UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION, CITIZENS EQUAL RIGHTS ALLIANCE, DAVID R. TOWNSEND, New York State Assemblyman, MICHAEL J. HENNESSY, Oneida County Legislator, D. CHAD DAVIS, Oneida County Legislator, and MELVIN L. PHILLIPS,

Plaintiffs,

v.

Civil Action No.

DIRK KEMPTHORNE, individually and in his official capacity as Secretary of the U.S. Department of the Interior, P. LYNN SCARLETT, in her official capacity as Deputy Secretary of the U.S Department of Interior, JAMES E. CASON, in his official capacity as the Associate Deputy Secretary of the Interior; FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs; and JAMES T. KARDATZKE, Eastern Regional Environmental Scientist; and ARTHUR RAYMOND HALBRITTER, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation.

6:08-CV-660 LEK/GJD

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This memorandum of law is submitted by the undersigned counsel on behalf of Plaintiffs Assemblyman David R. Townsend, County Legislator D. Chad Davis and Melvin L. Phillips in opposition to Defendant's Partial Motion to Dismiss filed with this court on September 22, 2008. Plaintiff Townsend and Plaintiff Davis are bringing this action in both their individual and official capacity. Plaintiff Melvin L. Phillips brings this action as an individual and as the official spokesperson for the Orchard Party/Marble Hill Oneidas.

Plaintiffs' complaint challenges the Record of Decision ("ROD") issued by the Department of Interior ("DOI") on May 20, 2008, which seeks to take 13,003.89 acres of privately held land under the sovereign jurisdiction of New York State into trust on behalf of the Oneida Indian Nation of New York ("OIN"). Plaintiffs' challenges are made pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §§701-706. Plaintiffs assert that the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479, is inapplicable in New York and further, the OIN voted against the application of the IRA in New York. The DOI's attempt to take land into trust using the IRA, is an impermissible delegation of legislative authority in this case. Also, the federal government's attempt to take State sovereign land violates the Tenth Amendment of the United States Constitution. Defendants' wrongly assert that Plaintiffs lack standing to bring suit under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370. Plaintiffs also assert that Defendants' decision is contrary to Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719 because OIN fails to meet the requirements of the statute or the exceptions outlined in the statute. Plaintiffs also challenge the DOI's decision because the taking of the land on behalf of one class of citizens over another amounts to violations under the Civil Rights Act ("CRA"), 42 U.S.C. §§ 1981, 1983, 1985, 1988. All other claims made by Plaintiffs

in their Complaint are not included in Defendants' partial Motion to Dismiss. Therefore, Defendant's partial motion to dismiss should be denied in all respects.

STATEMENT OF FACTS

The court is familiar with the facts and relevant statues and case law associated with the numerous plaintiffs in this case. The relevant facts are set forth in the complaint and the numerous affidavits attached to this document. Plaintiff Melvin L. Phillips presents a slightly different claim than the other plaintiffs as he a full-blooded Oneida Indian who is living on New York State reserved land set aside for his descendants pursuant to the Treaty of 1788 and the June Treaty of 1842. Plaintiff Phillips' Band of Orchard Party/Marble Hill (aka Orchard Hill) Oneidas were recognized with a separate existence in the Treaty of 1838 and William Day, one of the signers of the Treaty on behalf of the Orchard Party, is a direct ancestor of plaintiff Melvin Phillips. The OIN was not recognized under that Treaty. Plaintiff Phillips is opposed to the federal intervention using the mechanism of the IRA as it will jeopardize the status of his land and his long term relationship with the State. Plaintiff Phillips is a traditional Indian and thus, does not support Indian gambling/gaming.

BACKGROUND

Defendants' foundational representation of the facts in the "Background" section of its memorandum of law is flawed in many areas. In essence, this application for land into trust by the OIN is nothing more than an effort to circumvent the *Sherrill* decision through the executive branch. See*, City of Sherrill v. Oneida Indian Nation of NY*, 544 U.S. 197 (2005). The *Sherrill* decision is unequivocal in holding that the Oneidas ceded *all* of their lands forever to the State of New York in 1788, not "most" of their land as asserted in Defendants' brief. The Oneidas retained a right to use and occupy the land and later, were given the right to sell the value of their

possessory rights in the 1794 Treaty. The Non-Intercourse Act was not enacted until 1790 and it was an act that expired after two years. Act of July 22, 1790, ch. 33, 1 Stat. 137. In the replacement Act of 1793, Congress specifically removed language that gave the Act applicability to, "any state, whether having pre-emption to such lands or not." Act of March 1, 1793, § 13, Stat. 329, 330. Further, section 13 states, "That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states." Id. § 13. The State has a long history of dealing directly with the New York Indians because of the unique Indian land status. There is no federal Indian land in New York today and all New York Indians are subject to New York's civil and criminal jurisdiction. 25 U.S.C. §§ 232, 233. See *United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

Sherrill held that the OIN has no aboriginal rights to any land in New York. There was no need for the court to "disestablish" any reservation, as OIN repeatedly and wrongly alleges, because no **federal** Oneida reservation ever existed in New York in the first place. The Oneida's federal reservation is in Wisconsin as evidenced by all the treaties and the behavior of the majority of the Oneida people who chose to move there. All of the Oneida lands were ceded to the State before the United States government even existed. Further, in 1988, the Second Circuit ruled that the sale of more than five million acres of the Oneida lands to the State of New York under the Treaty of 1788 were not invalid under the Articles of Confederation. *The Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2nd Cir. 1988).

Plaintiff Melvin Phillips lives on State land that has been under continuous possession by his ancestors and his family today. Defendant's quote Sherrill stating, "The Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo

Creek disestablished the Oneida's reservation." The Oneidas clearly do not have a federal reservation, necessary to comply with IGRA, or they would not have sought to create federal territory to legitimize their illegal gambling operations.

The Supreme Court in *Sherrill* warned, "If OIN can unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." Id. p. 210. It would be equally as disastrous if the DOI were allowed to use the powers of the executive branch to obtain the very same relief that OIN was denied by the Supreme Court.

APPLICABLE STANDARD OF REVIEW

On a motion to dismiss plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the court must accept all allegations in the complaint to be true including facts alleged in pleadings, exhibits and attachments. *Samuels v. Air Transport Local 504*, 992 F.2d 12, 15 (2nd Cir. 1993). An action must be dismissed when the court lacks subject matter jurisdiction over the issues raised in the complaint. The party asserting subject matter jurisdiction has the burden of proving that the court has such jurisdiction. *United Food & Commercial Workers Union, Local 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F2d 298, 301 (2nd Cir. 1994). A cause of action shall not be dismissed for failure to state a claim unless it "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Harris v. City of New York*, 186 F.3d 243, 247 (2nd Cir. 1999). Plaintiff need only allege enough to meet very liberal pleading requirements under the Federal Rules. F.R.C.P. 8(a)(2). The court may consider documents such as affidavits and other attachments when considering a motion to dismiss based on subject matter jurisdiction. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 f.2d

1012, 1019 (2nd Cir. 1993). Under a 12 (b) motion, the court must assume all of the allegations are true. *Conley v. Gibson*, 355 U.S. 41 (1957). In considering a motion to dismiss, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In determining jurisdiction in federal question cases, the Court is only required to consider, "whether – on its face– the complaint is drawn so as to seek recovery under the federal law or the Constitution. If so [the court should] assume or find a sufficient basis for jurisdiction, and reserve further scrutiny for an inquiry on the merits." *Nowak v. Ironworkers Local 6 Pensions Fund*, 81 F.3d 1182, 1189 (2nd Cir. 1996).

ARGUMENT

POINT ONE

A. The Indian Reorganization Act is Not Applicable to the OIN in New York

The ROD cites section 5 of the IRA 25 U.S.C. §465 as the basis for its authority to take the 13, 003.89 acres of Land into Trust on behalf of the OIN. The ROD asserts that this decision is made pursuant to purported dictate from the U.S. Supreme Court which states that the, " proper avenue" to re-establish sovereign authority is through the IRA. ROD, Page 6. This is a manipulation of the language in the *Sherrill* case, as this language was clearly dictum and was not part of the holding in that case. The Supreme Court in *Sherrill* did not even address the applicability of Section 465 to New York State. In light of the unique history and jurisdiction of New York Indians, when compared with Western tribes who initially and always under federal supervision, the New York Indians were not contemplated by the creators of the IRA. The IRA was intended to put an end to the policy of allotment under the Dawes Act of 1887. See H.R. Rep. No. 1804, at 6 (1934). The Dawes Act has never been applied in New York. The IRA was not

enacted to serve as a vehicle for taking land into trust in the Eastern states as is being wrongly asserted by the DOI.

Section 18 of the IRA, codified as 25 U.S.C. § 478, conditions application of the IRA on a vote of the majority of adult Indians in a reservation. If the majority of the adult Indians "shall vote against application" of the IRA, then the Act "shall not apply." 25 U.S.C. § 478. The Oneidas were not initially deemed to be eligible to vote under the IRA. However, they eventually did vote against the adoption of the IRA. See Laurence M. Hauptman, The Iroquois and the New Deal (1981) at Page 9. The Oneidas voted 12-57 against the application of the IRA. See Memorandum of Michael T. Smith, dated February 24, 1982 attached. The Oneidas have never had a federal reservation and have never had federal superintendence over their land. Thus, defendant's motion to dismiss should be denied and judgment should be entered in favor of plaintiffs dismissing the ROD in its entirety.

B. Section 465 is an Impermissible Delegation of Legislative Authority

There are constitutional limitations on the ability of Congress to delegate its power to an administrative agency. Defendants quote *Whitman v. Am. Trucking Assns*., 531 U.S. 457, 472 (2001) in support of their assertion that the use of the IRA in this case is valid when said statute, "clearly delineates the general policy, the public agency which is to apply to it, and the boundaries of this delegated authority." Defendant's brief, p. 8. As indicated above, the IRA does spell out several limitations which are being completely ignored by the DOI in its efforts to force this tortured reading of the IRA on the citizens of New York. The Oneidas clearly do not have access to Section 478 of the IRA as outlined above. The value of the Oneidas acquisition is clearly in excess of the Two Million Dollar ($2,000,000) limit prescribed in Section 5. The assessed value of the Oneida County parcels alone was estimated to be over $400,000,000. See Report of CGR,

Inc., Kent Gardner, PhD, Jurisdictional and Economic Impacts of Granting the Oneida Indian Nation's Application to Take Lands into Trust In Oneida and Madison Counties, January 2006 (rev. February 2006), pp. 47-51.

Defendant's discussion of Section 5 is a gross distraction in an attempt to avoid the plain reading of the statute. The IRA was not intended to be used by the DOI to assist Indians in avoiding State gambling laws and State and local taxation, as they are doing in this case. The DOI is clearly advocating a continuing and permanent tax dodge that has caused severe economic harm to the state and local economies and will aggravate those conditions if the ROD is not defeated. See CGR, Inc. Report, pp. 39-50. Defendant continually cites cases from the Eighth Circuit in the Western States which have no precedential value in this case as the IRA has never been applied in New York. The validity of the application of the IRA in New York is a case of first impression as the New York Indians and their land status and long term relationship almost exclusively with New York State, lack nearly all of the attributes of the Western tribes. The DOI's attempt to take land into trust under §465 is in excess of the Secretary's (Associate Deputy Secretary) authority. As discussed below, the Secretary claims that the Commerce Clause gives him plenary authority over Indian Affairs. However, this authority is not unlimited and the statute is clear as to the limitations in this particular case. The Defendants' motion to dismiss should be denied based on the aforesaid reasons.

C. The DOI Lacks Authority to Involuntarily Take Property from the State of New York Pursuant to the Tenth Amendment of the U.S. Constitution

When the United States government was formed in 1789, it was given expressly granted or delegated powers by the original thirteen states of the union and the original states were to retain "original or inherent powers" or often referred to as residuary powers. The Constitution assumes

this division of powers throughout while the Ninth and Tenth Amendments reaffirm those powers. The Tenth Amendment states, "The 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."

Article IV § 3 of the U.S. Constitution states:

"New States may be admitted by Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other state . . ."

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the court discusses the limitations found in the Tenth Amendment,

"While the Tenth Amendment has been characterized as a 'truism,' stating merely that all retained which has not been surrendered, *United States v. Darby* 312 U.S. 100, 124 (1941), is not without significance. The Amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry et al v. United States*, 421 U.S. 542 , 547 n. 7. (1975).

Defendant's claim that the Indian Commerce clause gives the "United States" the "constitutional authority to regulate the affairs of Indians." Def. brief p. 7. The Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 states, "The Congress shall have Power to regulate Commerce with . . . the Indian Tribes."

The fact that Congress shall have the power to regulate *commerce*, does not translate into unlimited power in the hands of the executive branch (DOI) to undermine the constitution and the foundation of the separation of powers doctrine, nor should it be translated as empowering the DOI unilateral authority to usurp State and local jurisdiction to set up a quasi-sovereign government with special privileges beyond those of all other citizens.

Defendants' cite *Carcieri v. Kempthorne* , 497 F.3d. 15 (1st Cir. 2007) (en banc), *pet. for*

cert granted in part, 128 S. Ct. 1443 (Feb. 25, 2008), as authority for their assertion that the IRA is applicable in New York. Def. brief p. 8. The *Carcieri* case is currently pending before the Supreme Court and one of the questions presented is whether or not a Rhode Island Tribe is able to qualify under the IRA for purposes of taking land into trust on a 31 acre parcel that is not part of the Congressional Settlement Act. The other question presented in *Carcieri,* concerns the viability of the *Congressional Settlement Act*, not a decision by the DOI, that set aside land for the same tribe which specifically requires that the settlement lands be subject to State civil and criminal jurisdiction, and thus, rendering the lands in question in that case, ineligible for gaming under IGRA. The Act also required the tribe to give up all aboriginal title to their lands. Unlike the *Carcieri* case, the case at bar does not involve an act of Congress. Further, the OIN ceded all of their aboriginal land over 200 years ago. This case involves a bold and raw taking of land from a State by the DOI, contrary to core constitutional principles. The DOI's ROD is well beyond a mere Indian Commerce issue.

Defendants' cite *United States v. John*, 437 U.S. 634, 653 (1978), claiming that the '"United States" (not the DOI) can take land into trust for Indians even where Indians cease to exist in that state." The *John* case does not discuss the applicability of the IRA to New York which is a pre-emptive state and has no federal Indian land within its borders.

Defendant's carefully use the term "United States" in citing some of these cases. None of these cases, nor the U.S. Constitution, authorize the "DOI" to convert New York sovereign land into federal land on behalf of Indians. The Congress has the power to regulate commerce among the Indian tribes, not take land in violation of the Tenth Amendment. To date, no court has expanded Congress's power to take land from a pre-emptive state on behalf of an Indian tribe. The *Sherrill* court was concerned about a checkerboard pattern of jurisdiction that would negatively

impact the state and local government's ability to govern effectively. The legislative plaintiffs, Townsend and Davis, have standing to make this claim as the proposed taking of state sovereign land will severely impair their ability to represent the interests of their constituents against the DOI's intrusion through a quasi-sovereign Indian government. See Attached affidavits of Townsend and Davis.

Plaintiff Melvin Phillips would be placed in the same situation as the spokesperson for a separate and distinct nearby tribe.

POINT TWO

Plaintiffs Have Standing to Challenge the Record of Decision Under APA and NEPA and their Claims Affirmatively State a Claim Upon which Relief Can be Granted.

Plaintiffs have standing to challenge the various claims alleged against defendants in the complaint. Although the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq, does not detail the right of a private citizen to bring an action against an agency, challenges to an agency decision are governed under the Administrative Procedures Act ("APA"). 5 U.S.C. §§ 702, 704. The APA provides private non-governmental plaintiff a right of review of final agency actions. 5 U.S.C. § 704. In this case all three plaintiffs are asking that the court set aside the DOI's final decision to take land in to trust, because the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706. Plaintiffs possess the requisite personal stake in the outcome of this controversy and are within the "zone of interest" as set forth in the relevant statutes and case law governing the standing issue on claims against this ROD and thus, defendants' motion to dismiss the NEPA challenge based on standing must be denied.

Defendants argue that plaintiffs' complaint should be dismissed because plaintiffs lack

prudential standing to bring this action. Defendants define prudential standing as "a general prohibition on a litigant's raising another person's legal rights" and that the claim does not fall within the zone of interests protected by the law invoked." (Defendant's brief, P. 19)

In order to meet the prudential standing requirements under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) plaintiff must prove that he has suffered an "injury in fact" which is "concrete and particularized" under the statutes in question; namely, NEPA and APA. Finally, *Lujan* also requires that the defendant's unlawful conduct will cause the injury and will likely be addressed by the relief demanded. *Lujan* at 560-561. There is an important distinction in *Lujan* which asserted that, "'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards of redressability and immediacy." Id. at 572 n. 7. In *Lujan*, the Supreme Court in essence held that the "procedural right" must be connected to the plaintiff's own harm. *Lujan* involved the building of a federally licensed dam and its impact on nearby residents. The court ruled against the standing of interested parties who "live (and propose to live) at the other end of the country from the dam." However, the court specifically stated, "We do *not* hold that an individual cannot enforce procedural rights: he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." Id. at 572 n. 8. *Lujan* was cited for this same principle in *Nulankeyutmonen Nkihtaqmikon v. Impson*, 2007 U.S. App. LEXIS 22053 (1st Cir. Sept. 14, 2007).

In the case at bar, the plaintiffs are suing to enforce their rights under NEPA through the APA where there is a strong presumption in favor of judicial review. Plaintiffs' contend that the DOI and BIA have failed to take the requisite "hard look" at devastating consequences that such a sweeping and comprehensive decision will have on the environment. Plaintiffs assert that the

environment in this case includes the "human environment" as set forth in NEPA which includes,

"The continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote general welfare to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4332 (a).

Plaintiffs' interest in the environmental and economic well-being of the State of New York are among the interests to be considered under 25 C.F.R. § 151.10(f), 151.10 (h) before land is placed into trust. *See, e.g.*, TOMAC v. Norton, 193 F. Supp. 2d 182 (D.D.C. 2002) *aff'd*, 433 F.3d 852 (D.C.Cir. 2006*)* (holding that a community group had standing to challenge the BIA's decision to take land into trust for the construction of a casino under the Indian Gaming Regulatory Act) and 25 C.F.R. § 151.10 (f), (h); *see also Citizens Exposing Truth About Casinos v. Norton,* 2004 U.S. Dist. LEXIS 27498, at *6 & n.3 (D.D.C. Apr. 23, 2004) (holding that a citizen's group had standing under the Indian Reorganization Act, found at 25 U.S. C. § 461-475, to challenge a trust acquisition because the Act's implementing regulations provide for consideration of land use conflicts and NEPA requirements). *Cf. City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197; 125 S. Ct. 1478, 1493; 161 L. Ed. 2d 386 (2005) "If (the Tribe) may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." Id. p 210.

Plaintiff Phillips is equally, if not more vulnerable if OIN were to take control of the State reserved lands occupied by his family and the Marble Hill band.

This position of the BIA on NEPA is based on federal common law district court rulings that held that the state and local governments did not have standing to sue against the fee to trust

applications of Indian tribes because they were not within the "zone of interests" to be protected by the IRA and 25 U.S.C. § 465. See *City of Tacoma et al v. Andrus et al*, 458 F. Supp. 465 (D.D.C. 1978) and *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978).

The above district court opinions have been effectively overruled by *Sherrill* and the promulgation of the new regulations implementing 25 U.S.C. § 465. See 25 C.F.R.§151 et. seq. (2004). As prepared, the ROD does not address any of the factors deemed part of the "justifiable expectations" of the local non-Indian residents or state and local governments identified in the *Sherrill* decision as disruptive. The regulatory and cumulative jurisdictional impacts of removing thousands of acres from the sovereign control of state and local governments has not been adequately addressed by agency and thus, plaintiffs have a valid APA claim to have the decision set aside.

Defendant's further contend that NEPA and APA do not afford plaintiffs any relief for economic harm as a result of the fee to trust decision. Economic devastation has already occurred and continues to ravage the area as a result of the ongoing illegal casino operation run by the applicant OIN. See, CGR, Inc. Report, pp. 39-50. All three plaintiffs reside and work within a 20 mile radius of the lands proposed to be taken into trust. All three have suffered harm and will continue to suffer concrete and particularized harm if the proposed land is to be placed in trust. All three plaintiffs suffer greater harm than residents from other parts of the state as Oneida County's higher taxes are a direct result of the OIN's failure to pay millions of dollars in lawfully owed taxes. See CGR, Inc., Report pp. 39-50. The OIN also refuses to comply with state and local laws concerning land use, DEC regulations and payment of property, sales and use taxes just to name a few ongoing illegalities. This has caused hundreds of tax paying businesses to go under and thousands more who have lost their jobs as a result of the uneven playing field that is currently

caused by OIN's refusal to comply with existing laws. All of this has resulted in a much higher cost of living for all residents of Oneida County than in neighboring counties with similar demographics. See CGR , Inc., Report, January 2006 (rev. February 2006). Plaintiffs all reside within a 20 mile radius of the parcels slated to be taken into trust by DOI. Plaintiffs Townsend and Davis are also taxpayers in Oneida County.

POINT THREE

Plaintiffs have Standing to Make a Claim Under IGRA

As in the NEPA claim, plaintiffs are suing to enforce legal rights under the Indian Gaming Regulatory Act (IGRA). IGRA has specific and particularized rules regulating Indian gaming. 25 U.S.C. §2719 et seq. Specifically, § 20 prohibits gaming on lands acquired in trust after October 17, 1988, with certain exceptions. The exceptions contained in subsection (b) state:

"(1) subsection (a) 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

(B) lands are taken into trust as part of –

(I) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." (Emphasis supplied.)

OIN's gambling facility does not qualify under Section 20 nor does it qualify under one of the exceptions. One of the reasons for enacting IGRA was to regulate the adverse consequences of gambling on surrounding communities. 25 U.S.C. §2719(b)(1)(A); see *TOMAC v. Norton*, 193 F.Supp. 2d 182, 190 (D.D.C. 2002), aff'd in relevant part, 433 F3d. 852 (D.C. Cir. 2006). Gambling under IGRA requires that the lands where gambling occur be considered pursuant to a valid compact, signed by the Governor of the state. The DOI/BIA have failed to comply with Section 20 or the above listed exceptions under the statute. Thus, the OIN parcels pertaining to gaming are ineligible for gaming and the Defendant's record of decision is arbitrary and capricious under the APA standard.

All three plaintiffs live and work near the OIN parcels that are the subject of the decision to take land into trust on behalf of OIN. All three plaintiffs have a personal stake in these issues and thus have standing to sue under the IGRA through the APA. As residents and nearby property owners, they have a "concrete and particularized interest" in ensuring that defendants ongoing violation of IGRA and other illegalities be stopped. As mentioned above with the NEPA statute, a violation of IGRA which was enacted in part to protect citizens from illegal gambling operations, affords these plaintiffs standing to bring this case. *TOMAC*, at 187-188.

Assemblyman David Townsend and County Legislator D. Chad Davis also have standing to sue as *parens patriae* on behalf of their constituents. See *Support Ministries for Persons with Aids, Inc. V. Waterford*, 799 F. Supp. 272 (N.D.N.Y. 1992) As a duly elected member of the 115th Assembly District of the New York State legislature, precisely the district where OIN's illegal gambling operation is located, Plaintiff Townsend is empowered to protect the rights of the State

to defend its sovereignty, it's right to collect taxes and to enforce health and safety regulations. The legislative plaintiffs have legal and legitimate concerns about the negative effect of casino gambling in their neighborhoods and the overall harm to the surrounding community. Furthermore, IGRA requires the consent of the Governor as well as the approval of the legislature before a gaming compact can be valid and in full force and effect. (*Peterman v. Pataki*, 798 N.Y.S. 2d 347, 4 Misc. 3d 1028A, 2004 WL 2222278 (N.Y. Sup. Ct. 2004) affirmed *Peterman v. Pataki*, 21 AD3d 1388, 801 NYS2d 212,2005 N.Y. App. Div. LEXIS 10373 (N.Y. App. Div. 4th Dep't, 2005) Appeal denied by *Peterman v. Pataki*, 24 AD3d 1328,806 NYS2d 442, 2005 N.Y. App. Div. LEXIS 14706 (N.Y. App. Div. 4th Dep't, 2005) Appeal denied by *Peterman v. Pataki*, 6 NY3d 713, 849 NE2d 971, 816 NYS2d 748, 2006 N.Y. LEXIS 1271 (2006) US Supreme Court certiorari denied by *Oneida Indian Nation v. Peterman*, 127 S Ct 730,166 L Ed 2d 562, 2006 U.S. LEXIS 9260 (U.S., Dec. 4, 2006)).

As a duly elected member of the Legislature, Plaintiff Townsend as the voice the people, is empowered and obliged to cast a vote either for or against the compact. His constituents have been denied their voice by the BIA/DOI failure to comply with applicable Federal and state laws. Plaintiff Davis is in the same position as a County legislator who is duly elected by his constituents to represent their interests.

All three plaintiffs clearly have claims that fall with the "zone of interests" contemplated by the prudential standing requirement of IGRA and thus, the defendant's motion to dismiss must be denied.

POINT FOUR

Plaintiff Melvin Phillips and Marble Hill Oneidas Should Be Protected by the State of New York Because of their "Recognized" Status

Placing land into trust on behalf of OIN will cause harm to the Marble Hill Oneidas as the status and future of their State reserved lands will be placed in jeopardy. Plaintiff, Melvin L. Phillips, is a full-blooded Oneida Indian residing in the Town of Vernon, Oneida County, on untaxed state land where the Indian title has never been extinguished. Melvin Phillips is the official spokesperson for the Marble Hill band, and is an Orchard Party-Marble Hill (otherwise known as Orchard Hill) Oneida representative to the Grand Council of the Iroquois Confederacy. This band is recognized as a separate tribe of the Oneida Indians, at least since the 1838 Treaty, and nothing, including an Act of Congress, has happened to remove this recognition since that time. The Marble Hill Oneidas should be treated the same as the Tonawanda Band of Senecas in terms of Federal recognition, separate from the already existing Seneca Nation, was based on this same treaty. Thus, the Orchard Party/ Marble Hill Oneidas should not be denied their separate recognition. Unlike the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames, the Marble Hill Oneidas are the only historic Oneidas who hold paramount title to the land that they live on and can trace an unbroken connection to New York land. The Marble Hill band are an independent tribal community of Oneida Indians who trace their lineage directly from the Orchard Party of the historic Oneida Indians. None of the historic Oneida Indian tribes have applied to place the lands into trust where Plaintiff Phillips and other members of his family live. Plaintiff Phillips is a direct descendant of the "Home Party" from the June 25, 1842 treaty with the Orchard Party, who chose not to leave the State of New York under (after) the Treaty of Buffalo Creek in 1838 (Article XIII)

The Marble Hill Oneidas have been recognized by the federal government. Plaintiff can identify his relatives who signed the Treaty of 1838 and is the spokesperson for the Marble Hill Oneidas. See Attached Affidavit of Melvin Phillips.

The BIA stated in a memorandum dated February 24, 1982, " . . . most of the Marble Hill Indians are descendants of the "Home parties" of the 1840's. Therefore, because their tribal affiliations can traced to the town Home Parties of the 1840 treaties, they are the only historically identifiable "tribal" Oneidas in New York. This is not to say that the Onondaga group are not Oneida. They, however are individual not tribal. They arrived on Onondaga as individuals or in small groups and are not recognized bands or tribes." BIA Memo Page 9, Section G. This Attachment is also Exhibit C in the State of New York's Motion for Summary Judgment, 6:08-CV-660, Filed November 17, 2008.

Sharon Blackwell of the Department of the Interior has stated in an affidavit, "The absence of federal recognition does not imply that it (tribe) is not a successor in interest to any interests protected, secured or reserved to the Historic Oneida Nation by Articles II and IV of Treaty of Canandaigua." (Attachment)

The present situation is that the Oneida Nation of New York has accused Plaintiff Phillips and other Orchard Party/Marble Hill Oneidas of treason. More accurately, the Marble Hill people are following the rules of the Grand Council, their traditional governing body. If the DOI's effort to place land into trust is not defeated, and the Orchard Party/Marble Hill Oneidas separate and distinct sovereignty is destroyed, the Orchard Party/Marble Hill Oneidas will be placed under control of the OIN, a separate tribe, against their will. Their civil rights will then be violated by the arbitrary enforcement against them by the OIN under the auspices of the BIA. See attached affidavit of Melvin L. Phillips.

The effect of the past actions of the OIN and the current ROD is the destruction of the Marble Hill Oneidas state reservation that has been preserved by them since the Treaty of 1788. The Marble Hill land is threatened by this transfer to a rival tribe, which is an involuntary taking by the federal government who has promised to leave the land intact and in their control. See Treaty of Canandaigua 1794, Article 3 and 4. Plaintiff, Melvin Phillips is also a citizen and resident of the affected municipalities. As both an Indian spokesmen for the Marble Hill Oneidas, his treaty rights, rights as an Indian and rights under the United States Constitution are being infringed by an illegal involuntary change of government which will result in the loss of tribal property. As an individual and United States citizen, he has all of the civil rights of any other citizen. It is a violation of those rights to have a non-representative government forced upon him and to be deprived of his rights to certain lands pursuant to Treaties that have been accepted and affirmed by both he the State and Federal governments. Plaintiff, Melvin Phillips not only has no say in the Oneida Nation Government but he is falsely being accused of treason by a government that has no legitimate claim to his membership or consent. Further, ROD will force a government onto him in which he has no representation, no rights, no participation in violation of his most fundamental civil and constitutional rights including the 10th Amendment.

While it is true that certain members of the Marble Hill community at one time signed a limited letter of support for current leadership of the Oneida Indian Nation of New York, the Marble Hill Oneidas have never surrendered their separate tribal existence or identity. Members of the Marble Hill Oneidas, including plaintiff Phillips, signed a letter of support for Halbritter which should not construed as a waiver of his separate status.

The Marble Hill Oneidas and his leadership were endorsed again in 1994 when Melvin Phillips was recognized as the representative of the Oneida Nation of Orchard Hill by the Grand

Council of the Haudenosaunee, or Six Nations Iroquois Confederacy and has represented them on numerous occasions on negotiations with the Governors office, the Environmental Protection Agency, and other official entities (See, Attachment).

Again, Ms. Blackwell states in # 8 that, the absence of federal recognition, however, does not imply that it is not a successor-in-interest to any interests protected, secured**,** or reserved to the historic Oneida Nation..." (See, Blackwell Affidavit attachment)

The Marble Hill Oneidas were also recognized as a tribal entity in a letter dated April 25, 1980 from Rick Lavis, Deputy Assistant Secretary – Indian Affairs, Department of Interior (Attachments). The Oneida Daily Dispatch summarized this letter with a headline that said, "New York Oneidas not 1 nation, Department of Interior suggests." (Oneida Daily Dispatch, 4/29/1980)

The Marble Hill Oneidas were also recognized in an "Historical Sketch of Oneida Nation" attached to the aforesaid letter prepared by the DOI dated, April 25, 1980 which stated: "Thus, the question of eligibility was focused only on those Oneida in Oneida County, which are now identified as the 'Marble Hill' group. Initially they were also considered not eligible, but upon reconsideration the Department of the Interior changed its position and called for a referendum on June 17, 1936, the last day such a vote could be held. A question was then raised as to which Oneida people should be allowed to vote and if there should be on or two polling places. It was decided that there would be only one voting place at Oneida County and that the Oneida on the Onondaga would be allowed to vote 'as absentee members if otherwise eligible.'"

Although Plaintiff Phillip's lands are not currently included in the ROD on behalf of OIN, there is a continuing threat that these lands could be included in a later application if the land into trust application is successful. OIN has indicated its intention to expand on the trust acreage in the future. The ROD contemplates additional land to be acquired in the future up to 35,000 acres as

contemplated by Alternative B in response to prior land claim settlement discussions which could very well include the Plaintiff Phillips Marble Hill land. See ROD, P. 15.

Without immediate protection from the Court, Plaintiff Phillip's rights' and those of the people on Marble Hill are threatened by the DOI's attempts to convert their reserved State land into trust land under the dictatorship of the current leadership. For example, Plaintiff Phillips was threatened in a letter from Oneida Indian Nation's Clerk Men's Council and Clan Mothers dated June 5, 1995 which falsely accuses Melvin Phillips of numerous outrageous claims and stating clearly that he has lost his "voice". The letter closes by stating "…It is a serious offense against the Nation and its people to withhold information about efforts to erode Nation sovereignty, or to be part of a conspiracy to withhold such information." (See, Attachments)

Further, in the Men's Council Minutes dated April 14, 1997, "…Council stated when these people refuse, they are the ones creating their own misery…" (See, Attachments)

If the Marble Hill Oneidas are not given separate recognition and self-determination, and the OIN's land is taken into trust, they will be subject to the same abuse that Plaintiff Phillips has suffered in his efforts to protect his State reserved land and the land of the Marble Hill Oneidas.

The Marble Hill Oneidas have never ceded title to their land (Lot numbers 2 & 3 from the June of 1842 Treaty with New York State). If land is taken into trust and the OIN is given sovereign rights over the lands in the application, then there is nothing to stop OIN from enforcing the codes of the Oneida Indian Housing Authority currently being enforced on the 32-acre land against the Marble Hill people as well. Without recognition of Plaintiff Phillips leadership, there is no protection on the Marble Hill lands from the arbitrary enforcement of the OIN. The "checkerboard" sovereignty that Justice Ginsberg warns about in writing for the majority in *Sherrill* is of great concern for Indians and non-Indians alike. "…has recognized the

impracticability of returning to Indian control land that generations earlier passed into numerous private hands. "...See, *e.g., Yankton Sioux Tribe v. United States,* 272 U.S. 351, 357... to initiate the impossibility doctrine: ...would 'seriously burde(n) the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches. *Hagen v. Utah*, 510 U.S. 399, 421. at 335."

In keeping with the strong policy of the federal government to protect Indian lands, once an Indian tribe (the Orchard Party-Marble Hill Oneida) makes out a *prima facie* case of prior possession or title to the property in dispute (Lots 2, 3 and Burial Ground), the burden of proof rests upon the non-Indian to demonstrate otherwise. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668-69, 99 S.Ct. 2529, 2538-39 (1979)(citing 25 U.S.C. 194). The burden of proof thus shouldered by the non-Indian questioning Indian title encompasses both the burden of producing evidence and the burden of persuasion.

As the 1982 Interior Memo states, to the extent that plaintiff Phillips and the Home Party descendants still hold occupancy/possessory title of their land, they are the only Oneidas to have never left the land, and maintain an existence since time immemorial on Lot # 3 (June 1842 Treaty with Home Party) and Lot # 2 (NY State Law 1869 nullifying Patent) with a burial ground, meeting place, community structure, etc.

The Marble Hill Oneidas are the **only** band who meet the requirements for federal recognition under the current statutes. In order to meet the guidelines of CFR, Title 25, Volume 1, Part 83.1 defines an, "Indian tribe, also referred to herein as tribe, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States..."

The Marble Hill Oneidas also meet the "Mandatory criteria for Federal acknowledgment" under Part 83.7. Part 83.8 requires previous Federal acknowledgment, "…If a petitioner provides

substantial evidence of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of Sec. 83.7 to the extent required by this section."

Therefore, since Plaintiff Phillips and the Marble Hill Oneidas meet all of the requirements to be a federally recognized tribe, he/they have standing to raise all of the claims brought int his action.

CONCLUSION

For all of the reasons above, this Court should deny the government's partial motion to dismiss Plaintiffs' (Townsend, Davis and Phillips) complaint in its entirety based on standing and the failure to state a claim upon which relief can be granted for the following claims; Challenge to the Tenth Amendment; Applicability of the IRA; the NEPA claim; the IGRA claim; and all the Civil Rights claims, and for such other and further relief the court deems appropriate.

DATED: November 18, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2008, I filed the foregoing document and related attachments with the Clerk of the Court via the CM/ECF system which gave notice to the following attorney:

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