
|
Sept. 29, 2009.

Attorneys and Law Firms

Cornelius D. Murray, Jane Bello Burke, O'Connell, Aronowitz Law Firm, Albany, NY, for Plaintiffs.

Steven Miskinis, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM-DECISION AND ORDER

LAWRENCE E. KAHN, District Judge.

Plaintiffs filed this action on June 19, 2008, challenging a May 20, 2008 Record of Decision ("ROD") in which the United States Department of the Interior ("DOI") decided to accept over 13,000 acres of land in

central New York into trust for the benefit of the Oneida Indian Nation of New York ("OIN"). *See* Compl. (Dkt. No. 1). Presently before the Court is Defendants' Motion seeking partial dismissal of Plaintiffs' Complaint. Motion to dismiss (Dkt. No. 10). Also before the Court is Plaintiffs' Motion seeking summary judgment on their second claim. Motion for Sum. Judg. (Dkt. No. 18). For the reasons that follow, Defendants' Motion is granted and Plaintiffs' Motion is denied.

I. BACKGROUND[1]

On April 4, 2005, the OIN submitted a fee-to-trust request to the DOI's Bureau of Indian Affairs ("BIA") requesting that the Secretary of the Interior (the "Secretary") take approximately 17,370 acres into trust on behalf of the OIN. ROD at 2, 6 (Dkt. No. 1, Ex. A); *see* Compl. ¶¶ 38-39. The request included land located in

[1] The above-captioned case is one of several filed in this Court by different plaintiffs raising challenges to various aspects of the DOI's May 20, 2008 Record of Decision. *See* 5:08-CV-633; 5:08-CV-648; 5:08-CV-649; 6:08-CV-644; 6:08-CV-660. These cases represent only the latest chapter in a long saga of litigation involving the OIN's land claims in New York. For a more detailed historical background of the OIN and this litigation, see, for example, the Supreme Court's opinion in *City of Sherill, New York v. Oneida Indian Nation of New York* ("*Sherill*"), 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005); the Second Circuit's opinion in *Oneida Indian Nation of New York v. City of Sherill, New York* ("*Oneida Indian Nation*"), 337 F.3d 139 (2d Cir.2003) (reversed by the Supreme Court in *Sherill*); or this Court's opinions in *Oneida Indian Nation of New York v. New York*, 500 F.Supp.2d 128 (N.D.N.Y.2007) and *Oneida Indian Nation of New York v. New York*, 194 F.Supp.2d 104 (N.D.N.Y.2002).

the Towns of Verona and Vernon, New York. Compl. ¶ 1. Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the DOI issued a draft Environmental Impact Statement ("EIS") regarding the proposed fee-to-trust request on November 24, 2006. ROD at 2, 6; Compl. ¶ 44. Public comments were solicited until February 22, 2007, and public hearings were held on December 14, 2006 and February 6, 2007. ROD at 2, 6; Compl. ¶ 45. The DOI issued its final EIS on February 22, 2008. ROD at 2, 7; Compl. ¶ 45. On May 20, 2008, "based on the Department's review of the Draft EIS, the Final EIS, comments received from the public, Federal agencies, State agencies, local governmental entities, and potentially affected Indian tribes, and the applicable statutory and regulatory criteria for acquiring title to lands in trust status[,]" the DOI issued its Determination to acquire approximately 13,003.89 acres in trust for the OIN. ROD at 2.

In their Complaint, Plaintiffs challenge the DOI's May 20, 2008 ROD, alleging violations of, *inter alia*, the Tenth Amendment; the land into trust provision of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 ("Section 465"); and the Indian Gaming Regulatory Act ("IGRA"). *See generally* Compl. Plaintiffs invoke federal jurisdiction pursuant to, *inter alia*, the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. *Id.* ¶ 11. Plaintiffs seek a declaratory judgment that the Defendants' actions were illegal, null and void, and a permanent injunction prohibiting implementation of the May 20, 2008 ROD. *See id.*

On September 22, 2008, Defendants filed the pending Motion of partial dismissal. Dkt. No. 10. On November 18, 2008, Plaintiffs filed the pending Motion seeking summary judgment with respect to their Second Claim. Dkt. No. 18.

II. DEFENDANTS' MOTION TO DISMISS

A. Standard of Review

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When considering a motion to dismiss pursuant to Rule 12(b)(6), a district court must accept the allegations made by the non-moving party as true and "draw all inferences in the light most favorable" to the non-moving party. *In re NYSE Specialists Securities Litigation*, 503 F.3d 89, 95 (2d Cir.2007). "The movant's burden is very substantial, as '[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'" *Log On America, Inc. v. Promethean Asset Mgmt. L.L.C.*, 223 F.Supp.2d 435, 441 (S.D.N.Y.2001) (quoting *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir.1995) (internal quotation and citations omitted)).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), "[a] case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000) (citing FED. R. CIV. P. 12(b)(1)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova*, 201 F.3d at 113 (citing *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir.1996)). In reviewing a motion to dismiss for lack of subject matter jurisdiction, a court "'must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor.'" *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir.2008) (quoting *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir.2001)). A defendant's challenge to a plaintiff's constitutional standing to sue is properly brought under Rule 12(b)(1). *See Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 89 n. 6 (2d Cir.2006) ("Although we have noted that standing challenges have sometimes been brought under Rule 12(b)(6), as well as Rule 12(b)(1) . . . the proper procedural route is a motion under Rule 12(b)(1).") (internal citations omitted).

B. Tenth Amendment

In their First Claim, Plaintiffs allege that Section 465,[2] as applied, violates the Tenth Amendment. *See*

[2] Section 465 provides, in relevant part, that:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment,

Compl. ¶¶ 62-71. Plaintiffs contend that "[p]rinciples of state sovereignty, implicit throughout the Constitution and explicit in the Tenth Amendment," prohibit the federal government from "commandeer[ing] thousands of acres of settled land from the jurisdiction of the State without its consent for the purpose of creating a sovereign Indian enclave." Pls.' Mem. in Opp'n at 14 (Dkt. No. 17). Defendants contend that Plaintiffs lack standing to raise a Tenth Amendment claim, and that Plaintiffs' Tenth Amendment claim fails to state a claim upon which relief can be granted. *See* Motion to dismiss.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by

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> gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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.

the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (citations omitted).

Plaintiffs' Tenth Amendment claim must be dismissed, as Section 465 represents a valid exercise of congressional authority pursuant to the Indian Commerce Clause.[3] Pursuant to the Indian Commerce Clause, Congress has the power "[t]o regulate commerce . . . with the Indian tribes[.]" U.S. CONST. art. I, § 8, cl. 3. As the Supreme Court has repeatedly noted, Congress possesses plenary authority to legislate in matters involving Indian affairs. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (describing Congress' powers to legislate in respect to Indian matters as "plenary and exclusive"); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998)

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[3] Plaintiffs' Tenth Amendment claim has been addressed only sparingly by other courts. In *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir.2007) (en banc) (reversed on other grounds), the State of Rhode Island and associated plaintiffs challenged the DOI's decision to accept a 31-acre parcel of land into trust for an Indian Tribe. The plaintiffs brought numerous statutory and constitutional claims, including a Tenth Amendment challenge. The First Circuit affirmed the District Court's grant of summary judgment for the DOI on all claims. As to the Tenth Amendment claim, the First Circuit held that "[b]ecause Congress has plenary authority to regulate Indian affairs, section 465 of the IRA does not offend the Tenth Amendment." 497 F.3d at 40 (citation omitted). The plaintiffs petitioned for certiori on various grounds, but not on the Tenth Amendment claim. In *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), the Supreme Court reversed the First Circuit on statutory grounds.

("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]") (citing *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985).

Given the Supreme Court's broad interpretation of the Indian Commerce Clause, the Secretary's determination to take land into trust for the OIN pursuant to Section 465 must be read as a valid exercise of the power delegated to Congress by the Constitution. As the Secretary's authority to take land into trust for Indians springs from powers delegated to Congress in Article I, Section 465, as applied herein, does not implicate the Tenth Amendment. *See New York*, 505 U.S. at 156.

Plaintiffs also cite to the Enclave Clause in support of their Tenth Amendment claim. *See* Pls.' Mem. in Opp'n at 14. The Enclave Clause provides that Congress has the power "to exercise exclusive Legislation in all Cases . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts . . . and other needful Buildings[.]" U.S. CONST. art. I, § 8, cl. 17. However,

the Enclave Clause is not implicated by the DOI's accepting land into trust pursuant to Section 465. Accepting land into trust does not amount to exclusive federal jurisdiction over the subject land, as would be required for the Enclave Clause to apply. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.").

Plaintiffs also argue that "New York, as one of the original 13 colonies, stands in a somewhat different position from most other States with respect to this issue of state sovereignty." Pls.' Mem. in Opp'n at 15. However, this argument is without merit, as pursuant to the "'equal footing doctrine,' all States are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States." *Minnesota v. Mille Lacs Bank of Chippewa Indians*, 526 U.S. 172, 203, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (citing *Coyle v. Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911)). The authorities cited by Plaintiffs do not support the proposition that the ROD-because it concerns land in one of the original thirteen colonies-runs counter to the Tenth Amendment.

Accordingly, Plaintiffs' Tenth Amendment claim is dismissed.[4]

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[4] As the Court is granting Defendants' Motion to dismiss Plaintiff's Tenth Amendment claim pursuant to Rule 12(b)(6), the

C. Indian Gaming Regulatory Act and the Legality of Gaming at Turning Stone Casino

In their Third Claim, Plaintiffs allege that the Defendants' decision to take the subject land into trust for the OIN was arbitrary, capricious and an abuse of discretion because, *inter alia*, the operation of the Turning Stone Casino,[5] a Class III gaming[6] facility, is illegal, and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719 (Section 2719) prohibits gambling on land acquired in trust after IGRA's enactment, and the OIN does not qualify for any of the exceptions to Section 2719. Compl. ¶¶ 96-109. Plaintiffs contend that they "neither assert a claim for relief under IGRA nor request an order terminating the illegal gambling operation there." Pls.' Mem. in Opp'n at 17. Instead, Plaintiffs contend that the alleged illegality of gambling at Turning Stone is an element of Plaintiffs' APA claim seeking an order nullifying the Secretary's decision to take 13,000 acres into trust for the OIN. *Id.*

Defendants argue that Plaintiffs lack standing to challenge the legality of gaming at Turning Stone. *See*

Court need not address Defendants' argument that Plaintiffs lack standing to pursue this claim.

[5] It is undisputed that the ROD includes the land where the Turning Stone Casino is located and that the Turning Stone Casino is located in Verona, New York. Compl. ¶ 13.

[6] Class III gaming is defined in IGRA as "all forms of gaming that are not class I gaming or class II gaming[,]" 25 U.S.C. § 2703(8), and "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

Motion to dismiss. Defendants also argue that because the Turning Stone Casino is situated within the boundaries of the OIN reservation, the Secretary need not comply with 25 U.S.C. § 2719(b)(1)(A) before taking the subject land into trust. *See id.*

The Court concludes as a matter of law that to the extent Plaintiffs invoke IGRA or otherwise challenge the legality of gaming at Turning Stone Casino, Plaintiff's claims are without merit and must be dismissed. IGRA establishes the requirements for lawful Class III gaming on Indian lands:

> 1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> (A) authorized by an ordinance or resolution that –
>
> (I) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b) of this section, and
>
> (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d). IGRA defines "Indian lands" as including, *inter alia*, "all lands within the limits of any Indian reservation[.]" 25 U.S.C. § 2703(4)(A).

Plaintiffs contend that the OIN is illegally operating a Class III gaming facility at Turning Stone Casino because the OIN lacks jurisdiction over the land where the casino is located, and there is no valid Tribal-State compact. *See* 25 U.S.C. § 2710(d). However, in the ROD, the DOI discussed the issue of the legality of gaming at the Turning Stone Casino:

> The State of New York and others questioned whether further State approval of Class III gaming at the Turning Stone Resort & Casino is necessary before the Department may issue this ROD. Since 1993, the Nation has been lawfully conducting Class III gaming at Turning Stone under IGRA. The casino is situated within the Oneida reservation on Indian lands as required by IGRA. *See* 25 U.S.C. § 2703(4). The casino has been operating pursuant to a gaming compact between the State and the Nation that was approved by the Department in 1993 and that remains in effect. *See* BIA, *Notice of Approved Nation-State Compact*, 58 Fed.Reg. 33160 (June 15, 1993). Under the terms of the compact, the Nation exercises "full jurisdiction over and . . . responsibility for Nation Class III gaming operations" at Turning Stone. *Nation-State Compact Between the Oneida Indian Nation of New York and the State of New York* § 3 (1993); *see also id.* §§ 5 (law enforcement powers), 12 (protection of health and safety). Thus,

> no further approvals by the State or the Department are required. . . .

ROD at 8-9. Plaintiffs have failed to show how the alleged illegality of gaming at the Turning Stone Casino pursuant to IGRA would impair the DOI's statutory authority to take land into trust for the OIN pursuant to Section 465 of the IRA. Moreover, the National Indian Gaming Commission, and not the DOI, is the federal agency tasked with ensuring compliance with IGRA. *See* 25 U.S.C. §§ 2705, 2713.

Plaintiffs have also failed to show that the ROD failed to comply with Section 2719 of IGRA. Section 2719 provides, in relevant part, that:

> (a) Prohibition on lands acquired in trust by Secretary
>
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless –
>
> > (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
>
> * * *
>
> (b) Exceptions
>
> (1) Subsection (a) of this section will not apply when –

> (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
>
> * * *
>
> (c) Authority of Secretary not affected
>
> Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

25 U.S.C. § 2719.

Because the Turning Stone Casino is within the boundaries of the OIN reservation, the procedures required by 25 U.S.C. § 2719(b)(1)(A) do not apply. In *Oneida Indian Nation*, in a series of consolidated cases, the OIN brought suit against the City of Sherrill and Madison County, New York, alleging that properties once part of the OIN's ancestral land that OIN members had reacquired on the open market were within the OIN reservation and therefore not subject to taxation. The Second Circuit held, *inter alia*, that the OIN reservation, as recognized by the 1794 Treaty of Canandaigua, has never been disestablished, and that therefore the lands were not subject to taxation. 337

F.3d at 160-65, 167; *see id.* at 165 ("Construing the Buffalo Creek Treaty liberally and resolving, as we must, all ambiguities in the Oneidas' favor, we conclude that neither its text nor the circumstances surrounding its passage and implementation establish a clear congressional purpose to disestablish or diminish the OIN reservation.").

In *Sherrill*, the Supreme Court reversed and remanded, holding that "'standards of federal Indian Law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." 544 U.S. at 214. The Supreme Court noted how the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks." *Sherrill*, 544 U.S. at 216-17. However, the Supreme Court noted that it "need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneida's reservation, as Sherrill argues." 544 U.S. at 216 n. 9.

Plaintiffs argue that sovereignty is a distinguishing characteristic of an Indian reservation, and that accordingly the OIN reservation must be considered disestablished because the Supreme Court's decision in *Sherrill* confirmed that the OIN cannot exercise sovereignty over lands reacquired in fee after over a century of non-tribal ownership. However, the Second Circuit's holding in *Oneida Indian Nation* that the OIN reservation has not been disestablished remains

binding precedent on this Court. In *Oneida Indian Nation of New York v. Madison County*, 401 F.Supp.2d 219 (N.D.N.Y.2005) (Hurd, J.), Madison County unsuccessfully argued that relying upon the Second Circuit's holding that the Oneida reservation was not disestablished is contrary to the Supreme Court's decision in *Sherrill*. Judge Hurd concluded that, because the Supreme Court "explicitly declined to decide whether the Second Circuit erred in determining that the reservation was disestablished . . . the Second Circuit holding that the reservation was not disestablished remains undisturbed." *Oneida*, 401 F.Supp.2d at 231.

This Court agrees that the Second Circuit's holding remains good law. In *Sherrill*, the Supreme Court not only expressly declined to address the Second Circuit's determination that the OIN reservation had not been disestablished, but also noted that "'only Congress can divest a reservation of its land and diminish its boundaries.'" 544 U.S. at 216 n. 9 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984) (other citations omitted)); *see Solem*, 465 U.S. at 470 ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Congress has not divested the OIN of its reservation. Therefore, the Turning Stone Casino is "located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a). Accordingly, the provisions of 25 U.S.C. § 2719(b)(1)(A) do not apply,

and Defendants' Motion to dismiss this claim is granted.

D. Attorney General as Defendant

Plaintiffs have named the Attorney General of the United States as a Defendant in this action. *See generally* Compl. Defendants move to dismiss the Attorney General from the case, asserting that no claim has been raised against him and that Plaintiffs have shown no waiver of sovereign immunity that permits a suit against him. *See* Motion to dismiss.

The Court agrees with Defendants that the Attorney General must be dismissed as a party to these proceedings. The Complaint lists the Attorney General as the official who is responsible for "defending the constitutionality of all statutes enacted by Congress that are challenged in actions such as this[,]" Compl. ¶ 10, but includes no direct allegations regarding the Attorney General's conduct. While Plaintiffs cite to 28 U.S.C. § 2403 in support of their inclusion of the Attorney General as a Defendant, that statutory provision does not provide a basis for the Attorney General to be a proper party to this litigation. The provision provides, in relevant part, that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is *not* a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify

> such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(a) (emphasis added). The provision is inapplicable here as a federal agency and federal officers are already parties to this action. In any event, the provision would not mandate that the Attorney General be named as a party, but only that the court notify the Attorney General of the action, and permit, but not require, the United States to intervene. *See id.*

As Plaintiffs have not otherwise demonstrated how the Attorney General was sufficiently involved in the challenged action, i.e. a determination by the DOI, to make the Attorney General a proper party to this action, he is dismissed as a Defendant.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see Beard v. Banks*, 548 U.S. 521, 529, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d

265 (1986)). A court must " 'resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.' " *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir.2001) (quoting *Cifra v. General Electric Co.*, 252 F.3d 205, 216 (2d Cir.2001)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

If the moving party meets its initial burden of demonstrating that no genuine issue of material fact exists for trial, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citations omitted). The nonmovant "must come forth with evidence sufficient to allow a reasonable jury to find in her favor." *Brown*, 257 F.3d at 251 (citation omitted). The nonmoving party "may not rely merely on allegations or denials in its own pleadings;" bald assertions or conjecture unsupported by evidence are insufficient to overcome a motion for summary judgment. FED. R. CIV. P. 56(e)(2); *see also Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991); *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir.1990).

B. Discussion

Plaintiffs move for summary judgment on their Second Claim on the grounds that there is no statutory authority for the Secretary to take land into trust for the OIN. *See generally* Mem. in Supp. (Dkt. No. 18, Attach.1); Reply (Dkt. No. 34). Specifically, Plaintiffs contend that:

> the Indian Reorganization Act ("IRA"), and, in particular 25 U.S.C. § 465, which the Defendant U.S. Secretary of the Interior has invoked as the sole authority for taking land into trust on behalf of the of the Oneida Indian Nation ("Oneidas"), does not apply to the Oneidas because the IRA, by its very terms, applies only to tribes which affirmatively chose via a tribal election to be subject to its terms. The Oneidas, by Defendants' own admission, specifically elected not to be covered by the IRA. While the Defendants have indicated that the Indian Land Consolidation Act of 1983 ("ILCA") nevertheless extended the reach of the IRA to tribes regardless of any such election, Defendants overlook the limited application to the ILCA. That law applies only to tribes for which the United States Holds land in trust, 25 U.S.C. § 2201(1),[7] and the Oneidas are not such a tribe.

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[7] Under Section 2201(1), "Indian tribe" or "tribe" means "any Indian tribe, band, group, pueblo, or community for which, or for members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1).

Mem. in Supp. at 4 (internal citations omitted). Defendants dispute Plaintiffs' reading of 25 U.S.C. § 2201(1) ("Section 2201(1)") and contend that land can, in fact, be accepted into trust for the OIN pursuant to Section 465. *See generally* Defs.' Opp'n to Mot. for Sum. Judg. (Dkt. No. 27). For the following reasons, this Court finds that there are extant issues of fact which preclude the granting of summary judgment on this ground.

i. Voting to Opt-Out of the IRA

Plaintiffs contend that the United States lacks the authority to take land into trust for the OIN pursuant to Section 465 of the IRA because the OIN voted to reject the IRA. Mem. in Supp. at 1. Plaintiffs rely on section 18 of the IRA, enacted as part of the original IRA in 1934 and codified at 25 U.S.C. § 478 ("Section 478"). *Id.* It provides:

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

25 U.S.C. § 478.

In 1935, Congress extended the voting deadline and changed the majority vote requirement from a majority of eligible adults to a majority of those voting, assuming at least thirty percent (30%) of eligible adults voted. *See* 25 U.S.C. § 478a. A tribe that did not vote, or that did not meet the statutory requirements, did not, under Section 478, reject the IRA. *Id.* Defendants concede that the OIN opted out of the IRA by tribal vote. *See* Defs.' Opp'n to Mot. for Sum. Judg. at 2-4. It is, however, irrelevant whether the OIN rejected the IRA,[8] as Congress enacted the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202 ("Section 2202"),[9] to amend or repeal any possible Section 478 trust land disability. *See* 25 U.S.C. § 2202.

ii. Defining "Tribe" Under 25 U.S.C. § 2201(1)

In the ROD, the DOI invoked Section 2202 as authority for accepting land into trust for the OIN pursuant to Section 465. *See* ROD at 33-34 ("In the 1983 Indian Land Consolidation Act, 25 U.S.C. § 2202, Congress extended the provisions of Section 5 to all tribes

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[8] "The Federal Defendants are aware that the Nation believes that the vote to opt out of the IRA may not have been valid, but for purposes of this motion it is assumed that the ROD is correct on this point. Of course if the Nation is correct, resort to ILCA is not necessary in order to accept land into trust on behalf of the Nation pursuant to the IRA so, as a factual matter, it is immaterial to the ROD." *Id.* at 2, n. 3.

[9] Section 2202 states that "the provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title . . . " *Id.*

except as otherwise provided under Federal law. Therefore, no statutory limitation on acquiring land in trust is applicable to the Nation's request."); Defs.' Statement of Facts ¶¶ 13-14 (Dkt. No. 27, Attach.2). Plaintiffs, however, argue that pursuant to the definition section of ILCA, Section 2201, the OIN are not considered a "tribe." Mem. in Supp. at 5-8.

Under Section 2201(1), "Indian tribe" or "tribe" is defined as "any Indian tribe, band, group, pueblo, or community for which, or for members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). Plaintiffs contend that under Section 2201(1), the meaning of "tribe" is restricted to those tribes for which the United States holds land in trust and urge this Court to adopt this reading. Mem. in Supp. at 7. According to Plaintiffs' reasoning, the "all tribes" provision in Section 2202 would then be restricted to only those entities that already have trust land. *See id.* The Defendants contest Plaintiffs' reading of the statute. *See* Defs.' Opp'n to Mot. for Sum. Judg. at 4-19. Defendants argue that the statutory purpose, legislative history, and canons of construction refute Plaintiffs' interpretation. *See id.* This is an issue of first impression.

A principle purpose of both the IRA and ILCA was to restore Indian economic life through expanding tribal land bases. The IRA was promulgated in 1934 as "[a]n Act to conserve and develop Indian lands and resources." 48 Stat. 984 (1934). "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and give him a chance to develop the initiative

destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-54, 93 S.Ct. 1267, 36 L.Ed.2d 114 (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)); *see also Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) ("The overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically"). ILCA was subsequently enacted in 1983 to further effectuate this purpose by, *inter alia*, removing the Section 478 disability and expanding the reach of the IRA and Section 465, specifically. *See* H.R.Rep. No. 97-908, 7 (1982) ("Section 203 [25 U.S.C. § 2202] extends the provisions of section 5 of the Act of June 18, 1834 [i.e., the IRA] to all tribes."). Restricting the definition of "tribe" under Section 2201(1) to only include tribes for which the United States already holds land in trust would vitiate the very purpose and intent of ILCA.[10]

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[10] Even assuming *arguendo* that this Court was incorrect about Congress' intent and purpose of the IRA and ILCA, which it is not, the DOI's interpretation, which is consonant with that of the Defendants, would be entitled to deference. In determining whether to accept an administrative agency's interpretation of a statute that it is tasked with administering, the Court should first inquire whether:

> Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the Court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the

Further, the canons of statutory construction support giving the word "tribe" a less restricted meaning.

The Supreme Court has stated that according to the rule of the last antecedent, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows. . . ." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003). In *Barnhart*, the Court construed a statute providing disability benefits to a claimant if "he is not only unable to do his previous work but cannot . . . engage in another kind of substantial gainful work which exists in the national economy." *Id.* at 21-22. The question was whether "which exists in the national economy" modifies only the phrase it followed, "another kind of substantial gainful work," or whether it modifies all previous phrases, specifically "his previous work." *Id.* The Court of Appeals had read the limiting language to modify all prior phrases. The Supreme Court said that this was in "disregard[]" of the rule of the last antecedent, under which the limitation

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agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As evidenced by the ROD, the DOI's interpretation of Section 2201(1) is consistent with Defendants. *See* ROD at 33-34. In order to uphold the DOI's interpretation, the court need only find that the DOI's interpretation "is a sufficiently rational one." *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985). Here, Plaintiffs fail to proffer any argument that pushes the DOI's interpretation "over the edge of reasonable interpretation." *Whitman*, 531 U.S. at 485.

at the end of the statute applied only to the last antecedent, not to an earlier phrase in the statute. Justice Scalia, writing for a unanimous Court, explained "the error of the Third Circuit's perception" that the limitation at the end of the statute applied to more than the last antecedent:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home – alone party may have had nothing to do with damage to the house – for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both.

Id. at 27-28.

In *Barnhart*, the Court relied on *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959), which construed a statute defining "invoice" as "a written account, memorandum, list, or catalog . . .

transported or delivered to a purchaser, consignee, factor, bailee, correspondence, or agent, or any other person who is engaged in dealing commercially in fur products or furs." The Court of Appeals had interpreted "who is engaged in dealing commercially in fur products or furs" as applying to all prior phrases, such as "purchaser" and "consignee." The Supreme Court reversed, holding that the limitation applied only to the last antecedent, "any other person." The "limiting clause is to be applied only to the last antecedent." 359 U.S. at 389 & n. 4; *see also United States v. Kerley*, 416 F.3d 176, 180 & n. 2 (2d Cir.2005) (in statute defining "support obligation" as "any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe," qualifying phrase "pursuant to, etc." applies to last antecedent, "order of an administrative process," and not to earlier antecedent, "court order"). The Court rejects Plaintiffs' position that the last antecedent rule is "ridiculous as applied. . . . [and] totally unavailing."[11] Reply at 3.

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[11] Further, a feature of, or corollary, to the rule of the last antecedent is the rule of punctuation. It confirms the proper reading of the trust land qualification at the end of Section 2201(1) as applying only to the word "community." "When a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents." *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir.1999) (abrogated on other grounds) (for term defined as "clause in a contract or an arbitration agreement, signed by the parties," modifier applied to all antecedents because it was set off by a comma). Where the comma is not used to set off the modifier, then there is confirmation that the modifier applies only to the last antecedent. *See id.* at 216 n. 1.

Finally, the Supreme Court has also said that "[w]hen we are faced with . . . two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in th[e] Court's Indian jurisprudence: '[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)); *accord County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). Based on the foregoing discussion, this Court finds that "for which, or for members of which, the United States holds lands in trust" only applies to the last antecedent, "community," and not to the entirety of Section 2201(1).[12] Accordingly, this Court finds for

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Under this rule of punctuation, it would be necessary to insert a comma, as shown below, to read the trust land qualification at the definition's end as applying to "tribe" and the entire series that comes before, rather than as just applying to the last antecedent, "community," i.e., "Indian tribe" or "tribe" means "any Indian tribe, band, group, pueblo, or community***[,]*** for which, or for the members of which, the United States holds land in trust." Obviously, however, there is no such comma in Section 2201(1). The absence confirms that the trust land qualification modifies only the antecedent to which it is connected, "community."

[12] Plaintiffs also argue that Congress "clearly intended that a tribe is one for which the United States holds land in 'trust,' not one with 'trust or restricted fee' land." Reply at 13. The land in question is land that was accepted into trust by the United States on behalf of the OIN. *See generally* ROD. Therefore it is irrelevant to the issue at bar whether there is any "basis to read [Section

Defendants and denies Plaintiffs' Motion for summary judgment.

IV. CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED, that Defendants' Motions seeking partial dismissal (Dkt. No. 10) is **GRANTED**; and it is further

ORDERED, that the Attorney General is **DISMISSED** as a defendant in the above-captioned action; and it is further

ORDERED, that Plaintiffs' Motion for summary judgment on their Second Claim (Dkt. No. 18) is **DENIED**; and it is further

ORDERED, that the Clerk serve a copy of this Memorandum-Decision and Order on the parties.

IT IS SO ORDERED.

* * *

2201(1)] to include lands that tribe own [sic] subject to a restriction on alienation by operation of law" and the Court will, therefore, reserve judgment. Reply at 14.

APPENDIX D

2015 WL 1399366
United States District Court,
N.D. New York.

UPSTATE CITIZENS FOR EQUALITY, INC.; David Vickers; Richard Tallcot; Scott Peterman; and Daniel T. Warren, Plaintiffs,

v.

Sally M.R. JEWELL, in her official capacity as Secretary of the U .S. Department of the Interior; Michael L. Connor, in his official capacity as Deputy Secretary of the Interior; Elizabeth J. Klein, in her official capacity as Associate Deputy Secretary of the Department rtment of the Interior;[1] the United States of America; and the United States Department of the Interior, Defendants.

No. 5:08-cv-0633 (LEK/DEP).
|
Signed March 26, 2015.

Attorneys and Law Firms

David B. Vickers, Office of David B. Vickers, Fayetteville, NY, for Plaintiffs.

Steven Miskinis, U.S. Department of Justice, Washington, DC, for Defendants.

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

MEMORANDUM-DECISION and ORDER

LAWRENCE E. KAHN, District Judge.

I. INTRODUCTION

Plaintiffs Upstate Citizens for Equality, Inc. ("UCE"), a non-profit corporation; and a number of UCE's officers, Richard Tallcot, Daniel T. Warren, Scott Peterman, and David Vickers (collectively, "Plaintiffs"), commenced this action to challenge a May 20, 2008, Record of Decision issued by Department of the Interior ("DOI") taking over 13,000 acres of land in Central New York into trust for the benefit of the Oneida Indian Nation of New York ("OIN" or the "Nation"). Dkt. Nos. 1; 35 ("Complaint"). Presently before the Court is Defendants' Motion for summary judgment. Dkt. Nos. 79 ("Motion"); 79-1 ("Memorandum"). Plaintiffs have filed a Response and Defendants, in turn, have filed a Reply. Dkt. Nos. 80 ("Response"); 81 ("Reply"). For the following reasons, Defendants' Motion is granted.

II. BACKGROUND

A. Legal Framework

The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 *et seq.*, was the centerpiece of New Deal Indian policy, which sought to enable tribes "to interact with and adapt to modern society as a governmental unit," and repudiated an era in which federal Indian policy had encouraged cultural assimilation. F. Cohen, *Handbook of Indian Law* § 1.05, at 81 (Newton

ed.2012). The IRA ended allotment, *see* General Allotment Act of 1887, 24 Stat. 388, where tribal lands had been broken up and distributed to individual Indians, and instead "facilitat[ed] tribes' acquisition of additional acreage and repurchase of former tribal domains," *Handbook of Indian Law* § 1.05, at 81.

To that end, § 5 of the IRA empowers the Secretary of the DOI (the "Secretary") to acquire land in trust for Indian tribes, such that the land is exempt from state and local taxation. 25 U.S.C. § 465. A tribe is qualified to have land taken into trust under § 5 if they meet the IRA's definition of "Indian," which includes, *inter alia*, "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction." 25 U.S.C. § 479. DOI has promulgated regulations at 25 C.F.R. Part 151, which establish procedures for the acquisition of land in trust under § 5. These include criteria the Secretary must consider in making an acquisition, depending on whether the acquisition is on-reservation, 25 C.F.R. § 151.10, or off-reservation, *id.* § 151.11.

B. Factual Background

"OIN is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation," which historically occupied what is now central New York, although the tribe's land holdings and population have fluctuated significantly over time. *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). On April 4, 2005,

OIN submitted a request to DOI under § 5 of the IRA requesting that the Secretary acquire approximately 17,370 acres in Madison County and Oneida County, New York into trust status for OIN.[2] Dkt. No. 57-4 ("ROD") at 6. The request comprised properties that were reacquired by OIN in open-market transactions, two centuries after they had last been possessed by the Oneidas. *Id.* The land is the location of OIN's Turning Stone Resort & Casino ("Turning Stone"), a Class III casino under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*; various other commercial enterprises, such as gas stations and golf courses; and OIN's government and cultural facilities. ROD at 6. OIN intends to continue existing uses of the land. *See id.* at 8, 31.

Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, DOI issued a draft Environmental Impact Statement ("EIS") regarding the proposed fee-to-trust request on November 24, 2006. *Id.* at 6. The purpose of the proposed action was "to help address the Nation's need for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth." *Id.* at 8. Public comments were solicited until February 22, 2007, and public hearings were held on December 14, 2006, and February 6, 2008. *Id.* at 6-7. DOI issued its final EIS on February 22, 2008. *Id.* at 7.

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[2] For further background on the history of OIN and the events leading to OIN's fee-to-trust request, *see generally City of Sherrill*, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386.

In the final EIS, DOI analyzed the environmental and socioeconomic impacts of the proposed action – acquiring the full 17,370 acres requested in trust – and eight reasonable alternatives. *Id.* at 6-7. On March 20, 2008, DOI issued its decision to accept approximately 13,003.89 acres in trust for the Nation. *Id.* at 7. The selected alternative "reflects the balance of the current and short-term needs of the Nation to reestablish a sovereign homeland and the New York State and local government requests to establish a more contiguous and compact trust land grouping." *Id.* at 19. Under the selected alternative, 4,284 of the requested acres would not be placed into trust. *Id.* The selected lands are centered around Turning Stone in Oneida County and OIN's 32-acre territory in Madison County. *Id.*

C. Procedural Background

Plaintiffs commenced this action on June 16, 2008, asserting a number of legal challenges under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*[3] The named Defendants are: Sally M.R. Jewell, United States Secretary of the Interior; Michael L. Connor, Deputy Secretary of the Interior; Elizabeth J. Klein, Associate Deputy Secretary of the

[3] Several other parties also filed suit challenging the ROD. *State of New York, et al. v. Salazar, et al.*, No. 6:08-cv-0644; *City of Oneida v. Salazar, et al.*, No. 5:08-cv-0648; *Town of Verona, et al. v. Salazar, et al.*, No. 6:08-cv-0647; *Central New York Fair Business Association, et al., v. Salazar, et al.*, No. 6:08-cv-0660; and *Niagra Mohawk Power Corp. v. Kempthorne, et al.*, No. 5:08-cv-0649.

Interior; the United States of America; and the United States Department of the Interior (collectively, "Defendants").[4] *Id.* ¶¶ 25-28.

Plaintiffs' Complaint raises, *inter alia*, the following claims: (1) Defendants exceeded their statutory authority in deciding to acquire the land into trust under the IRA; (2) that § 5 of the IRA violates the nondelegation doctrine; (3) Defendants acted arbitrarily and capriciously because they failed to apply the appropriate criteria and consider the relevant factors; (4) Defendants' decision to acquire the land into trust was arbitrary and capricious because it was based on the assumption that gambling at Turning Stone was lawful under the IGRA; (5) the operation of Turning Stone violates the statutory procedures mandated by IGRA §§ 2710 and 2719; (6) a 2007 letter determining that DOI would not reconsider its approval of the 1993 gaming compact between OIN and New York State was arbitrary and capricious; and (7) a claim seeking a writ of mandamus, ordering Defendants to carry out their statutory duties. *See generally* Compl. Plaintiffs subsequently submitted an Amended Complaint, which challenged a separate decision by the General Services Administration on December 30, 2008, to transfer 18 acres from the former Griffiss Air Force Base to DOI to be held in trust for OIN. Dkt. No. 35.

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[4] Defendants Philip N. Hogen, chairman of the National Indian Gaming Commission; the National Indian Gaming Commission; and Michael B. Mukasey, Attorney General of the United States were dismissed as Defendants in a Memorandum-Decision and Order dated March 4, 2010. Dkt. No. 49.

Defendants filed a Motion for partial dismissal of Plaintiffs' claims and a Motion to dismiss Plaintiffs' supplementary claim. Dkt. Nos. 23; 45. On March 4, 2010, the Court granted Defendants' Motions in their entirety. Dkt. No. 49 ("2010 Memorandum-Decision and Order"). The Court dismissed "Plaintiffs' (a) non-delegation claim, (b) IGRA compliance claim, (c) gaming compact claim challenging Defendant Cason's June 13, 2007 letter, (d) claim challenging NGIC's 1994 approval of the gaming compact, and (e) claim seeking to enjoin Defendant officials to take enforcement actions pursuant to the IGRA." *Id.* at 30-31. The Court also dismissed Plaintiffs' supplementary claim. *Id.* at 31.

On November 15, 2011, Defendants moved for summary judgment on the remaining claims in Plaintiffs' Complaint. Dkt. No. 57. On the same date, Plaintiffs filed a letter motion for summary judgment. Dkt. No. 58. A newly central issue raised in Plaintiffs' challenge to the ROD was whether OIN was eligible to have land taken into trust under the IRA in light of the Supreme Court's recent decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). In *Carcieri*, the Supreme Court determined that the word "now" in the definition of "Indian" in the IRA – "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" – meant the date of the IRA's enactment in 1934. *Carcieri*, 555 U.S. at 381. Thus, to be eligible to have land taken into trust under the IRA, a tribe must have been under federal jurisdiction in 1934. Since *Carcieri* had not been addressed in the ROD, the Court issued

a Memorandum-Decision and Order dated September 24, 2012, denying all motions for summary judgment across the related cases, and remanding to DOI to establish a record and determine in the first instance whether OIN was under federal jurisdiction in 1934. Dkt. No. 65.

On February 19, 2014, after the parties had an opportunity to submit evidence for DOI to consider, DOI filed an Amendment to the ROD applying *Carcieri* to OIN, consistent with the Court's remand. Dkt. No. 76-1 ("Opinion"). The Opinion concluded that OIN "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 on June 18, 1936." *Id.* at 3. The Opinion determined that while the vote alone was sufficient, there were a number of other federal actions which, "either in themselves or taken together," establish that OIN was under federal jurisdiction in 1934. *Id.*

On March 7, 2014, Defendants again moved for summary judgment on the remaining claims in Plaintiffs' Complaint. Mot.

III. LEGAL STANDARD

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure instructs a court to grant summary judgment if "there is

no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant bears the burden of informing the court of the basis for the motion and of identifying those portions of the record that the movant claims will demonstrate the absence of a genuine issue of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). If the movant has shown that there is no genuine dispute as to any material fact, the burden shifts to the non-moving party to establish a genuine issue of fact by "citing to particular parts of materials in the record." FED. R. CIV. P. 56(c). This requires the non-moving party to do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

"The question whether an agency's decision is arbitrary and capricious . . . is a legal issue," and is thus, "amenable to summary disposition." *Noroozi v. Napolitano*, 905 F.Supp.2d 535, 541 (S.D.N.Y.2012) (quoting *Citizens Against Casino Gambling in Erie Cnty. v. Stevens*, 945 F.Supp.2d 391, 399 (W.D.N.Y.2013)). "When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." *State of Conn. v. U.S. Dep't. of Commerce*, No. 04-cv-1271, 2007 WL

2349894, at *1 (D.Conn. Aug.15, 2007) (citing *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C.Cir.2001)); *see also James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C.Cir.1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.").

B. Administrative Procedure Act

Under the APA, a district court may set aside an agency's findings, conclusions of law, or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In reviewing agency action, [a][c]ourt may not 'substitute its judgment for that of the agency.'" *Natural Res. Def. Council v. EPA*, 658 F.3d 200, 215 (2d Cir.2011) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). Rather, a reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416; *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). Courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 664, 658 (2007) (internal quotations and citations omitted).

Nevertheless, a reviewing court's "inquiry must be searching and careful." *Natural Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 555 (2d Cir.2009) (internal quotation marks and citations omitted). An agency decision may be deemed arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, 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. *Motor Vehicle Mfrs. Ass'n of U.S., Ind. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Yale New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir.2006).

Further, courts "do not hear cases merely to rubber stamp agency actions. To play that role would be 'tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act.'" *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 755 (D.C.Cir.2000) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C.Cir.1995)); *see also Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir.2008) ("This is not to suggest that judicial review of agency action is merely perfunctory. To the contrary, within the prescribed narrow sphere, judicial inquiry must be searching and careful.") (internal quotation marks and citations omitted). In order for an agency's decision to survive judicial review, the agency must have articulated "a rational connection between the facts found and the choice made." *Henley v. FDA*,

77 F.3d 616, 620 (2d Cir.1996) (internal quotation marks omitted).

IV. DISCUSSION

Defendants move for summary judgment on the following claims remaining in Plaintiffs' Complaint: (1) DOI lacks authority to create federal land in New York State on the basis of federalism principles; (2) the Indian Commerce Clause does not authorize the removal of land from a state's sovereign control; (3) the IRA does not apply to OIN because the Oneidas voted to reject the Act's application and the IRA only applies to lands that were subject to allotment; (4) OIN's fee-to-trust application was not properly before DOI because Raymond Halbritter ("Halbritter") is not the legitimate leader of OIN; (5) the Bureau of Indian Affairs ("BIA") is institutionally biased in favor of Indian tribes and ignored UCE's comments; (6) DOI incorrectly applied the on-reservation regulations, rather than the off-reservation regulations; and (7) DOI failed to consider the requisite regulatory criteria.

A. *Carcieri*

The Court first addresses the extent to which Plaintiffs have made a claim premised on *Carcieri.* Plaintiffs have stated that the Oneidas were under State jurisdiction, Compl. ¶¶ 55-57, and that the Oneidas have only ever had a State reservation, Resp. at 14. Plaintiffs presented these arguments, *inter alia*, to DOI during the remand process. Op. at 39-40. The

Court will consider these arguments insofar as they challenge DOI's conclusion that the Oneidas were under federal jurisdiction in 1934.

1. State Jurisdiction and Reservation

Plaintiffs claim that the Oneidas, in the 1788 Treaty of Fort Schuyler, ceded all of their lands to the State of New York and retained only a "state use right reservation." Compl. ¶ 37. Plaintiffs further claim that the Oneidas sold their "possessory interests" to the State from 1795 onward. Resp. at 14. Plaintiffs deny that the 1794 Treaty of Canandaigua, 7 Stat. 44, created a federal reservation, and instead interpret that Treaty as "acknowledg[ing] the state reservation" created in the earlier Treaty of Fort Schuyler. Compl. ¶ 37; Resp. at 14. Based on the foregoing, Plaintiffs claim that the Oneidas have no reservation-State or federal-because they sold any rights they retained to the State. Resp. at 14.

Defendants rejected these arguments that on the ground that the Treaty of Canandaigua created a federal reservation, which has never been disestablished by Congress. Op. at 36-38. Defendants relied on the Second Circuit's holding in *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 165 (2d Cir.2003), that the Oneida reservation has not been disestablished, which, as the Court has recognized, remains the law in the Second Circuit, *New York v. Salazar*, No. 08-cv-644, 2009 WL 3165591, at *8-9 (N.D.N.Y. Sept.29, 2009) (Kahn, J.). Defendants also considered

related arguments that the Oneidas were under State jurisdiction. Defendants noted "confusion by some federal officials as to the interplay of state authority . . . vis-a-vis federal jurisdiction," Op. at 21, and that management of "Indian affairs had been left to the state," *id.* at 34. Defendants concluded, however, that any such confusion was belied by the record as a whole. *Id.* at 21. Defendants again relied on the Second Circuit's holdings in *United States v. Boylan*, 265 F. 165 (2d Cir.1920) and *Oneida Indian Nation*, 337 F.3d 139, which recognized a federal OIN reservation and, implicitly, federal jurisdiction. *See* Op. at 18-19 ("State laws cannot change the status of either a federal reservation or a federally recognized tribe.").

The Court again acknowledges binding Second Circuit precedent that there is a federal OIN reservation that has not been disestablished. *See Oneida Indian Nation*, 337 F.3d at 165. Plaintiffs' argument that the Oneidas have remained under State jurisdiction, resp. at 14, fails because the Supreme Court determined in *Oneida Indian Nation of N.Y. v. Oneida Cnty., N.Y.*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) ("*Oneida II*"), that "[o]nce the United States was organized and the Constitution adopted, . . . tribal rights [of occupancy] to Indian lands became the exclusive province of the federal law," *id.* at 667. "The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian Tribes, including

the Oneidas." *Id.* Thus, it follows from *Oneida II* that the land "acknowledged" as "reserved to the Oneida" in the Treaty of Canandaigua was under the jurisdiction of federal law, and not state law. *See id.* at 67071; *see also Boylan*, 265 F.3d at 171 ("[T]he exclusive federal jurisdiction over the [Oneidas] is in the federal government . . . even though the state of New York has legislated.").

2. Plaintiffs' Other Comments

Plaintiffs made several other comments during the remand regarding the lineage of OIN. First, Plaintiffs claimed that the Oneidas had ceased to exist as a tribe by 1934. Op. at 39. Defendants considered the "Reeves Report," which was prepared by the Chief Counsel in the Office for Indian Affairs in 1914, and documented the "absence" of the Oneidas in New York State. *Id.* at 33. Defendants, however, concluded that the Reeves Report was "not an accurate representation of the Oneidas' status in 1934." *Id.* Defendants found that statements from other DOI officials and federal actions – including the lawsuit the United States brought on the Oneidas' behalf in *Boylan* – were better evidence of the official Department view. *Id.* at 34. Judgments regarding a tribe's existence is a matter that is squarely in BIA's expertise, *see, e.g., United Tribe of Shawnee Indians v. United States*, 253 F.3d 543 (10th Cir.2001), and the Court finds that Defendants reasonably weighed the conflicting evidence.

Plaintiffs also argued that the tribe the government recognized "may have been the Oneida Tribe of Wisconsin." Op. at 39. This assertion, however, is contradicted by all the evidence considered by Defendants, which concerns the Oneida groups in New York and their relations with the federal government. *See, e.g.*, Op. at 34. Finally, Plaintiffs claimed that "there is no legitimate link between the Oneida Indian Nation of New York and the entity currently enjoying BIA recognition." *Id.* at 39 (quotation marks omitted). This argument also fails to state a claim against DOI's conclusion the Oneidas were under federal jurisdiction in 1934 because "the United States (including the Department) has officially recognized the OIN as a successor in interest to the historic Oneida Nation since treaty times." *Id.* at 25 n. 168.

B. Plaintiffs' Constitutional Arguments

In their Response, Plaintiffs broadly attack the constitutionality of the § 5 fee-to-trust procedure. Resp. Specifically, Plaintiffs contend that § 5 violates principles of federalism implicit in the Constitution and exceeds Congress's authority under the Indian Commerce Clause. Resp. at 7-9. Plaintiffs are effectively making an argument under the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. A Tenth Amendment argument can be viewed as challenging congressional action as either exceeding

delegated power, or as having "invade[d] the province of state sovereignty reserved by the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 155, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

The Court already rejected a Tenth Amendment challenge to § 5 in a related case and does so again here. *Town of Verona v. Salazar*, No. 08-cv-647, 2009 WL 3165556, at *2-4 (N.D.N.Y. Sept.29, 2009) (Kahn, J.). Section 5 represents a valid exercise of congressional authority pursuant to the Indian Commerce Clause, which grants Congress the power "[t]o regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has consistently interpreted Congress' authority to legislate in matters involving Indian affairs broadly. *See, e.g., United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (describing Congress' powers to legislate with respect to Indian matters as "plenary and exclusive"); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]") (citing *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). Plaintiffs argue that the Indian Commerce Clause has limits, in the same way that the Interstate Commerce Clause has limits. *See United*

States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). However, Plaintiffs' lone citation is a Justice Thomas concurrence. *Adoptive Couple v. Baby Girl*, ___ U.S. ___, ___ – ___, 133 S.Ct. 2552, 2565-71, 186 L.Ed.2d 729 (2013) (Thomas, J., concurring). Given Congress' plenary authority in matters involving Indian affairs, the Court finds that the Secretary's determination to acquire land into trust for OIN pursuant to § 5 is a valid exercise of the power delegated Congress by the Constitution.

The case law Plaintiffs cite suggesting that the federal acquisition of sovereign state land offends principles of federalism is unavailing. Resp. at 7-8 (citing *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009); *Idaho v. United States*, 533 U.S. 262, 121 S.Ct. 2135, 150 L.Ed.2d 326 (2001); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 61 S.Ct. 1050, 85 L.Ed. 1487 (1941)). None of the cited cases involve § 5 of the IRA. Rather, the cited cases involve land bestowed to a state at its admission to the union and later congressional action inconsistent with state sovereignty over those lands. *Hawaii*, 556 U.S. at 176 (finding that interpretation of congressional resolution would raise "grave constitutional concerns" where it would "cloud" Hawaii's title to sovereign lands three decades after Hawaii's admission to union); *Idaho*, 552 U.S. at 280 n. 9 ("Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State.") (quotation omitted). The Secretary's acquisition of lands into trust within the OIN reservation is clearly

a different situation. It is well established that trust acquisition does not negate state authority. *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."). Thus, the Secretary's § 5 trust acquisition on behalf of OIN does not interfere with state sovereignty so as to create the "grave constitutional concerns" found by the *Hawaii* Court, 556 U.S. at 176.

The Court also notes Plaintiffs' Guarantee Clause argument. Resp. at 8-9. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. 4, § 4, cl. 1. Plaintiffs appear to claim that the Guarantee Clause is violated because the trust acquisition deprives the Oneida Indians of a republican form of government since the leadership of Halbritter "is of a non-democratic and decidedly non-republican nature." Resp. at 9. This claim fails in the first instance because it is doubtful whether the Guarantee Clause is justiciable. *New York*, 505 U.S. at 184 ("In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."); *see also Cnty. of Charles Mix v. U.S. Dep't of Interior*, 799 F.Supp.2d 1027, 1037-38 (D.S.D.2011) (finding Guarantee Clause challenge to trust acquisition nonjusticiable). Assuming, *arguendo*, that the claim is justiciable, Plaintiffs have not alleged that any "State" is deprived of a republican

form of government, *see New York*, 505 U.S. at 144, nor do Plaintiffs-not being members of OIN-have standing to raise a claim regarding the nature of OIN's government, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

C. Application of the IRA to the Oneidas

Plaintiffs summarily assert that the IRA does not apply to OIN because: (1) OIN voted in 1936 to reject the application of the Act under § 18 and (2) the IRA only applies on lands that were subject to allotment. Compl. ¶¶ 136-37. The first argument fails because Congress in the Indian Land Consolidation Act ("ILCA"), 96 Stat. 2517, extended the benefits of the IRA to tribes that had initially opted out of the Act by a § 18 vote. Section 2202 of the ILCA provides that "[t]he provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title." 25 U.S.C. § 2202. In a related argument, Plaintiffs claim that OIN does not meet the definition of "tribe" in the ILCA, because that definition is limited to tribes for which the United States has held land in trust. Compl. ¶ 59. The Court rejected this argument in two related cases and does so again here. *See New York v. Salazar*, 2009 WL 3165591, at *13-15; *Town of Verona*, 2009 WL 3165556, at *9-11. Similarly, the Court has also already rejected the argument that the IRA is limited to lands that were subject to allotment in related cases and does so again here. *City of Oneida, N.Y. v. Salazar*, No. 08-cv-0648, 2009 WL 3055274, at *5 (N.D.N.Y. Sept.21, 2009) (Kahn, J.).

D. State Consent

In group of arguments, Plaintiffs claim that State consent is necessary in order for the United States to acquire land within the State. Compl. ¶¶ 119, 142, 145. Plaintiffs' claim appears to be premised on the Enclave Clause, which provides that Congress may "exercise . . . Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. 1, § 8, cl. 17. Courts, however, including this Court, have rejected Enclave Clause challenges to § 5 trust acquisitions. *See Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir.2007), *rev'd on other grounds*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791; *Town of Verona*, 2009 WL 3165556, at *3. As explained above, the federal government does not exercise exclusive jurisdiction over land held in trust on behalf of a tribe. *Nevada*, 533 U.S. at 361; *see also Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 50 S.Ct. 455, 74 L.Ed. 1091 (1930) (citing Indian reservation as example of land that is not an enclave).

Plaintiffs further argue that New York has only consented to the United States acquiring property in the open market under limited circumstances, which do not include taking land into trust on behalf of a tribe. Compl. ¶ 145 (citing N.Y. STATE LAW § 50). However, § 50 only applies where the State's consent is necessary. State consent is necessary only where the United States will acquire exclusive jurisdiction over the state property. *See United States v. Johnson*, 994

F.2d 980, 984 (2d Cir.1993) ("The federal government can only acquire jurisdiction over property [within a state] . . . if both state and federal governments agree to the transfer."). Thus, for the same reason Plaintiffs' Enclave Clause claim fails, Plaintiffs' reliance on New York State Law § 50 is also misplaced. *See Nevada*, 533 U.S. at 361.

E. Plaintiffs' APA Claims

Plaintiffs' third count for relief consists of wide ranging allegations that Defendants' determination was arbitrary and capricious and without observance of procedures required by law under 5 U.S.C. § 706(2). Compl. ¶¶ 158-80.

1. Legitimacy of Halbritter's Leadership of OIN

Plaintiffs claim that Defendants' acquisition of land into trust on behalf of OIN is arbitrary and capricious because the application was presented by Halbritter, as the leader of OIN, when in fact, Halbritter had been removed from that position "on or about May 21, 1995." Compl. ¶ 159. The events Plaintiffs rely on are recounted in *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 710 (2d Cir.1998). Plaintiffs' conclusory claim may be interpreted as either requesting that the Court determine the leadership of OIN, or as challenging BIA's recognition of Halbritter. Insofar as Plaintiffs request the former, the Court lacks subject matter jurisdiction over matters of a tribe's internal governance.

See Runs After v. United States, 766 F.2d 347, 352 (8th Cir.1985). To the extent Plaintiffs challenge BIA's recognition of Halbritter, that claim is appropriately considered in the first instance by BIA. *See Shenandoah*, 159 F.3d at 712-13 (requiring challenge to BIA's recognition of Halbritter to be first exhausted before BIA); *Runs After*, 766 F.2d at 352. The claim is not appropriately presented to BIA in the context of a fee-to-trust determination. In addition, Plaintiffs lack standing to challenge Halbritter's leadership of OIN because Plaintiffs – who are not members of OIN – cannot show that the purported illegitimacy of Halbritter's leadership has caused them an "injury in fact." *See Lujan*, 504 U.S. at 560.

2. Plaintiffs' Comments and Institutional Bias of BIA

In similar claims, Plaintiffs allege that DOI did not consider their comments and that BIA is generally biased in favor of Indian tribes. Compl. ¶¶ 160-62.

"[A]n agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, . . . stating its response in the final statement." 40 C.F.R. § 1503.4(a). Furthermore, "[t]he agency shall discuss at appropriate points in the final statement any responsible opposing view." *Id.* § 1502.9. The record demonstrates that DOI considered and responded to Plaintiffs' comments, to the extent that they were relevant. *See, e.g.*,

Final EIS, App. M at 291-93, AR010877-79,[5] (UCE comment letter dated December 14, 2006 and BIA responses); Final EIS, App. M at 823-37, AR029681-95 (noting UCE comment letter dated December 27, 2006); ROD, App. B at 223-28, AR005322-27 (UCE comment letters challenging constitutionality of fee-to-trust process). Although "there must be good faith, reasoned analysis in response" to opposing viewpoints, "an agency's obligation to respond to public comment is limited" and "[n]ot every comment need be published in the final EIS." *California v. Block*, 690 F.2d 753, 773 (9th Cir.1982) (internal quotation omitted). The Court finds that DOI adequately considered Plaintiffs' comments in the final EIS and ROD. *See* Final EIS, App. M at 291-93, AR010877-79 (responding to UCE's contentions, *inter alia*, that § 5 of the IRA violates the nondelegation doctrine, that OIN is an "unconstitutional entity," and that the trust acquisition violates state sovereignty).

"The Department of Interior's review of an application to take land in trust is subject to the due process clause and must be unbiased." *South Dakota v. U.S. Dep't of Interior*, 401 F.Supp.2d 1000, 1011 (D.S.D.2005). However, "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10, 122 S.Ct. 431, 151 L.Ed.2d 323 (2001), and the party asserting bias bears the burden of proof, *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982).

[5] The administrative record was filed with the Court on disks. Dkt. No. 54.

Plaintiffs' general allegation that BIA "only represents the interests of the Indian tribe" is effectively a claim that the policies established by Congress in the IRA create structural bias in favor of Indians. The Court finds that Congressional polices cited by Plaintiffs – which have been approved by the Supreme Court, *e.g., Morton*, 417 U.S. at 554-55 – are insufficient to establish structural bias. *See South Dakota*, 401 F.Supp.2d at 1011 ("Following Congress's statutory policies does not establish structural bias.").

3. On- and Off-Reservation Regulations

DOI has established different regulations applicable to "on" and "off" reservation trust acquisitions. 25 C.F.R. §§ 151.10, 151.11. The off-reservation regulations require the Secretary to give "greater scrutiny to the tribe's justification of anticipated benefits," and "greater weight" to the jurisdictional concerns of local governments. *Id.* § 151.11(b). Plaintiffs claim that the Secretary incorrectly applied the on-reservation regulations. Compl. ¶¶ 163-65.

An acquisition is considered "on-reservation," when "the tribe is recognized by the United States as having governmental jurisdiction" over the area of land. 25 C.F.R. § 151.2(f). Plaintiffs argue that the Supreme Court's holding in *City of Sherrill* that OIN "cannot unilaterally reassert sovereign control" over the lands in question means that OIN does not have governmental jurisdiction over those lands. Compl. ¶¶ 163, 167. The *City of Sherrill* Court, however,

clearly distinguished between questions of right and questions of remedy; its holding was that equitable considerations bar OIN from reasserting sovereign control. *See City of Sherrill*, 544 U.S. at 213-14. The *City of Sherrill* Court reserved judgment on whether the Oneidas' reservation still exists, 544 U.S. at 215 n. 9, and as the Court has acknowledged, it remains the law in the Second Circuit that the OIN reservation has not been disestablished, *see New York*, 2009 WL 3165591, at *8-9. Thus, the United States does recognize OIN as having governmental jurisdiction over the land in question, and, accordingly, DOI correctly applied the on-reservation regulations.

4. Regulatory Factors

Plaintiffs allege that DOI did not adequately consider certain of the requisite regulatory criteria under 25 C.F.R. § 151.10.

a. Statutory Authority

Section 151.10(a) requires the Secretary to consider "[t]he existence of statutory authority for the acquisition." Plaintiffs claim that "there is no valid statutory authority for Defendants to take the land into trust." Compl. ¶ 172. This claim is premised on Plaintiffs' constitutional challenges to the IRA, and since the Court has already rejected those challenges, this claim also fails. *See also* ROD at 33-34 (discussing statutory authority for trust acquisition).

b. OIN's Need for Land

Section 151.10(b) requires the Secretary to consider "[t]he need of the individual Indian or the tribe for additional land." Plaintiffs claim that DOI did not adequately consider OIN's need for the land and that the acquisition will make OIN "wealthy at the expense of the surrounding non-Indian communities." Compl. ¶ 173. DOI did, in fact, consider comments that OIN is a financially secure tribe and would therefore have its needs met by continuing as a private landowner. ROD at 36. DOI noted, however, that "a demonstration of necessity may take into account more than economic need." *Id.* DOI determined that acquiring the land in trust was important because of the antagonistic relationship between OIN and State and local governments; DOI concluded that so long as OIN is a private landowner, it will continue to face litigation. *Id.* Acquiring the land in trust would enable OIN to continue existing uses of its lands, and thereby promote tribal self-determination and economic development; it would help "address the Nation's current and near-term needs to permanently reestablish a sovereign homeland for its members." *Id.*

The Court finds that DOI reasonably weighed OIN's need for the land to be held in trust. *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir.2005) ("It [is] sufficient for the Department's analysis to express the Tribe's needs and conclude generally that the IRA purposes were served."). DOI adequately responded to Plaintiffs' objection in the ROD.

c. Removal of Land from Local Tax Rolls

Section 151.10(e) requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." Plaintiffs claim that DOI "failed to adequately consider the loss of taxes actually assessed and paid on the property as required." Compl. ¶ 179.

Contrary to Plaintiffs' assertion, DOI thoroughly analyzed the impact of the trust acquisition on the tax rolls of each affected jurisdiction. ROD at 40-55. While finding that § 151.10(e) only required analysis of tax impacts "based on existing circumstances, i.e., taxes actually assessed and paid," and did not require speculation "on the outcome of the pending litigation between the Nation and the Counties over taxes," *id.* at 41, DOI also evaluated the tax impacts in the event that the Counties do prevail in that tax litigation, *id.* at 45. Defendants concluded that, "based on taxes actually assessed and paid," the benefits of the acquisition to OIN outweighed the tax impacts on local governments. *Id.* at 50. Defendants' analysis further balanced lost tax revenue against the economic and tax benefits produced by OIN's business activities, and found that the net economic impact on almost every jurisdiction was positive, even assuming, *arguendo*, that OIN does not prevail in the ongoing tax litigation. *Id.* at 49-50. Considering the foregoing, Defendants ultimately concluded that the impact of removing the land from the tax rolls was not significant when balanced with the benefits to OIN. *Id.* at 50.

The Court finds that this discussion is sufficient to meet DOI's obligation under § 151.10(e) to consider the impact on local tax rolls. Plaintiffs' assertion that DOI did not consider the "loss of taxes actually assessed and paid on the property," is belied by the ROD, which shows that DOI did consider the loss of taxes actually assessed and paid, and took account of the uncertainties regarding the pending tax litigation.

d. Tax Liens

Plaintiffs challenge the ROD's compliance with § 151.13, which requires the Secretary, upon the determination to acquire land into trust, to require "title evidence." If the Secretary discovers any "liens, encumbrances, or infirmities," she may require "the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition." *Id.*

Given the uncertainty of the pending tax litigation, DOI required OIN "to provide a letter of credit to the United States for the difference between (a) the total taxes and related charges levied on the casino tax lot as of the date of formal acceptance and (b) the amount that the Nation paid or guaranteed through a letter of credit to the taxing jurisdiction." ROD at 54. "The purpose of the letters of credit . . . is to provide assurances that revenues will be paid over to the Counties *if and* when taxes are judicially determined to be due and owing." *Id.*

Defendants argue that Plaintiffs do not have standing to challenge DOI's compliance with its title examination provisions. Mot. at 47. The Court agrees. Article III standing requires that a plaintiff has (1) suffered an injury-in-fact, that (2) is caused by the conduct complained, and would be (3) redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Plaintiffs lack standing because they are unable to show that DOI's title examination process caused their injuries. The language of § 151.13 makes clear that title examination is separate from the Secretary's determination to take land into trust; title examination occurs "[*i*]*f* the Secretary determines that he will approve a request for the acquisition of land." 25 C.F.R. § 151.13 (emphasis added). Although title examination occurs prior to final approval action on the acquisition, *see id.* § 151.12(b), it is not a factor that the Secretary considers in making a trust decision under either § 151.10 or § 151.11. Plaintiffs' alleged injuries are caused by the decision to acquire the land into trust, and not by the title examination procedures. Compl. ¶ 18. Plaintiffs therefore lack standing to challenge DOI's requirement of letters of credit.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion (Dkt. No. 79) for summary judgment on all remaining claims is **GRANTED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

APPENDIX E

§5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

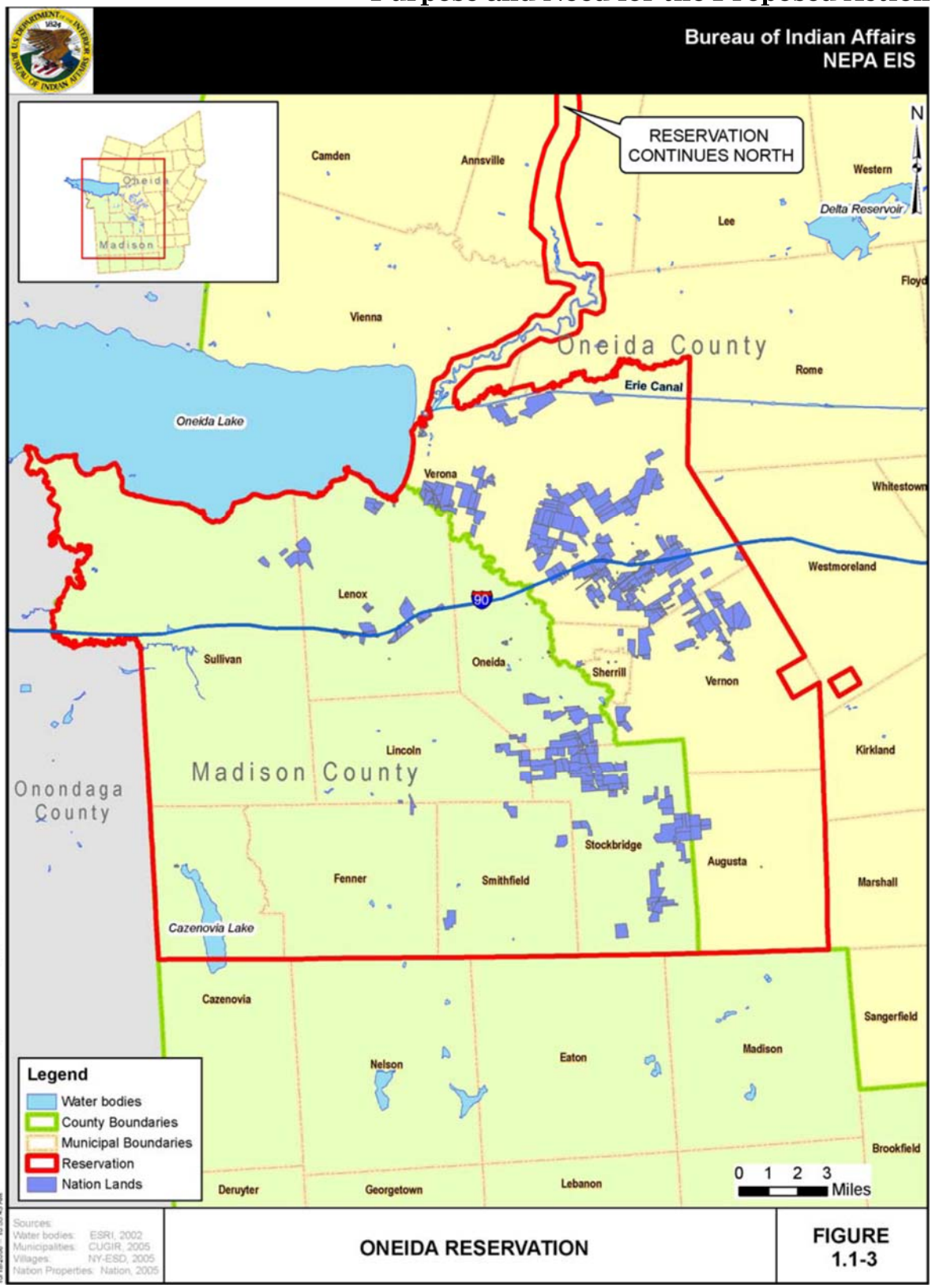
The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.)[1] 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.

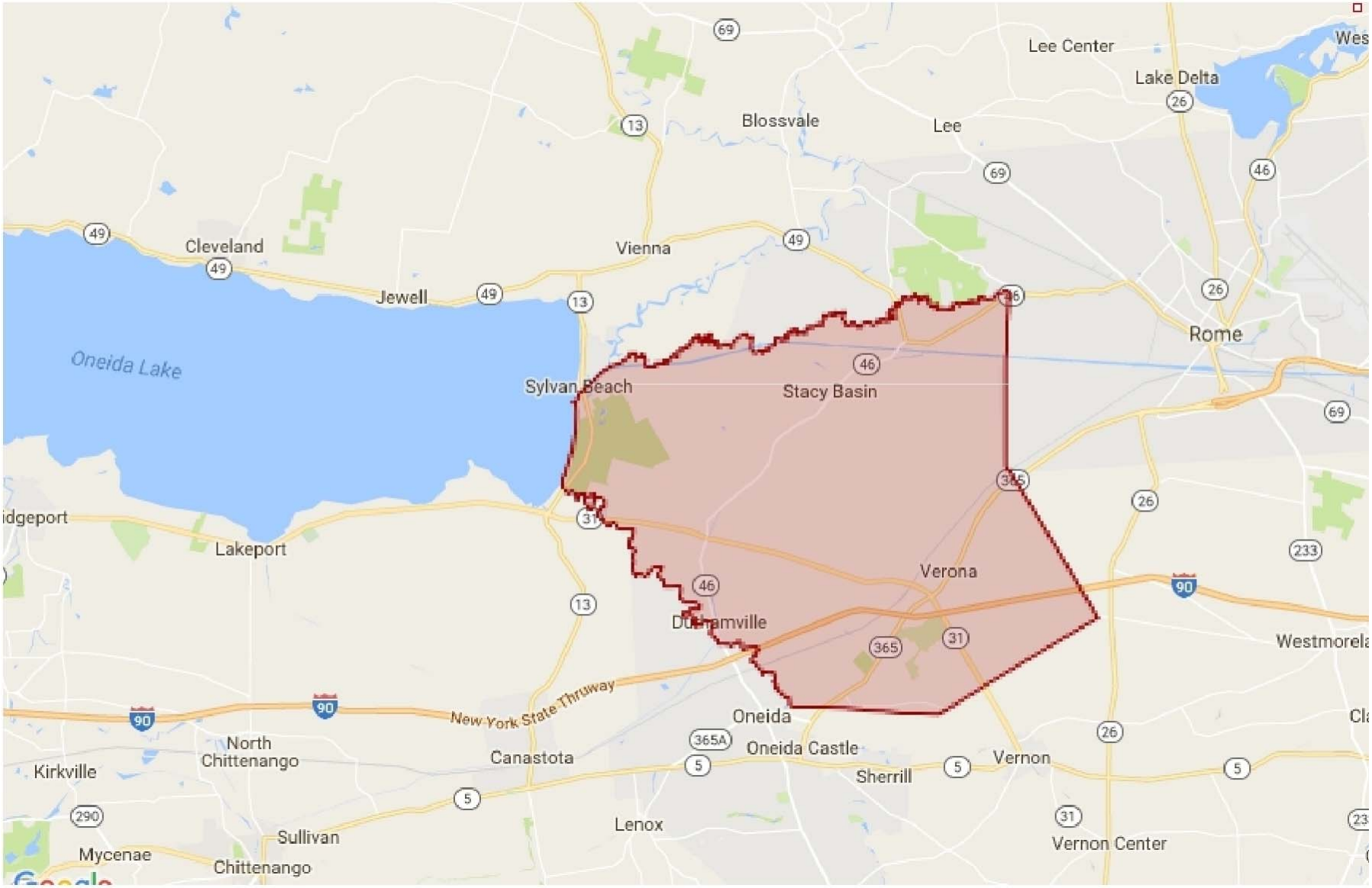
(June 18, 1934, ch. 576, §5, 48 Stat. 985; Pub. L. 100-581, title II, §214, Nov. 1, 1988, 102 Stat. 2941.)

APPENDIX F

Section 1
Purpose and Need for the Proposed Action



Town Of Verona Boundary Map



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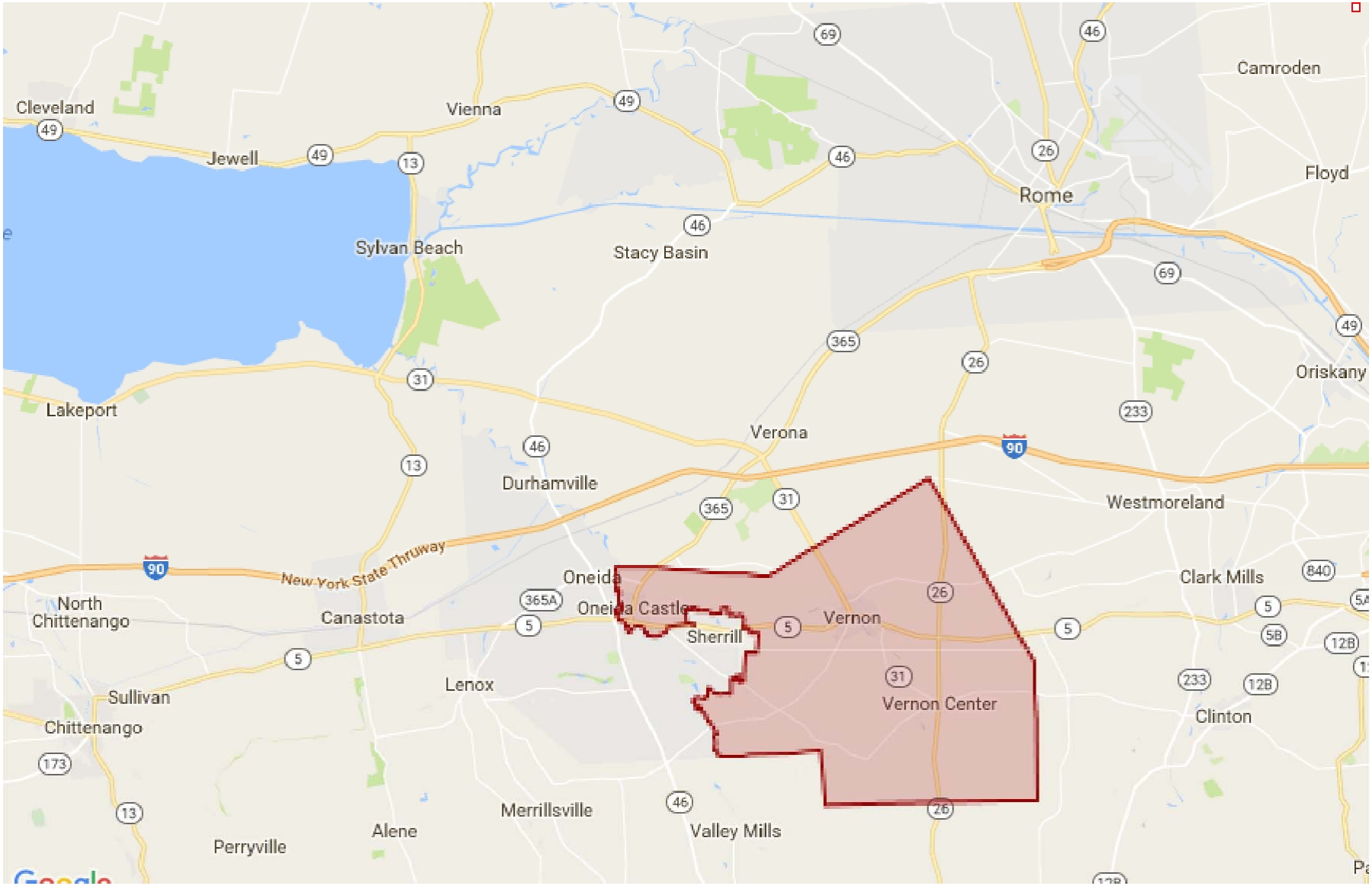

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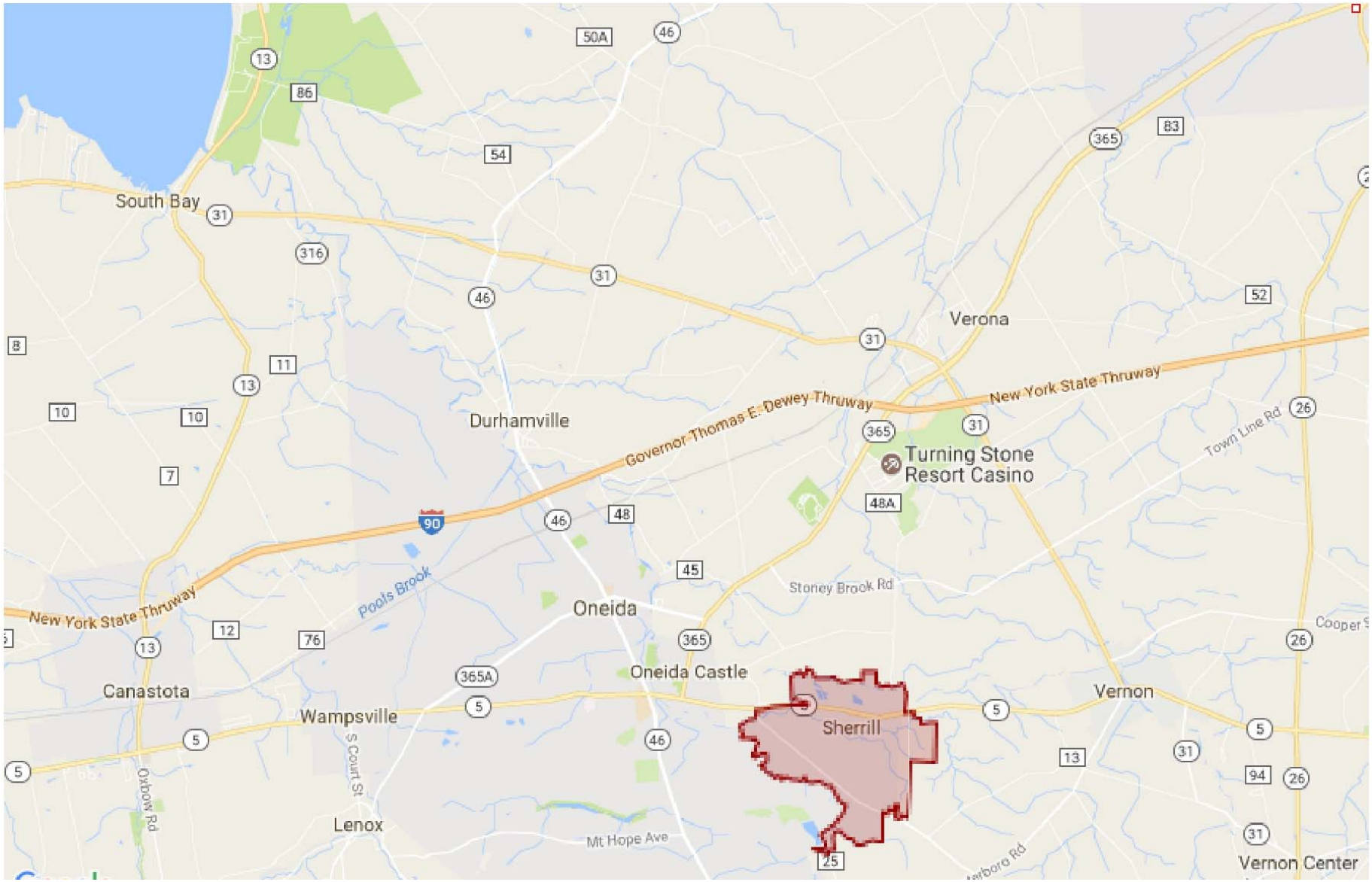
6/15/2017 Sherrill, NY Profile: Facts, Map & Data



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