UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs,

v. 6:08-cv-644 (LEK/GJD)

KENNETH L. SALAZAR, et al.,

Defendants.

OPPOSITION OF DEFENDANT-INTERVENOR ONEIDA NATION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

OVERVIEW 1

I. DOI HAS AUTHORITY TO TAKE LAND INTO TRUST FOR THE ONEIDA NATION BECAUSE THE NATION WAS A RECOGNIZED TRIBE "UNDER FEDERAL JURISDICTION" AT THE TIME OF THE IRA. 3

II. DOI APPLIED THE CORRECT STANDARDS UNDER ITS PART 151 REGULATIONS.....16

A. The "On-Reservation" Regulation Applies to the Oneida Trust Application Because All of the Land is Within the Boundaries of the Oneida Reservation Acknowledged in the Treaty of Canandaigua.....16

B. Remand to Apply the 25 C.F.R. § 151.11 Off-Reservation Standards Would Be Pointless Because DOI Has Already Decided and Stated in the ROD that It Would Reach the Same Decision Under 25 C.F.R. § 151.11 that It Reached Under the On-Reservation Standards in 25 C.F.R. § 151.10.....18

III. THE ROD IS NOT INCONSISTENT WITH DOI POLICY. 19

A. There Is No DOI Policy Limiting Trust Land to Tribes that Cannot Manage Their Own Affairs.....20

B. In Light of the Continuing Dispute about the Validity of Property Taxes and Tax Liens, It Made No Sense for DOI to Order Preliminary Title Opinions.....22

1. Preliminary title opinions would have been pointless because everyone knew about the Counties' tax liens, and DOI received title insurance policies dealing with all other title issues. 22

2. Departure from internal procedures that do not affect the substantive standards applied by an agency is not a basis for setting aside agency action.....23

C. DOI Properly Addressed 25 C.F.R. § 151.13 by Requiring the Oneida Nation to Post Letters of Credit. 24

IV. DOI CANNOT BE FAULTED FOR CONSIDERING MORE ALTERNATIVES AND SCENARIOS IN THE EIS THAN MIGHT HAVE BEEN NECESSARY. 27

V. DOI CONSIDERED ALL OF THE FACTORS IN 25 C.F.R. § 151.10 REGARDING ON-RESERVATION TRUST ACQUISTION.....29

A. DOI Considered the Scope of Its Legal Authority. 25 C.F.R. § 151.10(a).....30

B. DOI Considered the Need for Additional Land. 25 C.F.R. § 151.10(b).....31

C. DOI Considered Tax Impacts. 25 C.F.R. § 151.10(e). 35

D. DOI Adequately Considered Jurisdictional Conflicts. 25 C.F.R. § 151.10(f).....40

E. DOI Considered Its Ability to Discharge Its Responsibilities. 25 C.F.R. § 151.10(g).....45

VI. THERE IS NO REASON TO ADDRESS FUTURE TRUST APPLICATIONS.....46

CONCLUSION.....47

TABLE OF AUTHORITIES

Page(s)

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 16, 25

Brodsky v. United States Nuclear Regulatory Comm'n, 578 F.3d 175 (2d Cir. 2009) 17

Butte Cnty. v. Hogen, 613 F.3d 190 (D.C. Cir. 2010) 5

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 21

Carcieri v. Salazar, 555 U.S. 379 (2009) 3, 4

Center for Biological Diversity v. Dep't. of the Interior, 623 F.3d 633 (9th Cir. 2010) 40

Cent. N.Y. Fair Bus. Ass'n v. Salazar, No. 08-cv-660, Mem. Decision & Order (filed Mar. 10, 2010) (DE 74) 32, 44

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 30, 45

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) ..... passim

Coliseum Square Assoc., Inc. v. Jackson, 465 F.3d 215 (5th Cir. 2006) 19, 24, 44

Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82 (2d Cir. 2000) 20, 21, 32, 35

Fla. Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 5

Fund for Animals v. Kempthorne, 538 F.3d 124 (2d Cir. 2008) 29

Gila River Indian Cmty. v. United States, 776 F. Supp. 2d 977 (D. Ariz. 2011) 24

In re Sunflower Racing, Inc., 219 B.R. 587 (Bankr. D. Kan. 1998) 26

Iowa Tribe of Kansas & Nebraska v. Salazar, 607 F.3d 1225 (10th Cir. 2010) 45

Jennison v. Hartford Life & Accident Ins. Co., No. 3:10-CV-00164 (LEK/DEP), 2011 WL 3352449 (N.D.N.Y. Aug. 3, 2011) 5

Lyng v. Payne, 476 U.S. 926 (1986) 19

Marshall Cnty. Health Care Auth. v. Shalala, 988 F.2d 1221 (D.C. Cir. 1993) 1, 5

Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) 44

Mich. Gambling Opposition v. Norton, 477 F. Supp. 2d 1 (D.D.C. 2007) 24

Morton v. Mancari, 417 U.S. 535 (1974) 32

Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005) 1, 5, 43

New York v. Salazar, 701 F. Supp. 2d 224 (N.D.N.Y. 2010) 1, 6, 28

New York v. Salazar, No., 08-cv-644, Mem. Decision & Order (filed Sept. 29, 2009) (DE 132) 38, 41

Oneida Indian Nation v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003) ..... passim

Oneida Indian Nation v. Cnty. of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977) 4, 15

Oneida Indian Nation v. Cnty. of Oneida, 719 F.2d 525 (2d Cir. 1983) 4

Oneida Indian Nation v. Madison Cnty., __ F.3d __, 2011 WL 4978126 (2d Cir. Oct. 20, 2011) 16, 23, 43

Oneida Indian Nation v. Madison Cnty., 401 F. Supp. 2d 219 (N.D.N.Y. 2005) 23

Oneida Indian Nation v. Madison Cnty., 605 F.3d 149 (2d Cir. 2010) 16

Oneida Indian Nation v. Oneida Cnty., 432 F. Supp. 2d 285 (N.D.N.Y. 2006) 23

S.W. Ctr. for Biological Diversity v. Babbitt, 131 F. Supp. 2d 1 (D.D.C. 2001) 5

Schweiker v. Hansen, 450 U.S. 785 (1981) 19

Shawano County v. Acting Midwest Regional Director, 53 IBIA 62 (Feb. 28, 2011) 11

South Carolina v. Catawaba Indian Tribe, Inc., 476 U.S. 498 (1986) 20

TOMAC v. Norton, 433 F.3d 852 (D.C. Cir. 2006) 45

Town of Verona v. Salazar, No. 08-cv-0647, Mem. Decision & Order (filed Sept. 29, 2009) (DE 33) 32

United States v. Boylan, 256 F. 468 (N.D.N.Y. 1919) 4, 8

United States v. Boylan, 265 F. 165 (2d Cir. 1920) 4, 9

United States v. Holliday, 70 U.S. 407 (1865) 9

United States v. John, 437 U.S. 634 (1978) 12

USPS v. Gregory, 534 U.S. 1 (2001) 2

STATUTES

25 U.S.C. § 2719 21

25 U.S.C. § 465 ..... 3, 20, 35

40 U.S.C. § 523 31

OTHER AUTHORITIES

1934 Cong. Rec. S11124-25 14

Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* 258, 260, 280 (2000) 14

F. Cohen, Handbook of Federal Indian Law 273 (1941) 12

H.R. Rep. No. 81-30, 80 (1950) 8

RULES

Fed. R. Civ. P. 10(c) 3

N.Y. Indian Law § 6 23

N.Y. Real Property Tax Law § 454 23

TREATY

Treaty of Canandaigua, 7 Stat. 44, Nov. 11, 1794 ..... 4, 8

REGULATIONS

25 C.F.R. § 151.10 ..... 16, 17, 29

25 C.F.R. § 151.11 ..... 16, 18

25 C.F.R. § 151.11(b) 18, 40

25 C.F.R. § 151.2(f) 16, 17, 25

25 C.F.R. pt. 292 ..... 21, 26

Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393, § 6(a) 25

OVERVIEW

The striking thing about plaintiffs' motion for partial summary judgment is what is missing. After delaying summary judgment proceedings by at least two years to pursue extraordinary extra-record discovery related to a bias claim, plaintiffs have abandoned that claim. Plaintiffs' explanation (Pls. Mem. 4 n.2),[1] that they have not sought summary judgment because there *may* be disputed issues of material fact rings hollow. The Magistrate Judge granted discovery of privileged documents and a deposition of one of DOI's decision-makers. *New York v. Salazar*, 701 F. Supp. 2d 224, 243 n.14 (N.D.N.Y. 2010) (DE 183). Plaintiffs barely asked any questions related to bias during the deposition, did not move to include the deposition in the administrative record, and did not seek any further discovery. If plaintiffs thought that they could make the showing of bias required to set aside agency action, they would have presented that evidence in a motion for summary judgment. There is no other avenue left for them to pursue such a claim in an APA case, in which claims and defenses are resolved on summary judgment. *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 561 (D. Vt. 2005) ("When reviewing agency action, the district court 'sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the Secretary's [action] was factually flawed.'") (citation omitted); *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("Appellants . . . overlook the character of the question before the district court when an agency action is challenged. The entire case on review is a question of law, and only a question of law.").

[1] Citations to "Pls. Mem." refer to Plaintiffs' Memorandum of Law in Support of Summary Judgment (DE 237). Citations to Nation "SJ Mem." refer to Defendant-Intervenor Oneida Nation's Memorandum of Law Supporting Its Motion for Summary Judgment (DE 236). Citations to "U.S. SJ Mem." refer to the United States' Memorandum of Law in Support of Motion for Summary Judgment (DE 240).

Declining to submit their bias claim to this Court for judgment, plaintiffs have chosen instead to drape insinuations of bias around attacks on the merits of DOI's decision. Plaintiffs cannot impeach by insinuation a decision that they lack sufficient proof to challenge directly on the merits. DOI is entitled to the presumption of regularity applicable to all government decision-making. *USPS v. Gregory*, 534 U.S. 1 (2001). Neither the defendants nor this Court should be required to devote attention to rebutting baseless insinuations that plaintiffs have declined to pursue.

The bulk of plaintiffs' memorandum is devoted to the claim that DOI did not consider and lacked statutory authority to take the land into trust, arguing that the Oneida Nation was not "under federal jurisdiction" at the time of the Indian Reorganization Act (IRA), which the Supreme Court concluded in its *Carcieri* decision is required to be eligible for trust land under the IRA. Plaintiffs concede that a remand to DOI to address this *Carcieri* question resulting from the Supreme Court's post-ROD *Carcieri* decision would be futile. It would be futile, not – as plaintiffs would have it – because DOI is flouting *Carcieri*, but rather because there is only one conclusion DOI or any fair decision-maker could reach: the Nation *was and is* under federal jurisdiction, beginning at the latest with the Treaty of Canandaigua in 1794, and continuing through the payment of treaty annuities, through the Second Circuit's 1920 *Boylan* decision, and on through DOI's decision to have the Oneida Nation hold a vote on whether to reorganize under the IRA, and to the present. Standing alone, DOI's decision to hold a vote on IRA reorganization controls the question, because under the IRA eligibility to hold an election is governed by the same standard as entitlement to trust land. Any tribe that DOI called to vote on IRA reorganization qualifies for trust land under the IRA as a matter of law.

Plaintiffs' remaining claims are legally or factually erroneous or are nothing more than quibbles with DOI's judgment about how to balance competing considerations entrusted by statute to DOI's discretion. The Nation's previously-filed Memorandum of Law in Support of Motion for Summary Judgment showed from the ROD and the administrative record that DOI engaged in a careful effort to balance the relevant interests under its Part 151 regulations, as anticipated by the Supreme Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005).

Plaintiffs' summary judgment motion should be denied for the reasons set forth in the Nation's Memorandum of Law in Support of Motion for Summary Judgment (DE 236), which is incorporated here by reference pursuant to Fed. R. Civ. P. 10(c) to minimize repetition, as well as for the reasons added here.

I. DOI HAS AUTHORITY TO TAKE LAND INTO TRUST FOR THE ONEIDA NATION BECAUSE THE NATION WAS A RECOGNIZED TRIBE "UNDER FEDERAL JURISDICTION" AT THE TIME OF THE IRA.

Relying on scattered extra-record documents plaintiffs chose not to submit to DOI when the Nation's trust application was under review before the agency, and on an extra-record report from a historian whom plaintiffs did not disclose as they were required to do, plaintiffs urge this Court to determine for itself whether the Nation was "under federal jurisdiction" and thus meets the requirements identified by the Supreme Court in its 2009 *Carcieri* decision. *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Supreme Court held that only Indians that were "under federal jurisdiction" at the time that the IRA was enacted qualify for trust land under section 5 of the IRA, 25 U.S.C. § 465. Prior to *Carcieri*, DOI had construed the provision of the IRA defining "Indian" to refer to members of tribes under federal jurisdiction at the time of the agency action, and the only court to address that question had agreed with DOI. 555 U.S. at 386-

87. Accordingly, there was no reason in 2008 for the ROD explicitly to address whether the Oneida Nation was under federal jurisdiction at the time of the IRA. But there was and could be no uncertainty about the answer to the "under federal jurisdiction" question: as noted in the ROD, DOI determined that the Oneida Nation could vote on reorganization under the IRA, which is dispositive here. ROD 33-34; Nation SJ Mem. 12, 14-15; U.S. SJ Mem. 19-20.) DOI's determination in 1936 is consistent with the decisions by this Court, by the Second Circuit, and by the Supreme Court confirming the Oneida Nation's succession to federal jurisdiction established in the Treaty of Canandaigua (7 Stat. 44, Nov. 11, 1794), and that jurisdiction was never removed.[2]

Plaintiffs urge the Court to comb through their ad hoc historical record rather than the administrative record. (Pls. Mem. 24.) That would be both inappropriate and unnecessary.

It would be inappropriate because judicial review under the APA is limited to the administrative record. Plaintiffs cannot avoid the deference courts owe to agency determinations, especially on matters within the agency's expertise, by withholding documents from the agency and later offering them to the court. Neither the documents nor the report plaintiffs have submitted to this Court were submitted to DOI as part of the administrative record, and this Court therefore should not consider them. Plaintiffs could have submitted the documents to DOI in support of their argument that DOI lacked authority to acquire trust land for

[2] *E.g.*, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005) (Oneida Nation "is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation"); *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 166 (2d Cir. 2003) (same); *Oneida Indian Nation v. Cnty. of Oneida*, 719 F.2d 525, 527 (2d Cir. 1983) (same); *Oneida Indian Nation v. Cnty. of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977) (same); *United States v. Boylan*, 265 F. 165, 174 (2d Cir. 1920) (guardian and ward relationship persists); *United States v. Boylan*, 256 F. 468, 479 (N.D.N.Y. 1919) ("The United States has steadily and uniformly asserted its jurisdiction over the Indians of the 'Six Nations,' which, as stated, included the Oneida Indians and other New York tribes."); *id.* at 494 ("It has repeatedly been decided that the Constitution of the United States conferred jurisdiction over the Indian tribes and their property in the several states of the Union, and this jurisdiction was exercised as we have seen.").

the Oneida Nation.[3] (*See* Pls. Mem. 24 n.18 (alleging that the State had put DOI "on notice" of the *Carcieri* issue "since at least January 30, 2006").) Although plaintiffs said during the trust process that there were "serious questions" about federal *recognition* of the Oneidas in 1934, they backed that up with nothing more than a single irrelevant document.[4]

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[3] Plaintiffs were aware of and exercised their right to submit material to DOI. They deluged the agency with submissions of materials on various topics, and yet they chose not to do so with regard to the *Carcieri* argument. Had they done so, DOI would have considered the materials. *See Butte Cnty. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (remanding to the agency to consider material submitted prior to final agency action). Plaintiffs cannot now challenge the agency's trust decision on the basis of extra-record materials they withheld. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Jennison v. Hartford Life & Accident Ins. Co.*, No. 3:10-CV-00164 (LEK/DEP), 2011 WL 3352449, at *5 (N.D.N.Y. Aug. 3, 2011) ("In the Second Circuit, review under the arbitrary and capricious standard is limited to the evidence in the administrative record.") (citation omitted).

> [T]he process engaged in under the APA is one of judicial review of what the agency did with the information before it and not an entirely independent judicial determination of the question before the agency in which a court considers the information before the agency *and* information which plaintiffs did not bring to the attention to the agency but which it asks the court to consider . . . . That mongrel cannot possibly be called judicial review of agency action. The policy of deferring to an agency's expertise by engaging in the true form of judicial review of its decision is frustrated in the most obvious way by permitting a party who has petitioned the agency to overturn the agency's decision on the basis of evidence which it could have offered the agency but did not. The last thing a reviewing court should do is encourage parties not to submit pertinent information to an agency and then seek the judicial overturning of agency action based on the failure to consider what the petitioning party supposedly knew but did not tell the agency. Engaging in a process of predicating a judicial conclusion of the irrationality of an agency's decision on information not before the agency is therefore understandably a perfect violation of the law of this Circuit pertaining to judicial review.

S.W. Ctr. for Biological Diversity v. Babbitt, 131 F. Supp. 2d 1, 6 (D.D.C. 2001); *see Nat'l Wildlife Fed'n*, 386 F. Supp. 2d at 561 ("When reviewing agency action, the district court 'sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the Secretary's [action] was factually flawed.'") (quoting *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225 (D.C. Cir. 1993)); *Marshall Cnty. Health Care Auth.*, 988 F.2d at 1225 ("Appellants wish to go to trial, preceded by discovery, to show the Secretary's wage studies were 'flawed' or unfair and that they were 'of questionable value' to justify refusal of an exception. Appellants misunderstand the role the district court plays when it reviews agency action. The district court sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the Secretary's study was factually flawed.").

[4] The State submitted comments challenging DOI's authority to take land into trust on a number of grounds, including the claim that the IRA did not apply to New York, and that the Nation was ineligible because it had rejected IRA reorganization. Baldwin Decl. Ex. O, at AR000286 n.2; Ex. P, at AR0001113 n.2. In a footnote, the State said there were "serious questions as to whether in 1934 the DOI recognized the Oneidas in New York as a tribe," citing only the 1914 (pre-*Boylan*) Reeves report. Baldwin Decl. Ex. O, at AR000286 n.2. (*See* Pls. Mem. 26

After they filed APA challenges, plaintiffs moved for discovery to supplement the administrative record on the *Carcieri* issue. Plaintiffs contended that such discovery to supplement the administrative record was needed to give the Court a sufficient basis to decide the *Carcieri* issue. Plaintiffs listed a number of documents that they claimed should be included, but were not part of the administrative record, and could not therefore be considered by the Court without supplementation. (DE 174, at 32-34.) The Magistrate Judge denied the request without prejudice to its renewal before this Court, recognizing that whether to consider extra-record material is really a merits question in an APA action governed by the record rule. *New York v. Salazar*, 701 F. Supp. 2d 224, 243-44 (N.D.N.Y. 2010). Yet in the nineteen months between the Magistrate Judge's ruling and the filing of summary judgment motions, plaintiffs made no such request. Instead, plaintiffs submitted documents – including the documents referred to in their unsuccessful and never-renewed motion to supplement the record – and expert reports referring to such documents, without seeking leave. Disregarding the Magistrate Judge's denial of their request, the rules governing APA review, and the Case Management Plan (which required expert disclosure), plaintiffs improperly seek to create their own record by fiat. The Court can reasonably infer that plaintiffs' attempted subversion of the record and discovery rules was deliberate.

It is unnecessary for the Court to comb through plaintiffs' scattered, non-authoritative, extra-record historical documents. The report and attorney declaration that plaintiffs have proffered are inadmissible and cannot be considered on summary judgment, wholly independent of the record rule, because plaintiffs violated the expert disclosure requirements of Local Rule

(discussing Reeves report).) There was no reason for DOI to respond to that tentative footnote in the ROD, beyond correctly stating that DOI had statutory authority pursuant to 25 U.S.C. § 465 to accept a trust transfer. ROD 33-34.

26.3 (never even saying that they had experts let alone disclosing them), because the report does not satisfy the expert witness gate-keeping requirements of Fed. R. Evid. 702, and because Local Rule 7.1(a)(3) excludes attorney declarations from the summary judgment record, as set forth more fully in the Nation's Objections and Response to Plaintiffs' Statement of Material Facts. Those requirements exist to weed out just the kind of distorted and untrustworthy evidentiary submission that plaintiffs have offered as a basis for decision to this Court and rely on in their memorandum.[5]

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[5] The Court cannot go outside the administrative record to decide the *Carcieri* issue, but it can look at material from the full historical record, including the huge volume of material exchanged by the parties in discovery in the Oneida land claim litigation (but omitted by plaintiffs and their expert) to rule that plaintiffs' submission would not qualify for consideration even in a de novo judicial proceeding. The Nation has submitted examples of such materials in support of its Objections to Plaintiffs' Statement of Material Facts. Decl. of Michael R. Smith in Support of Objections to Statement of Material Facts ("Smith Decl."). The Nation's objections and responses show in depth why the report of plaintiffs' purported expert, historian Stephen Beckham, is unreliable and does not meet the *Daubert* standards required for admissibility under Fed. R. Evid. 702. Among many other problems, the Beckham report does not even refer to, much less discuss, the mountain of historical evidence showing the persistent exercise of federal jurisdiction over the Oneidas. Whether that is because Beckham only reviewed documents provided by plaintiffs' lawyers, or whether he reviewed evidence that does not support his view but ignored it in his report, does not matter. All of the contrary evidence is easily found and, indeed, as explained in the Nation's objections and responses, is in documents that plaintiffs' counsel has had for years by virtue of discovery in the Oneida land claim litigation. Just a brief synopsis of the contrary, but ignored, evidence demonstrates why the Beckham report, and the historical documents cited throughout plaintiffs' summary judgment papers, should be disregarded. *Cf. Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 166-67 (2d Cir. 2003) (rejecting scattered historical documents offered to prove that Oneida Nation ceased to exist and be recognized by the United States and explaining that such evidence is part of a mixed historical record and, given the formal treaty relationship between the Nation and the federal government, scattered historical documents do not substitute for official, formal federal action withdrawing treaty recognition or termination tribe).

- Late 18th and early 19th DOI census reports do not cast doubt on federal government jurisdiction over the Oneidas. The Annual Reports of the Commissioner of Indian Affairs list the Oneidas on the Oneida Reserve as a tribe under the New York Agency from 1886 to 1927 (when DOI ceased reporting individual tribal census records). Smith Decl. ¶ 18. Those reports do not list state-recognized tribes like the Shinnecocks. The 1891 Annual Report specifically refers to the Oneidas as one of the tribes "under the charge of this agency." The 1892 Extra Census Bulletin identifies two Oneida chiefs in New York. Maps prepared for the Commissioner of Indian Affairs for the period 1883-1917 show an Oneida reservation in New York, including for 1892. Smith Decl. ¶ 20. The 1893 Annual Report refers to the Oneidas as among the "Indians under the jurisdiction" of the New York agency. So does the 1900 Annual Report, and the 1901 Annual Report. The 1906 Annual Report also lists the Oneida along with the Cayuga, Onondaga, Seneca, St. Regis, and Tuscarora in the New York Agency census. (*See* Pls. Mem. 27-28.) In 1940, DOI took a census of all the New York tribes, including specifically the Oneida Nation. Smith Decl. Exs. 17-19.
- The Oneida vote against IRA reorganization in 1936 did not eliminate "any possibility of coming under federal jurisdiction" (Pls. Mem. 34), any more than it removed federal jurisdiction over the other federally-recognized tribes, which also voted against reorganization. The Compilation of Material Relating to the

Plaintiffs' historical submission is, in any event, beside the point because federal jurisdiction at the time of the IRA is established as a matter of law by authoritative federal actions asserting jurisdiction over the tribe, from the Treaty of Canandaigua in 1794 and the payment of annuities thereafter, to filing suit in the *Boylan* case in 1915, to holding the IRA vote in 1936. 7 Stat. 44, Nov. 11, 1794; *United States v. Boylan*, 256 F. 468, 477 (N.D.N.Y. 1919) (federal government sued as guardian for the Oneidas); *id.* at 479 (assertion of jurisdiction by the federal government); *id.* at 487 (noting continued payment of annuity); ROD 32-34; Nation SJ Mem. 14-16. Neither plaintiffs' documents nor plaintiffs' expert report call those dispositive actions into question. Plaintiffs' assortment of letters, census reports and internal documents is not material to the question framed in *Carcieri* for the same reason that the Second Circuit concluded that a similar collection of documents did not create a material factual dispute about whether the Oneida Nation lost its reservation because of a purported lapse of tribal status. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 166 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197 (2005) (contrasting "the opinions of a handful of government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased"

Indians of the United States, H.R. Rep. No. 81-30, 80 (1950) lists the Oneida reservation in New York, established in 1794, as being under federal supervision.

- Superintendent Berry's 1939 report does not indicate that the Oneidas were not under federal jurisdiction. (*See* Pls. Mem. 34.) Further, a 1940 letter from Berry, the Superintendent of the New York Indian Agency to the Commissioner of Indian Affairs lists the Tribal Officials of the Oneida Reservation. Smith Decl. Ex. 7. A 1945 letter from the Superintendent to the Commissioner lists the Oneida among the tribes "under federal jurisdiction." Smith Decl. Ex. 9.
- Contrary to plaintiffs' arguments about the 1982 Michael T. Smith memorandum (Pls. Mem. 36-37), DOI's Chief of the Tribal Relations Branch set out DOI's formal position regarding the Oneida Nation in a 1976 affidavit referring to the Nation as "the Indian tribe which remained on the New York Oneida Indian Reservation" following an 1842 treaty and as one of the tribes that executed the Treaty of Canandaigua. Smith Decl. Ex. 8.
- In describing as "negligible" evidence of tribal political activity from 1900 to 1945, Plaintiffs' expert does not mention that Oneida Chief Rockwell was introduced as a witness by the local member of Congress at a hearing in 1930, that he regularly wrote to the New York Superintendent to report on actions taken at Oneida tribal meetings, and that he formally asked DOI to survey the Oneida reservation in 1938. Smith Decl. Exs. 3, 5, 6, 16.

to "legislative or executive action withdrawing recognition" which are official governmental acts).[6]

Like recognition of a tribe by the federal government, federal jurisdiction over a tribe is exclusively a matter for the political branches of government. *See Oneida Indian Nation v. City of Sherrill*, 337 F.3d at 166 (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865)). The political branches assert federal jurisdiction by public actions such as making treaties, filing suit on behalf of the tribe or otherwise extending federal protection. Once established, such jurisdiction continues unless removed by authoritative executive or legislative action. *City of Sherrill*, 337 F.3d at 166.[7] Plaintiffs do not claim that any such action occurred with regard to the Oneida Nation. Indeed, this Court and the Second Circuit have confirmed that federal jurisdiction persisted beyond the period when plaintiffs maintain that the tribe ceased to exist. *Boylan*, 265 F. at 174 ("the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward"), *aff'g*, 256 F. 468, 496 (N.D.N.Y. 1919); *see also* U.S. SJ Mem. 17-29 (discussing why the Nation is entitled to summary judgment on Count 3 of Plaintiffs' Complaint); Nation SJ Mem. 12-18 (discussing more fully how the ROD and additional information demonstrate that the Oneidas were under federal jurisdiction at the time of the IRA).

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[6] Plaintiffs' discussion of pleadings on pages 35-36 is similarly unpersuasive. Both of these pleadings represent litigation positions, not historical fact, and neither overcomes the dispositive historical record. The United States' Answer was in defense against a claim by the Oneidas against the United States for failure to properly protect the Oneidas' interests. In such circumstances, it is not surprising that, like most defendants, the United States asserted a litany of defenses, including this historically inaccurate one. (Pls. Mem. 35.) The Waterman Affidavit was filed in an intra-tribal dispute for control of the Oneida Nation on the side of a dissident group. (Pls. Mem. 36.)

[7] This, among other reasons, is why it is incorrect for Plaintiffs to assert that if continued federal jurisdiction is confirmed by *Boylan* (which it is), then jurisdiction ended at the conclusion of that case. (Pls. Mem. 46-47.)

The parties agree that it would be futile to remand the *Carcieri* question to DOI, because DOI would unquestionably decide that the Oneida Nation was under federal jurisdiction at the time of the IRA and is eligible for trust land. Plaintiffs concede futility (Pls. Mem. 25), purportedly because DOI "cannot be trusted" to decide the question. (*Id.*) But the true reason that it would be futile to remand is that there is only one possible way for DOI to answer the question, particularly in light of DOI's decision to hold an election concerning whether the Oneidas wanted to reorganize their government under the IRA, which DOI explicitly noted in the ROD. ROD 33-34. Plaintiffs pleaded that IRA election as a fact in their own complaint. (SASC ¶ 147.) There is no dispute that the DOI officials called the election and that the Oneidas voted prior to the deadline for such elections that was set in an amendment to the IRA. *See* U.S. SJ Mem. 19 (discussing Oneida vote on the IRA); 1936 Annual Report of Commissioner of Indian Affairs 159, 163 (attached as Ex. 2 to the U.S. SJ Mem.).

The same statutory qualification applies to eligibility for trust land under section 5 of the IRA, 25 U.S.C. § 465, and eligibility to vote on reorganization under section 18 of the Act, 25 U.S.C. § 478. Both are limited to "Indians" as defined in section 19 of the IRA, including "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Thus, a determination that the Oneidas were "Indians" who could vote on reorganization also means that they were Indians eligible for trust land under *Carcieri*.[8] *See* Nation SJ Mem. 14-15 (explaining why the Oneida's IRA vote is dispositive);

[8] DOI's one-time uncertainty about whether the Oneidas had a reservation, (*see* Pls. Mem. 32-34), has no bearing on whether the Nation was under federal jurisdiction. Questions about reservation status were tied to the long struggle over New York's obligation to comply with the Nonintercourse Act and to the effect of unapproved land transactions on a federal treaty. Of course, there is no doubt today about the effect of the State transactions on reservation status. The Second Circuit held that the Oneida reservation had not been disestablished by unapproved state purchases. *City of Sherrill*, 337 F.3d at 165. The Supreme Court confirmed that state land purchases made without federal approval could not diminish or disestablish the Oneida reservation - that only Congress can do. *City of Sherrill*, 544 U.S. at 215 n.9.

U.S. SJ Mem. 19-20 (same). The Interior Board of Indian Appeals (IBIA) so held in *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62, 63 (Feb. 28, 2011). Plaintiffs do not even cite *Shawano County*, although it states the rule that DOI follows and is dispositive here.[9]

Plaintiffs equate the statutory requirement that a tribe be "under federal jurisdiction" with whether the tribe "had their lands supervised by the DOI, Office of Indian Affairs, and otherwise were under the 'supervision and control' of that office." (Pls. Mem. 21.) For that, plaintiffs rely on a colloquy between Senator Wheeler and Commissioner Collier, not anything in the IRA or any case construing it. (*Id.*) Putting aside the objection that Congress chose the words "under federal jurisdiction" rather than the ones plaintiffs propose to substitute, and that legislative history cannot change a statutory text, the quoted snippet of legislative history does not support plaintiffs' position. Senator Wheeler expressed concern about applying the benefits of the IRA to highly assimilated tribes in northern California that "are under the supervision of the Government of the United States." (*Id.*) It is hard to see how the language Commissioner Collier proposed to add to address Senator Wheeler's concern, and that was presumably intended to *exclude* the tribes the Senator was referring to would have the desired effect if "supervision" were the test for federal jurisdiction. Under that reading, the very tribes that concerned Senator Wheeler would *automatically* qualify under the IRA because he said they were under supervision. That cannot be what "under federal jurisdiction" meant.

[9] Plaintiffs mischaracterize DOI's brief in *Village of Hobart* (Pls.' Mem. 22-23), a case about a trust application by the Oneida Tribe of Indians of Wisconsin. That brief did not rely on a multi-factor test, as plaintiffs imply. To the contrary, the United States' position in that brief is entirely consistent with its position in this case that the 1936 IRA election is by itself determinative of the Oneida Nation's eligibility for trust land: "The fact that the Department of Interior held an election for the Oneida Tribe to determine whether it wanted to accept the terms of and organize itself under the IRA is *incontrovertible* proof that the United States viewed the Oneida Tribe as being under its jurisdiction in 1934." Appellee's Br., *Village of Hobart v. Acting Midwest Reg'l Dir.*, Nos. IBIA 10-107, 10-91, 10-92 (filed Sept. 27, 2010) (emphasis added).

Plaintiffs' argue that the federal government lost jurisdiction over the Oneidas in New York because the Oneidas ceased to be a tribe in the late 19th and early 20th centuries. The Second Circuit rejected both that argument and the evidence that plaintiffs cite in support. *City of Sherrill*, 337 F.3d at 166-67 & nn.23 & 24. And the Supreme Court rejected similar evidence in *United States v. John*, 437 U.S. 634, 650 n.20 (1978), when faced with the statement that it has been administratively determined that "[those Choctaws remaining in Mississippi when the Choctaw Tribe removed to Indian Territory lost their tribal status] cannot now be regarded as a tribe," referring to a 1936 DOI Solicitor's office memorandum. The Supreme Court saw no impediment to federal jurisdiction over the Mississippi Choctaw tribe and its lands—in that case federal criminal jurisdiction over "Indian country"—despite the recital of that administrative determination in the Handbook of Federal Indian Law. *See* F. Cohen, Handbook of Federal Indian Law 273 (1941).

John shows that plaintiffs' lapse-of-tribal-status theory is irrelevant to federal jurisdiction over the Oneida Nation at the time of the IRA. Mississippi contended in that case that the federal government had lost power over the Mississippi Choctaw, arguing that "since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians." 437 U.S. at 652. The Supreme Court rejected that argument: "Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." *Id.* at 653 (citation omitted). Pursuant to *John*, even if plaintiffs were right that, at earlier periods, there were doubts about tribal status regarding the Oneidas – and they are not right – that would be irrelevant to the

federal government's power to exercise jurisdiction over the Oneidas at the time of *Boylan* (suing on the Oneidas' behalf) or at the time of the IRA (conducting an IRA election).

Plaintiffs recognize that *Boylan* is fatal to the argument that the federal government somehow lost jurisdiction over the Oneida Nation during the 1891-1915 period covered by language in some DOI documents on which plaintiffs rely. Although plaintiffs feel compelled to mount a collateral attack on *Boylan* (Pls. Mem. 29-32), *Boylan* is binding precedent. In 1920, reviewing a trial record created in this Court, the Second Circuit held in *Boylan* that "the Oneida Indians were a distinct people, tribe, or band," 265 F. at 171, and that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward . . . ." *Id.* at 174. This Court cannot base a decision in this case on plaintiffs' arguments about scattered internal agency documents that are argued to prove "infirmities" in the Second Circuit's *Boylan* ruling. (*See* Pls. Mem. 30, 43-45.) Plaintiffs' criticisms of the *Boylan* decision are, in any event, unpersuasive. As the Second Circuit stated in *City of Sherrill*: "informal conclusions [by DOI officials] are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in *Boylan*." 337 F.3d at 167 (citation omitted).[10]

Plaintiffs also rely on post-*Boylan* statements by DOI officials that New York State rather than the federal government had authority over *all* federally-recognized tribes in New York State, not only the Oneidas, or that federal authority was unclear, limited, or contingent on appropriations. (Pls. Mem. 37-40.) Of course, if that had been true, the Senecas, Onondagas and

[10] Plaintiffs' rely heavily on the Reeves report. (Pls. Mem. 26.) The first edition of Cohen's Handbook of Federal Indian Law did reproduce the 1914 Reeves report, referring to it as an "interesting account." But the Handbook was by no means "the official position of DOI" (Pls. Mem. 28), on anything, and the Handbook took no position on whether the Oneidas were then a tribe under federal jurisdiction, much less a position inconsistent with the later decision to sue on the Oneidas' behalf in *Boylan*, or DOI's 1936 determination to hold an IRA election.

Mohawks would not have been "under federal jurisdiction" either. The concerted efforts of Commissioner Collier and others to gain the support of the New York tribes for the IRA would have made no sense if they were all statutorily ineligible (because they were not under federal jurisdiction at all). *See* 1934 Cong. Rec. S11124-25 (colloquy concerning application of the IRA to New York tribes and reproducing a letter from Commissioner Collier regarding a meeting with the Six Nations). It also makes no sense that Congress *eliminated* language in an earlier version of the IRA that would have made the Act inapplicable to tribes in New York. *Id*. at 11733 (Sen. Better) (discussing removal of the exemption of Indian in New York); *id*. at 11735 (reproducing letter from Seneca on behalf of New York Indians); Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* 258, 260, 280 (2000) (New York Indians were exempted from the original IRA bill, but the exemption was removed from the final legislation). The fact is that DOI called elections on IRA reorganization among all of the federally recognized New York tribes. ROD 33-34; SASC ¶ 147; AR004414.

Plaintiffs' last-gasp argument is that the Oneida Nation is not eligible for trust land, even if the Oneida vote on IRA reorganization satisfies *Carcieri*, on the theory that the Nation is somehow distinct from the tribe that voted on IRA reorganization in 1936. (Pls. Mem. 47-48.) Plaintiffs do not point to any official action by the executive branch or by Congress terminating recognition of the Oneida Nation and recognizing a new tribe. To the contrary, the Oneida Nation has repeatedly been recognized by the courts and by the United States as a party or successor to the Treaty of Canandaigua through an unbroken chain of succession, meaning that federal jurisdiction has persisted throughout that period. *See supra* 4 n.2. The tribe that voted on IRA reorganization was not limited to immediate heirs of the inhabitants of the *Boylan* tract. Plaintiffs' own document shows that the IRA election held by DOI was open to all 157 enrolled

members, of whom at least 69 voted, not just the few members of Chief Rockwell's family. (Pls. Mem. 34; Tennant Decl. Ex. LL.) Plaintiffs' genealogical excursions (Pls. Mem. 47-48), thus have no bearing on whether the Oneida Nation today is recognized as the tribe that voted on the IRA. Similarly, titular ownership of the *Boylan* tract as reflected on state land records has nothing to do with the continuity of the tribe. The *Boylan* judgment determined that the Oneidas' land was tribal land that could not be alienated from the tribe. Fee title transfers on County land records did not affect that. Finally, there is no basis for arguing that changes in the Nation's form of self-government have any effect on whether the tribe remains in existence—if there were, IRA reorganization itself would have created new tribes, rather than new tribal governments of existing tribes. *See Oneida Indian Nation v. Cnty. of Oneida*, 434 F. Supp. at 533 (despite then-current leadership dispute, "[r]egardless of which individuals hold office within the tribe, the tribe is recognized as the direct descendant of the Oneida Nation which inhabited New York 200 years ago.").

This, then, is what the record shows about federal jurisdiction. The United States explicitly placed the Oneida Nation under federal jurisdiction in the Treaty of Canandaigua, and the United States has continued to pay annuities to the Oneida in New York pursuant to that treaty through tribal officials to the present day. The United States as trustee filed suit to vindicate the Oneida Nation's rights in *Boylan*. The United States formally called and held an Oneida election on IRA reorganization. All of these facts are set forth in the administrative record. ROD 8, 34; AR04412-13; AR09975-76; AR043784-85; AR049235-36; *see* Nation SJ Mem. 12-18 (full discussion of these facts). As a consequence of all these undisputed facts, the "under federal jurisdiction" test is satisfied here as a matter of law.

II. DOI APPLIED THE CORRECT STANDARDS UNDER ITS PART 151 REGULATIONS.

A. The "On-Reservation" Regulation Applies to the Oneida Trust Application Because All of the Land Is Within the Boundaries of the Oneida Reservation Acknowledged in the Treaty of Canandaigua.

Plaintiffs fault DOI for applying the "on-reservation" trust regulation, 25 C.F.R. § 151.10, rather than the "off-reservation" regulation, 25 C.F.R. § 151.11. DOI's decision was correct.

The Second Circuit has repeatedly rejected arguments that the Oneida's Treaty of Canandaigua reservation was disestablished. *Oneida Indian Nation v. Madison Cnty.*, __ F.3d __, Docket Nos. 05-6408-cv (L), 06-5168-cv (CON), 2011 WL 4978126, at *26 (2d Cir. Oct. 20, 2011); *Oneida Indian Nation v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010); *see City of Sherrill*, 544 U.S. at 215 n.9 (noting that the Second Circuit had held that the reservation had not been disestablished, and explicitly declining to disturb that holding). Moreover, as plaintiffs acknowledge (Pls. Mem. 49), 25 C.F.R. § 151.2(f) defines "reservation" to include both current and former (*i.e.*, disestablished) reservation land, and so the disestablishment question is irrelevant to the applicability of 25 C.F.R. § 151.10 to the Nation's trust application.

Plaintiffs nevertheless argue that there is a middle area of land within reservation boundaries that must be treated as "off-reservation" and therefore subject to § 151.11 – land within a non-disestablished reservation over which a tribe lacks sovereignty because of the equitable principle applied in *City of Sherrill*. (Pls. Mem. 49-51.) The ROD, however, shows that DOI does not read its regulations as plaintiffs would. ROD 32-33. DOI's understanding of its own regulations is entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (defer to agency's interpretation of its own regulations unless "plainly erroneous or inconsistent with the

regulation") (citations omitted); *Brodsky v. United States Nuclear Regulatory Comm'n*, 578 F.3d 175, 182 (2d Cir. 2009) ("An agency's application of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'") (citations omitted).

Moreover, DOI's regulation calls for "governmental jurisdiction," not sovereignty. It makes no sense to equate jurisdiction with sovereignty in this context because a tribe would never have any reason to seek trust status for land that is already sovereign. 25 C.F.R. § 151.2(f). The whole point of trust status is to restore or create tribal sovereignty that does not otherwise exist, just as the Supreme Court pointed to the DOI's trust process and to 25 C.F.R. § 151.10 (the on-reservation regulation) as the "proper avenue" for the Nation to restore tribal sovereignty. *City of Sherrill*, 544 U.S. at 221; *see also* Nation SJ Mem. 39-41. It also makes no sense to require the tribe to have sovereignty when the same regulation applies to and treats *disestablished* reservation land as on-reservation for trust evaluation purposes. Disestablished reservation land obviously is not sovereign. So, "governmental jurisdiction" cannot possibly be understood as a synonym for sovereignty. Rather, section 151.2(f) refers to DOI's determination that the tribe seeking trust land is the tribe to which the reservation belongs, and over which it exercises internal self-government, such as the power to regulate its own members on tribally-owned land. DOI correctly determined that the Nation has the requisite governmental jurisdiction over the land, even though it does not have sovereignty. ROD 32-33; s*ee also* Nation SJ Mem. 39-41.

B. Remand to Apply the 25 C.F.R. § 151.11 Off-Reservation Standards Would Be Pointless Because DOI Has Already Decided and Stated in the ROD that It Would Reach the Same Decision Under 25 C.F.R. § 151.11 that It Reached Under the On-Reservation Standards in 25 C.F.R. § 151.10.

As plaintiffs acknowledge, DOI addressed their challenge to the application of the "on-reservation" regulation. (Pls. Mem. 51, citing ROD 33 n.5.) DOI stated that it would take the land into trust under the "off-reservation" regulation, 25 C.F.R. § 151.11, as well. Plaintiffs challenge that alternative decision, arguing that DOI failed to apply the off-reservation standard correctly because DOI did not separately tick through the factors in the ROD and failed to demonstrate that it gave the appropriate weight under that regulation to local government opposition to trust land. DOI did not say that the on- and off-reservation standards were the same, nor did it say that it did not give appropriate weight to local government concerns under the "off-reservation" regulation.

There was no reason for DOI to recapitulate its entire analysis in order to explain the decision to take the same land into trust under 25 C.F.R. § 151.11 in the ROD.[11] As Plaintiffs also acknowledge, the difference between the on- and off-reservation standards is the weight assigned to local government interests, which varies under the regulation with the distance between the tribe's reservation and the land to be acquired. 25 C.F.R. § 151.11(b); Pls. Mem. 52 (referring to distance from the reservation as the "key difference"). Here, even under plaintiffs' stilted reading of section 151.2(f) as excluding land within a reservation described in a federal treaty, all of the land the Nation seeks to have taken into trust is within reservation boundaries, and so the distance from the trust land to the reservation is zero. The effect of switching from

[11] Plaintiffs cite communications from DOI to Malcolm Pirnie, the contractor that helped to prepare the EIS, as evidence of insufficient regard for local government concerns, contrary to § 151.11. (Pls. Mem 54.) But those communications simply tell the contractor to disregard information that was not relevant to the *EIS*, which properly was concerned with impact on the physical environment. DOI did take local government concerns such as jurisdictional issues, into account in applying its Part 151 regulations in the ROD. ROD 55-68.

one standard to the other in this particular case with respect to the balance of tribal interests and those of local governments is inconsequential. The reasons for DOI's decision to take certain land into trust and no other land are no different under section 151.11 than under section 151.10. Those reasons are fully articulated in the ROD.

III. THE ROD IS NOT INCONSISTENT WITH DOI POLICY.

Agencies are not required to adhere to internal application-processing policies, and an agency action is not automatically arbitrary and capricious simply because it deviates from such policies that are followed in the mine run of cases. *Lyng v. Payne*, 476 U.S. 926, 937 (1986) (recognizing that "not all agency publications are of binding force") (citation omitted); *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (per curiam) (failure to follow Social Security claims manual does not invalidate decision); *Coliseum Square Assoc., Inc. v. Jackson*, 465 F.3d 215, 229-30 (5th Cir. 2006) (collecting cases that demonstrate that "[g]enerally, to be legally binding on an agency, its own publications must have been 'promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress" and holding that "HUD has not acted contrary to law by using methodology different from that contained in [a] Guidebook.") (citations omitted). Plaintiffs' policy-deviation claims would therefore fail even if plaintiffs could show that DOI departed from such policies in issuing the ROD. But the fact of the matter is that DOI did not deviate from any applicable policy.

A. There Is No DOI Policy Limiting Trust Land to Tribes that Cannot Manage Their Own Affairs.

Relying on a 1959 termination-era[12] memorandum, plaintiffs argue that DOI has a policy today against acquiring trust land for tribes that "have the ability to manage their own affairs." (Pls. Mem. 57, citing Baldwin Decl. Ex. CCC.) But, as plaintiffs acknowledge, that 1959 memorandum was quickly retracted. *See* Baldwin Decl. Ex. DDD. Plaintiffs offer no indication that DOI has adhered to the supposed policy since 1959, and it is obvious there is no such policy today. There is no such limitation in the trust statute, 25 U.S.C. § 465, or in DOI's subsequent, formally-promulgated trust regulations, which necessarily supersede any prior informal policies. To the contrary, DOI's policy has been to take land into trust for tribes that are already economically self-sufficient as well as tribes that are not. *See* U.S. SJ Mem. 30; Nation SJ Mem. 18; *see generally Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 92-94 (2d Cir. 2000) (wealth of Pequots irrelevant to their right to have trust land and to have benefit of ordinary principles of Indian law).

The 1960 memorandum retracting the supposed 1959 policy refers to avoiding trust acquisitions for a "big operator" looking for a "tax dodge." But plaintiffs offer no evidence—whatever that cryptic language meant—that DOI ever applied and followed any such policy at any time, and certainly not today. The fact that the Nation's trust land would be tax exempt once taken into trust does not make the trust application a tax dodge: tax exemption is true of *all* trust land, and a major purpose of a trust acquisition. 25 U.S.C. § 465. Nor does the Nation's successful casino and resort disqualify it from having its land held in trust. The 1960 memorandum was written long before the Supreme Court's decision in *California v. Cabazon*

[12] DOI policy prior to mid-1960s favored termination of tribal governments and assimilation of tribal members. *South Carolina v. Catawaba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986).

Band of Mission Indians, 480 U.S. 202 (1987), and Congress' enactment of IGRA, clarified the status of gaming on tribal land. IGRA (25 U.S.C. § 2719) and DOI's implementing regulations (25 C.F.R. pt. 292) clearly permit DOI to take land into trust for the very purpose of tribal gaming. *See Connecticut ex rel. Blumenthal*, 228 F.3d at 92-94 (Pequot tribe's operation of a profitable casino does not disqualify it from applying for trust land).

It is wrong, in any event, to deride the acquisition of the Nation's properties, including the casino resort, as a big operator's tax dodge. The fact is that plaintiffs and others have argued for years that the Nation's casino is operating illegally because the Nation does not have sovereignty over the land, including that argument in their summary judgment memorandum at pages 96-97. [13] Although DOI has correctly concluded that the casino is lawful even without trust status for the land underneath, DOI had good reasons to take the land into trust to end ongoing disputes about the status of the land that could interfere with the casino's operations or its ability to obtain financing. Taking the land into trust assures that the Nation's casino can continue operating and generating revenue, while denial of trust status would feed continued controversy. In addition, the excessive casino tax assessments which DOI has determined are effectively taxes on tribal gaming demonstrate the need to shield the Nation's land from future property taxation, so that the casino can provide financial support to the Nation and its members, as intended by Congress in IGRA. *See* pages 38-39 *infra* (discussing casino taxes); ROD 52 (tax

[13] On September 16, 2005, the State wrote to the Chairman of the National Indian Gaming Commission arguing that the Turning Stone Casino site did not qualify for gaming, among other reasons because "[t]he land clearly is not trust land." AR005824, 005825; ROD 36. *See also* AR00280-81 (Letter from the State to BIA Regional Director (Jan. 30, 2006) arguing that Turning Stone is "being operated in violation of the Indian Gaming Regulatory Act" because the tribe lacks "governmental jurisdiction" in light of *Sherrill*); AR00297 (State's comments on the trust application (Jan. 30, 2006), arguing that gaming is illegal because the Nation lacks sovereignty over Turning Stone land); AR074118, AR074119, AR074123 (Letter to DOI Deputy Solicitor (Apr. 30, 2007) arguing that gaming is illegal because the Nation lacks sovereignty over Turning Stone land).

assessment shows the need for federal protection); *see also* Nation SJ Mem. 57-61 (explaining why the tax on the Nation's gaming enterprise is unlawful).

B. In Light of the Continuing Dispute about the Validity of Property Taxes and Tax Liens, It Made No Sense for DOI to Order Preliminary Title Opinions.

Plaintiffs argue that the trust decision should be set aside because DOI did not obtain preliminary title opinions concerning the Nation's land. That is wrong.

1. Preliminary title opinions would have been pointless because everyone knew about the Counties' tax liens, and DOI received title insurance policies dealing with all other title issues.

The administrative record shows that DOI fully accomplished the purpose of performing a preliminary title examination on property to be acquired in trust, by obtaining title examinations and title insurance policies issued in favor of the federal government by Old Republic National Title Insurance Co. for each parcel. (*See, e.g.*, AR049599-049610; AR070291.) Tax liens are the only title issues not covered by the policies. Obtaining formal preliminary title opinions from a DOI lawyer would have been pointless because DOI and plaintiffs already knew those tax liens existed. Having identified and addressed the other title issues, DOI did not bother with the empty formality of obtaining preliminary title opinions reflecting tax liens because that would have served no purpose in deciding what action to take on the Nation's trust application or whether to take action to clear the tax liens in light of the still-unresolved dispute over the validity of the liens and whether the land is exempt from property taxation under state law.

Plaintiffs' real complaint is that DOI did not require the Nation to clear the tax liens, even though at the time of the trust decision in 2008 the district court had agreed with the Nation that all of the land was exempt from property taxes under New York law. *Oneida Indian Nation v.*

Oneida Cnty., 432 F. Supp. 2d 285, 290 (N.D.N.Y. 2006); *Oneida Indian Nation v. Madison Cnty.*, 401 F. Supp. 2d 219, 231 (N.D.N.Y. 2005); ROD 41; N.Y. Indian Law § 6; N.Y. Real Property Tax Law § 454. DOI could not clear the liens then (or now) without taking sides in the dispute over the validity of the property taxes and taxes liens—a dispute that remains unresolved today. *Oneida Indian Nation*, __ F.3d__, 2011 WL 4978126, at *22 (state tax exemption remains to be litigated in state court). Indeed, had DOI insisted that the Nation satisfy all of the tax liens, it would have required the Nation to pay penalties and interest on taxes assessed prior to the *City of Sherrill* decision that the Second Circuit has since confirmed (upholding the district court) were illegal and are not due. *Id.* at *23-24. Instead of taking sides in the tax dispute or trying to predict exactly how courts would resolve the dispute after years of future litigation, DOI required the Nation to post letters of credit, discussed more fully on pages 24-26 *infra* that assured payment of taxes and satisfaction of the tax liens *when and if* the courts resolved the Nation's liability for those taxes. ROD 53-55. DOI's decision to rely on title examinations and title insurance rather than preliminary title opinions was abundantly reasonable and justified.

2. Departure from internal procedures that do not affect the substantive standards applied by an agency is not a basis for setting aside agency action.

The inclusion of preliminary title opinions in a trust-processing checklist at a particular stage in the process is an internal housekeeping matter that does not affect the substantive standards applied to trust applications or the validity of DOI's decision. The decision to substitute title insurance, which is based on the opinion obtained by the insurer, for a preliminary opinion of a DOI lawyer had no effect on any rights of the plaintiffs, who have no stake in whether or not there are defects in title acquired by the United States. Such internal agency documents that guide the processing of agency actions, like DOI's trust checklist, do not limit

agency discretion or create rights in third parties. *Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977, 992 (D. Ariz. 2011) (rejecting claim based on trust checklist); *Mich. Gambling Opposition v. Norton*, 477 F. Supp. 2d 1, 11 (D.D.C. 2007) (same), *aff'd on other grounds*, 535 F.3d 23, 28-29 & n.3 (D.C. Cir. 2008); s*ee also Coliseum Square Ass'n*, 465 F.3d at 229 (collecting cases that demonstrate internal guidelines are not legally binding on an agency). Accordingly, a variation from such a practice is not a basis for setting aside agency action that is substantively correct. And, even if it were a basis for an APA challenge, plaintiffs lack standing to challenge the trust decision on the ground that DOI did not issue preliminary title opinions because the purpose of the preliminary title opinions, like the purpose of section 151.13, is to protect the United States' interest in avoiding unexpected liability or having the purpose of a land acquisition frustrated, not to enforce plaintiffs' tax liens. *See* Nation SJ Mem. 19, 55-57 (fully discussing standing issue).

C. DOI Properly Addressed 25 C.F.R. § 151.13 by Requiring the Oneida Nation to Post Letters of Credit.

Citing a letter to a former member of Congress sent by Associate Deputy Secretary James Cason in connection with the Oneidas' application, plaintiffs argue that DOI has a policy of requiring tax liens to be fully resolved before issuing a notice of a decision to take land into trust, but did not follow it here. (Pls. Mem. 62) (quoting the statement that DOI "typically" requires payment or an agreement with the assessor). DOI rightly concluded, however, that this is not a typical case because of continuing disputes about whether the Nation's land is tax-exempt. *See Oneida Indian Nation*, __ F.3d __, 2011 WL 4978126, at *22 (state tax exemption remains to be litigated in state court). As the ROD explained, the trust regulations "do not call for liens to be removed to the satisfaction of the local taxing authority; liens must be addressed to the satisfaction of the Federal government pursuant to Federal title standards." ROD 54. Moreover,

there is no requirement that title issues be resolved—even to the federal government's satisfaction—before a trust decision is made.[14] Rather, the government must be satisfied, when the trust transfer is completed and the land is formally accepted into trust, that it has made "adequate provision" under federal title standards.[15] *Big Lagoon Park Co. v. Acting Sacramento Area Dir.*, 32 IBIA 309, 317-18 (Aug. 31, 1998).[16] DOI did make adequate provision for the Counties' disputed tax liens by requiring the Oneida Nation to post letters of credit securing payment of the taxes, penalties and interest on the parcels if and when the courts determine that the taxes are lawfully owed. ROD 53-55.

As discussed in subsection B above, plaintiffs' complaint is not really with the process DOI used, but with the merits of DOI's decision not to require the Nation to pay in full disputed tax liabilities *before* the still pending legal dispute regarding state tax exemptions is resolved. *See Oneida Indian Nation*, __ F.3d __, 2011 WL 4978126, at *22 (dispute regarding state exemption remains pending). DOI's decision to rely on the letters of credit fully protected the Counties' interest—except for the illegal tax on the casino[17]—as well as the federal government's interest in protecting itself from liability or from acquiring land that cannot be used for the intended federal purpose. *See* U.S. SJ Mem. 69 (discussing purpose of section 151.13); Nation SJ Mem. 55-56 (same). DOI did so without interjecting the agency into the tax dispute or requiring DOI to predict the outcome of litigation on a question of state tax law that

[14] Plaintiffs argue that 25 C.F.R. § 151.12(b) requires DOI make the determination under section 151.13 before the decision is made, but section 151.12(b) addresses publication of the trust decision. It does not amend section 151.13.

[15] *See* Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393, § 6(a).

[16] 25 C.F.R. § 151.12(b) requires publication of the trust decision in the Federal Register. The reference to section 151.13 does not require such a determination to be made before publication of the decision. Even if DOI published notice of the trust decision too soon, that has no effect on any right of plaintiffs.

[17] *See* page 38-39, *infra*.

continues today. If the dispute is resolved in the Counties' favor, the liens will be eliminated by payment via the letters of credit. If the dispute is resolved in the Nation's favor, the liens will be invalid. In either case, any blot on title will be removed. DOI handled the issue in a completely reasonable way that was consistent with the federal government's interests and all legal requirements. Nation SJ Mem. 19-20, 53-61 (discussing how 25 C.F.R. § 151.13 is satisfied by the posting of the letters of credit); U.S. SJ Mem. 31, 64-70 (same).

Plaintiffs' complaints (Pls. Mem. 64), about the letters of credit are unfounded, as the Nation's obligation to secure payment through letters of credit does not depend on the creditworthiness of the particular issuing bank or whether that bank renews the letters of credit as they expire. DOI has required the Nation to post and supplement the letters of credit—it did not specify a particular bank—up to the time the land is actually accepted into trust status. ROD 53-55. There is no basis for plaintiffs' speculation (Pls. Mem. 65), that payment will not be made under the letters of credit if the tax exemption issue is resolved in the Counties' favor.[18] Certainly DOI has ample authority to enforce the requirement that the Nation post letters of credit because it is a condition for taking the land into trust.

In any event, as fully explained in the Nation's Memorandum of Law in Support of Motion for Summary Judgment at pages 19 and 55-57, plaintiffs lack standing to press this issue. The purpose of the federal title standards and the DOI regulation implementing them (25 C.F.R. § 151.13) is to protect the federal government, not local taxing authorities. Nation SJ Mem. 19,

[18] There is no merit to plaintiffs' argument that the Nation's agreement to continue to renew and supplement the letters of credit, as it has already done several times, is insufficient to protect the federal government's interest. *In re Sunflower Racing, Inc.*, 219 B.R. 587, 601-02 (Bankr. D. Kan. 1998), concerned the adequacy of a theoretical letter of credit as a substitute for certain liens under bankruptcy law, not under trust regulations. The problem in that case was not that the letter was promised in the future, but that there was no "actual letter of credit." *Id.* at 601. In this case, the letters of credit are in the record (AR048511-30), and DOI was satisfied with their terms. ROD 53-55.

56. The fact that the State and Counties may have interests in other aspects of the trust decision does not give them standing to invoke regulations that were not intended to protect those interests. (*Id.* at 51-52.)

IV. DOI CANNOT BE FAULTED FOR CONSIDERING MORE ALTERNATIVES AND SCENARIOS IN THE EIS THAN MIGHT HAVE BEEN NECESSARY.

Plaintiffs claim that the EIS violated NEPA by considering unrealistic alternatives and scenarios. (Pls. Mem. 67-80.) That claim fails for the fundamental reason that NEPA did not require DOI to perform an EIS at all because the trust acquisition was categorically excluded from EIS review. ROD 9; Nation SJ Mem. 62-63 (fully explaining this point); U.S. SJ Mem. 70. DOI went beyond what NEPA requires. Plaintiffs do not argue otherwise. (Pls. Mem. 79.) Moreover, even though not required, DOI's EIS was not flawed, and the plaintiffs fail to demonstrate otherwise. *See* Nation SJ Mem. 62-70 (discussing fully why Plaintiffs NEPA claims must be dismissed and demonstrating proper consideration of plaintiffs' misguided allegations of past harm to the environment); pages 40-43 *infra* (discussing erroneous environmental allegations).

Plaintiffs also fail to explain how DOI's consideration of property tax payment and foreclosure "scenarios" that they regard as unrealistic had a prejudicial effect on DOI's decision to take certain land into trust. The consideration of additional scenarios did not prevent DOI from considering the others that plaintiffs deem more probable and that undisputedly were considered. Plaintiffs do not point to anything in the ROD that depends on the likelihood of any particular scenario. So, even if plaintiffs were right in their premise that the scenarios should not have been considered, all that would prove is that DOI did unnecessary work. It makes no sense, for example, to criticize DOI for relying on a scenario involving a no-trust-land decision in

which the casino and all Nation enterprises would close, when DOI "dispute[d]" that scenario itself. (Pls. Mem. 72 (citing ROD 17).)[19]

Plaintiffs misunderstand the purpose of the property tax scenarios, which was to avoid basing the decision on assumptions about what would happen in future litigation between the Nation and the State and local governments or how the parties would react to the various possible outcomes. "In order to fully consider the comments of the Nation and the State and local governments, while remaining for the most part neutral on their respective legal positions during its review of the fee-to-trust request, the Department evaluated the full range of possible outcomes or 'scenarios' for these lands." ROD 13. Although plaintiffs quarrel with DOI's view of certain matters in this section (*e.g.*, Pls. Mem. 74-76 (arguing that instances of alleged past environmental violations called into question likely future compliance with federal environmental standards on trust land)), those disputes have nothing to do with the scenarios or DOI's consideration of them in the ROD or the EIS.

Plaintiffs argue that the ROD is tainted by the use of alternative scenarios, even if there is no NEPA violation. (Pls. Mem. 79.) Plaintiffs refer to only one place in the ROD where they claim the scenarios affected the agency's decision. (*Id.* at 80.) But the passage from the ROD that plaintiffs cite does not assume that the Nation would be likely to allow parcels not taken into trust to go into foreclosure, with the result that certain income, property and sales taxes attributable to the Nation activities on those parcels would cease. Plaintiffs do not deny that *if*

[19] Plaintiffs improperly cite the transcript of the deposition of James Cason for the proposition that the scenario in which the Nation allowed foreclosure was unrealistic. (Pls. Mem. 77, 80.) The Cason deposition is not in the record. The Magistrate Judge authorized plaintiffs to take the deposition for purposes of developing their bias claim. Instead, they devoted most of the deposition to other matters. The Magistrate Judge was clear that he was not ruling on the admissibility of the deposition for purposes of summary judgment, *Salazar*, 701 F. Supp. 2d at 243 n.14, and plaintiffs never sought to make the deposition—which is harmful to their position—part of the record. Those references should be stricken or disregarded.

the foreclosure scenario came to pass, it would have the effect described in the ROD. The ROD does not draw any conclusions about that probability, nor does it rely on the probability or improbability to decide what action DOI should take. Certainly DOI did not decide which alternative to choose on the sole basis of which one maximized the net tax revenue associated with the Nation, which is the point under discussion in that part of the ROD. In fact, the quoted passage indicates that "the net contribution under the Proposed Action" (all Nation land in trust) would be higher than under either the Preferred Alternative (the 13,004 acres) or the County-Proposed Alternative (1026 acres including the casino and resort). *See* ROD 17 (describing alternatives). But DOI did not select the Proposed Action; it selected the Preferred Alternative, and so DOI cannot have been relying on the foreclosure scenario to decide which alternative to pick. The quoted passage shows that DOI examined a broad range of options under a wide variety of conditions. It does not show that DOI predicated its decision on a disputed assumption about what the Nation would do if faced with foreclosure.

V. DOI CONSIDERED ALL OF THE FACTORS IN 25 C.F.R. § 151.10 REGARDING ON-RESERVATION TRUST ACQUISTION.

Plaintiffs contend that DOI failed to consider matters it was required to consider under the on-reservation trust regulation. 25 C.F.R. § 151.10. Even a glance at the Table of Contents of the ROD shows this is untrue: a heading in the ROD addresses each subsection. That DOI reached different judgments about certain factors than plaintiffs would have reached is not a basis for challenging DOI's decision under the APA. *City of N.Y. v. Permanent Mission of India*, 618 F.3d 172, 181 (2d Cir. 2010) ("We give a policy determination made by an agency pursuant to its explicitly delegated authority 'controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.'") (citations and internal quotation marks omitted); *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008) (an agency's choice is upheld if there

is a "rational connection" between the facts in the record and the choice that the agency made); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.").

A. DOI Considered the Scope of Its Legal Authority. 25 C.F.R. § 151.10(a).

Plaintiffs argue that the trust decision must be set aside because the ROD did not address the *Carcieri* "under federal jurisdiction" issue. But what the regulation requires DOI to consider is the "existence of statutory authority for the acquisition and any limitations contained in such authority." (Pls. Mem. 81.) DOI did that, explicitly concluding that it had authority under 25 U.S.C. § 465, which it did have. ROD 33-34 (section 7.2, "Statutory Authority for Acquisitions"); *see City of Sherrill*, 544 U.S. at 221 ("Section 465 provides the proper avenue for [the Nation] to reestablish sovereignty . . . ."). Plaintiffs' argument that more needed to be said, or that there needed to be a legal analysis, is not supported by the language of section 151.10(a).

The reference in the ROD to subsection 151.10(a) shows that DOI was aware of and considered the requirement that it have statutory authority for the acquisition. That would have been enough. But DOI did more. The ROD addressed specific challenges to that authority prominently raised by plaintiffs during the trust process. DOI had no obligation, beyond noting its § 465 authority, to respond to an obscure footnote in comments from the State asserting only that there are "serious questions as to whether in 1934 the DOI recognized the Oneidas in New York as a tribe," and citing a single irrelevant source. Baldwin Decl. Ex. O, at AR000286 n.2; Ex. P, at AR0001113 n.2. DOI's response–that it had authority under 25 U.S.C. § 465–was a complete response.

There is no basis for plaintiffs' contention (Pls. Mem. 82), that the Court must "vacate the Determination" because the *Carcieri* point is not addressed in the ROD. DOI determined that it had authority, and that was correct for the reasons previously shown. Had it separately analyzed the "under federal jurisdiction" point to support its finding of section 465 jurisdiction, it necessarily would have determined that the Oneida Nation was, as a matter of law, under federal jurisdiction at the time of the IRA, consistent with the rule that a tribe that voted on IRA reorganization was under federal jurisdiction for purposes of trust authority (and with the decision of the federal government to sue as trustee for the Oneida's in *Boylan*). Plaintiffs concede that DOI would conclude the Nation was under federal jurisdiction, so it would be futile to remand to address the issue in the ROD. (Pls. Mem. 25-26.)

B. DOI Considered the Need for Additional Land. 25 C.F.R. § 151.10(b).

As the ROD explains, section 151.10(b) is concerned with the federal government's justification for acquiring new land for the tribe, as the trust statute authorizes DOI to do, not with accepting into trust land the tribe already owns. The ROD addresses section 151.10(b), noting that Nation already owns all the land it sought to have taken into trust, so this factor is irrelevant.[20] ROD 34. DOI's interpretation of its own regulations as referring to the tribe's need for more land, not a change in the status of existing landholdings, is entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (defer to agency's interpretation of its own regulations unless plainly erroneous or inconsistent with the regulation); *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 182 (2d Cir. 2009) ("An agency's application of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'") (citations omitted).

[20] By the same token, there was no need for DOI to discuss the mandatory acquisition of 18 acres of former Air Force land. (*See* Pls. Mem. 83 n.54.) DOI had no discretion over that transfer of federal land into trust for the tribe. 40 U.S.C. § 523.

Even though section 151.10(b) is actually irrelevant, DOI went on to discuss the Nation's need for land, other than the 32-acre *Boylan* tract, over which the Nation could exercise sovereignty. ROD 34-38. Nothing in DOI's regulations indicates that tribal "need" is limited to *economic need*. (Pls. Mem. 85.) The law is to the contrary. ROD 35-36; *see also Connecticut ex rel. Blumenthal*, 228 F.3d at 92-94 (wealth of Pequots irrelevant to their right to have trust land and to have benefit of ordinary principles of Indian law). Congress was concerned with "economic life," but not only that. *See Town of Verona v. Salazar*, No. 08-cv-647, Mem. Decision & Order 17 (filed Sept. 29, 2009). (DE 38) As this Court noted: "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." *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 542 (1974)); *Cent. N.Y. Fair Bus. Ass'n v. Salazar*, No. 08-cv-660, Mem. Decision & Order 4 (filed Mar. 10, 2010) (DE 74) (objective of the IRA was to increase tribal self-government "both in political and economic affairs"). DOI could reasonably conclude, as explained in the ROD, that the Nation also needed additional land over which it could exercise authority as a tribal sovereign in order to reinvigorate the tribe as a political and cultural entity. ROD 36-38.

Plaintiffs are also wrong about economic need. While DOI concluded that the Nation's casino was operating lawfully, only trust status could lay to rest the challenges to its operation that had been raised by the State on the basis of lack of sovereignty. *See, supra*, pages 21-22. DOI was entitled to take into consideration the acrimonious history of relations between the Nation and the plaintiffs in weighing the risk that Nation activities would continue to be challenged absent trust status. (Pls. Mem. 88.) DOI's judgment that Nation needed more than 32 acres of sovereign land for a homeland and tribal land base was reasonable and entitled to

deference. ROD 36 (noting that the State "has separately contended that the Nation's core enterprise, the Turning Stone Casino, is unlawful"). Plaintiffs disagree, but they do not show that DOI's conclusion was arbitrary and capricious.[21]

Plaintiffs claim that DOI prejudged the Nation's need for land, insinuating that Associate Deputy Secretary Cason made a decision to take at least 10,000 acres of land into trust before the State and Counties had an opportunity to weigh in on the Nation's application. (Pls. Mem. 84.) The prejudgment argument featured prominently in the plaintiffs' discovery motion as the basis for obtaining internal DOI documents that had been withheld under the deliberative process privilege and for deposing Cason. (DE 141.) However, the deliberative process documents confirmed that the 10,000 acre figure had been a ceiling, not a floor. *See* ARS000903-08; ARS001065-66; ARS001351. Although the Court gave them the opportunity to depose Cason on this issue, plaintiffs have not sought to admit the Cason deposition nor have they cited the deposition on the question of prejudgment as they have improperly done elsewhere in their memorandum. That omission is telling. DOI told the Nation to prioritize the parcels in its application because it would not get more than 10,000 acres in trust, with no commitment that it would get that much, or anything. ARS001065; ARS001141-12; AR049276-77. Ultimately, DOI decided to take more than 10,000 acres into trust, but that was after a thorough parcel by parcel review, a complete EIS, and the benefit of comments from plaintiffs and others. ROD 7. There was no prejudgment.

[21] Plaintiffs complain that lower-level DOI staff expressed the view in an internal email that all of the Nation's land should be taken into trust to remedy the State's unlawful acquisition of the land. (Pls. Mem. 87.) Such internal staff discussions are irrelevant to APA review of the ROD. Plaintiffs repeatedly treat such interim staff communications as if they were the agency's final decision, but the ROD is not based on those communications and speaks for itself. Plaintiffs were given access to the deliberative process documents in order to evaluate their bias claim, which they have decided not to pursue.

Plaintiffs repeatedly note the date that they received "formal notice" of the Nation's application in an effort to suggest that they had something less than a fair opportunity to communicate their views to DOI. (*E.g.*, Pls. Mem. 84.) That implication is false. The State and Counties had actual notice of the Nation's trust application immediately and long before "formal notice" was given. Indeed, the State and Counties met with DOI about various post-*Sherrill* issues including trust status on April 22, 2005—soon after the Nation filed its application. AR07369-73 (memorandum summarizing meeting). Within a few days after the Nation filed the trust application, the State and Counties made their opposition to trust status known to DOI directly and through members of Congress sympathetic to their position. *See* AR049434-37 (Letter from Madison County Board of Supervisors Chairman to Secretary Norton (Apr. 11, 2005) opposing Nation's trust application); AR049431 (Letter from Oneida County Board of Legislators to Congressman McHugh (Apr. 11, 2005) opposing Nation's trust application); AR049426-47 (Letter from Congressman McHugh to Secretary Norton (Apr. 13, 2005) opposing Nation's trust application); AR049422 (Letter from Congressman Boehlert to Secretary Norton (Apr. 21, 2005) asking her to suspend all action on Nation's trust application); AR007369-73 (Memorandum summarizing April 22, 2005 meeting Department of Interior officials had with state and county officials and Nixon Peabody attorney Dave Schraver regarding Nation's trust application); AR049393-95 (Letter from Governor Pataki's office to Secretary Norton (May 13, 2005) opposing trust application).

Plaintiffs had ample opportunity to comment on the DEIS and FEIS and to make known their position on the trust acquisition long after they received "formal notice." The record shows that DOI met with the plaintiffs, reviewed their comments as well as those of citizens and public officials, and conducted a careful parcel by parcel review of the trust application, making a final

decision to include some parcels and to exclude others. ROD 7, 34-39. The agency fully considered the Nation's need for land above and beyond the requirements of section 151.10(b). *See* Nation SJ Mem. 43-44; U.S. SJ Mem. 48-51.

C. DOI Considered Tax Impacts. 25 C.F.R. § 151.10(e).

Plaintiffs claim that DOI did not properly consider the impact of the trust acquisition on local tax revenues. Like the purported other non-consideration claims, here again plaintiffs are really just quarreling with the outcome of DOI's consideration of an issue. The ROD shows that DOI fully considered the impact on local governments of removing Nation land from the tax rolls. ROD 40-49. Indeed, tax issues were a main focus in the ROD—both tax losses due to the non-taxability of trust land, and the extent to which trust land stimulated non-Indian tax payments by supporting Nation development. DOI's judgment regarding tax issues and how to weigh them is entitled to deference and is fully supported by the administrative record. Every trust acquisition has the effect of removing the land from local property tax rolls. 25 U.S.C. § 465 ("such land or rights shall be exempt from State or local taxation"). Thus, the mere fact that a trust acquisition reduces local property tax revenue is not a valid objection to taking land into trust. *See generally Connecticut ex rel. Blumenthal*, 228 F.3d at 85, 92-94 (recognizing that effect of trust transfer always is to create property tax immunity).

DOI would have been justified in giving less weight to tax impacts than usual, although it did not do so in the ROD. What makes the Oneida trust acquisition different is that—unlike the ordinary trust transfer involving fee land—this one will *not* reduce local property tax revenues in comparison to their current level because the Nation's legal obligation to pay property taxes remains in dispute, and the Nation has not paid taxes with respect to the land (except in the Cities of Oneida and Sherrill, where it has made such payments pursuant to agreements settling tax and

regulatory issues). ROD 42-44. Moreover, as to the largest share of the taxes, the Town of Verona treated the Nation's casino resort properties as wholly property tax exempt until after the *Sherrill* decision in 2005, when it first issued an assessment for that year and a "look back" assessment for 2004. ROD 50-52. And state law has, since 2005, relieved Oneida County of any responsibility to guarantee payment to the Town of Vernon and any school district therein of property taxes not paid by the Oneida Nation, and pursuant to the law the Town of Vernon assesses all properties in the town as if no property tax payments will be received from the Oneida Nation. State Fin. L. § 99-nj (AR48500-10). Taking the Nation's land into trust will not, therefore, take away any property tax revenue on which local governments have actually relied to fund their operations. Moreover, it remains to be seen whether, because of state tax exemptions, the local governments are entitled to collect property taxes on Nation land, even if the Nation's land were not taken into trust.

Plaintiffs argue that DOI relied unduly on the Nation's commitment to enter into agreements with local jurisdictions to offset the cost of services provided to the Nation. (Pls. Mem. 90-92.) But past experience makes DOI's judgment completely reasonable. The Nation voluntarily made payments in lieu of taxes (and which at least Madison County actually treated as tax payments for purposes of its own inter-governmental obligations) to local governments that agreed to accept them at a time when both the district court and the Second Circuit had ruled that the Nation was immune to local property taxes. ROD 22, 40, 47; AR75751; AR74078; AR81311-12; *see also* Nation SJ Mem. 5. That practice and the Nation's performance of its post-Sherrill agreements to pay taxes to the City of Oneida and City of Sherrill, and the Nation's continuing service agreements with other local governments, show that the Nation will enter into and abide by agreements to offset the costs of services provided by local governments. ROD 47,

50. Plaintiffs note that the Nation ceased to make Silver Covenant payments in 2005 (Pls. Mem. 92), but that occurred after the Counties made it clear that they planned to foreclose on Nation land notwithstanding past Silver Covenant payments and that they would give the Nation no credit towards claimed tax obligations for past or future Silver Covenant payments. AR020635-36; AR023552.

Contrary to plaintiffs' argument, DOI did not treat Nation payments to local governments for services, or to the State to reimburse it for overseeing Turning Stone Casino, or to employees who in turn pay income, property and sales taxes, as dollar for dollar replacements of property tax revenue. Rather, DOI considered the aggregate fiscal impact on local governments of assuring the continued viability of Nation business activities by taking the land into trust. ROD 47-50. DOI included in that analysis information about employment opportunities in the area and concluded that if Nation businesses, particularly the casino resort, were to close that there were not sufficient local alternatives to provide employment for the thousands of workers living in the area who would lose their jobs. (*Id.* at 24, 28.) It was completely reasonable for DOI to conclude that tax income generated from Nation employment offset the absence of property taxes on trust land. That includes employment generated by the Nation's payments to the State of New York for oversight of Turning Stone Casino pursuant to the gaming compact. Nothing in the ROD depends on whether the net tax revenues would be greater or smaller or whether the Nation could pay property taxes.

Plaintiffs argue that Turning Stone Casino would continue to operate even if land is not taken into trust, doubting that the Nation would actually close the casino and allow tax foreclosure. But the simple fact is that the State has repeatedly challenged the legality of the casino, including in its memorandum. (Pls. Mem. 96-97 (disputing that the casino is covered by

IGRA because the Nation does not have sovereignty over the land)); ROD 36 (noting State's contention). DOI and the Nation (as well as this Court) disagree. *See New York v. Salazar*, No. 08-cv-644, Mem. Decision & Order 17 n.9 (filed Sept. 29, 2009) (DE 132) ("the land upon which the Turning Stone Casino is situated clearly fits within 'Indian lands' pursuant to IGRA"); ROD 8-9, 12. Plaintiffs cannot ask the Court to disregard *the State's own* arguments about the legality of the casino; even if those arguments are unavailing, their existence presents a threat to the Nation and to local employment. Trust status will assure that the casino will continue to operate and will continue to generate income and employment opportunities for local residents and tax benefits for plaintiffs. DOI correctly said that in the ROD. ROD 23-25, 28, 41-53.

Plaintiffs emphasize the size of the annual tax assessments on Nation properties that would go into trust. (Pls. Mem. 88.) The vast majority of that figure represents the valuation of the casino resort as a gaming facility, which is not its fair market value to a purchaser (which could not offer casino gaming) and therefore imposes a tax on tribal gaming contrary to the Indian Gaming Regulatory Act. *See* 38-39 *infra*; ROD 51-53. Plaintiffs do not and cannot dispute that the casino resort facilities are economically viable only in the hands of the Nation; just the cost of maintaining the buildings would exceed the revenues they could generate absent the casino gaming function that draws visitors to the area. AR021158; AR066610-29 (casino appraisal); ROD 51-52. Property taxes violate preemptive federal law when they tax the *value* created by tribal gaming. Nation SJ Mem. 57-61 (fully explaining the point regarding illegality of tax on gaming enterprise).

Plaintiffs' argument that the authority to tax the casino parcels comes from *Sherrill*, not from IGRA (Pls. Mem. 95), misses the point that the issue here is not immunity to property taxation but a federal statutory preemption of taxation of gaming revenues. DOI did not base its

decision on the federal tax immunity rejected in *Sherrill*. To the contrary, DOI accepted for purposes of its analysis that Verona, in light of *Sherrill*, could tax the unimproved land value of the casino resort parcels as a matter of federal law. Nevertheless, DOI concluded that Verona could not also impose taxes on the Oneida Nation's gaming operation by basing its assessment on the unique value of the property as a casino resort. ROD 51-52. The record is clear that Verona used the value of the Nation's gaming business to arrive at a value to Nation land that the land would not have without gaming, including resort facilities that are economically dependent on the casino. ROD 52-53; AR48951-52; AR68396-97; AR68394-95. And the ROD is clear that DOI requires the Nation to pay that portion of the property taxes attributable to the value of the Nation's land without a gaming enterprise permit. ROD 52-53.

As explained more fully in the Nation's Memorandum of Law in Support of Motion for Summary Judgment, federal law preempts state tax law when the tax law is applied so as to divert tribal gaming revenues to local government coffers, contrary to IGRA's purpose. Nation SJ Mem. 57-61. That federal preemption analysis based on a conflict between IGRA and the Verona tax assessment has nothing to do with *City of Sherrill*. It results from the supremacy of IGRA's gaming provisions, not from tribal sovereignty.

DOI's judgment that there was nothing about the tax impacts in this case that would justify denying trust status was not an abuse of discretion, even without taking into consideration the offsetting fiscal benefits of Nation activities. *See* Nation SJ Mem. 44-47; U.S. SJ Mem. 51-57.

D. DOI Adequately Considered Jurisdictional Conflicts. 25 C.F.R. § 151.10(f).

DOI's regulations require the agency to consider "[j]urisdictional problems and potential conflicts of land use which may arise," when making a trust decision. A change of jurisdiction is inherent in *every* trust acquisition, so that cannot be a valid basis for challenging a trust decision. DOI did consider "jurisdictional problems and potential conflicts of land use" in detail and at length in its decision. ROD 55-68; *see also* Nation SJ Mem. 47-50 (fully discussing DOI's proper exercise of its discretion under 25 C.F.R. § 151.10(f)). Plaintiffs do not claim that DOI did not consider these issues, but they condemn DOI's conclusions for what plaintiffs call "failures of both factual support and logical reasoning." (Pls. Mem. 99.) Plaintiffs' real complaint is that DOI rejected their speculative forecasts of future harm and their exaggerated account of past pre-*Sherrill* disputes in weighing this factor.

Recognizing that the State retains criminal jurisdiction over trust land, 25 U.S.C. § 232, precluding any argument about gaps in criminal enforcement, plaintiffs focus their analysis of jurisdiction on supposed potential environmental harms. (Pls. Mem. 99-111.) But DOI completed a full EIS even though none was required and concluded that the trust acquisition would not cause an adverse impact on the environment. ROD 21. The Environmental Protection Agency reviewed the FEIS and concurred. ROD App. B, 117 ("Based on our review, we do not anticipate that conveying up to 17,370 acres now owned by the Oneida Nation of New York into trust will result in significant adverse impact to the environment.").[22]

[22] In stark contrast, EPA sharply criticized the EIS DOI prepared in *Center for Biological Diversity v. Dep't. of the Interior*, 623 F.3d 633 (9th Cir. 2010) (EPA commented that DEIS failed to satisfy NEPA disclosure requirements); *id.* at 649 (noting EPA objections to draft and final EIS). In the ROD at issue in this case, unlike the one in *Center for Biological Diversity*, DOI did *consider* the effects of a change in jurisdiction on the way the land would be used. (ROD 21 (referring to Nation's use of the land at a time when the federal courts had agreed with the Nation's position that state law was inapplicable as evidence of how it would be used in trust status in the context of the EIS); *id.* at 60-68 (discussion of land use and environmental concerns in the context of the Part 151 regulations). Plaintiffs

Plaintiffs' complaints about DOI's analysis are based on the same kind of speculation about the Nation's future conduct that this Court previously held were insufficient even for standing. *New York v. Salazar*, No. 08-CV-644, Mem. Decision & Order 21. As before, when plaintiffs challenged the mandatory transfer of excess Air Force property, "Plaintiffs do not allege that [the Nation] is currently developing the land in a manner harmful to Plaintiffs, and there is no indication in the record that the [Nation] is planning to develop the land in a manner that would implicate Plaintiffs' concerns." *Id.* DOI found that the Nation did not plan to change land use as a result of trust status. ROD 9, 31, 39. Plaintiffs' "speculative and hypothetical" (*New York v. Salazar*, No. 08-CV-644, Mem. Decision & Order 21), objections do not permit a court to set aside DOI's careful analysis as arbitrary and capricious.

DOI directly addressed the general "checkerboarding" issue—the problem inherent in applying different regulatory regimes to adjoining lands—in the ROD. As the Nation fully explained in its Memorandum of Law in Support of Motion for Summary Judgment at pages 47-50, DOI paid a lot of attention to achieving a trust land configuration, within the realm of the possible and consistent with tribal needs, that is contiguous. Acknowledging that "complete contiguity is neither a practical nor a reasonable expectation considering the process of land reacquisition," DOI found that the lands it had agreed to take into trust were "highly contiguous." ROD 56; *see also* ROD 38-39, 69. DOI excluded land it deemed insufficiently contiguous, even when the Nation conducts important governmental or commercial activities on the land. (*Id*. at 19.) DOI also found that the Nation's land use is generally consistent with the use of surrounding land. (*Id.* at 59.) The City of Oneida has agreed to treat the housing

simply disagree with DOI's conclusion that the Nation would not harm the land when subject to its own laws and federal regulation rather than to state law).

development at the Village of White Pines and the Ray Elm Children & Elders Center as conforming uses. (*Id.*) The disputes therefore principally concern the casino resort and some Sav-On gas stations. These are existing uses of the land, and plaintiffs identify no reason to believe that those uses would change in a manner detrimental to their interests upon transfer into trust.[23]

Plaintiffs argue that DOI should have assumed that the Nation would engage in future serious environmental violations unless restrained by state law. DOI addressed that concern directly and rejected it:

> The State and local governments raised concerns in several specific areas of governance and identified a few past Nation actions and conflicts with the Nation and as a basis for future concern over placing any lands into trust. These incidents, individually and collectively, are not substantial. The Department observes that many of these concerns appeared to stem from disputes over which government had jurisdiction at the time – an issue that this decision will resolve with respect to the Subject Lands after they are acquired in trust. These concerns have been satisfactorily addressed by the Nation in its responses to comments and through information provided to the Department in support of its fee-to-trust request.

ROD 61. Specifically addressing harm to wetlands, DOI noted that "the Nation is proposing no ground disturbing activity" that would threaten wetlands. *Id.* DOI also recognized that the Nation has been protective of the environment and of wetlands in particular. The Nation consults with federal agencies (*id.*), and has established a 75 acre wetlands mitigation bank to offset impact from the casino resort. ROD 61. Several of the resort's golf courses have earned certification from the Audubon Society because they

[23] Connecticut ex rel. *Blumenthal v. U.S. Dep't of* Interior, 228 F.3d 82, 90-91 (2001) (Checkerboard jurisdiction not novel in Indian law or impediment to trust acquisition). The ROD also addresses building code, zoning and other local regulatory issues. ROD 67-68.

"meet standards for protecting water quality, conserving natural resources, and providing wildlife habitats." *Id.* Likewise, DOI discussed the Nation's construction of a cogeneration plant and its impact on air quality. *Id.* at 62 (noting that such facilities are promoted by the New York State Energy Research and Development Authority and "illustrates the Nation's concerns for the environment."). The ROD also addresses wildlife protection, water resources, solid and hazardous waste, petroleum storage, pesticides, and other issues. *Id.* at 62-65.

There is no reason to predict that the Nation will not comply with *federal* environmental law once the land is taken into trust on the basis of pre-*Sherrill* non-compliance with *state* law. Plaintiffs emphasize that *Sherrill* held that the Nation's reacquired land was subject to state jurisdiction. As a matter of positive law, there is no question that the Supreme Court's holding means that state regulatory authority applied before as well as after the decision. But both the district court and the Second Circuit had agreed with the Nation prior to the Supreme Court's decision that the reacquired land was sovereign tribal land not subject to state taxation and regulation. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003); *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226 (N.D.N.Y. 2001); *Oneida Indian Nation v. Madison Cnty.*, __ F.3d __, 2011 WL 4978126, at *23-24 (2d Cir. Oct. 20, 2011) (recognizing that the Counties conceded and the district court agreed that it would be inequitable to hold the Nation liable for pre-*Sherrill III* interest and penalties on taxes). The Nation's non-compliance with state regulation under those circumstances does not indicate disregard for the environment or for lawful regulatory authority.[24] Plaintiffs offer no factual or legal support for the proposition

[24] Plaintiffs argue that the effect of trust status on easements is part of the section 151.10(f) analysis. (Pls. Mem. 109-11.) But the enforcement of easements has nothing to do with State and local regulatory authority, and the trust acquisition is subject to existing easements. ROD 66. The ROD notes that the Nation has a history of entering into

that compliance with federal environmental standards would lead to cognizable environmental harm.

DOI rejected as inconsistent with tribal sovereignty the argument that DOI should impose state and local standards on the Nation's trust land. ROD 12. The agency also observed that the dispute over regulatory authority was, at least in part, about jurisdiction in the abstract rather than "grounded in significant actual deficiencies in the Nation's past administration of its lands." ROD 67.

Plaintiffs are asking the Court to substitute its own judgment for DOI's on the basis of a distorted view of the facts in the administrative record. Courts defer to agency decisions about how to balance competing factors. *Kempthorne*, 538 F.3d at 132; *Permanent Mission of India*, 618 F.2d at 181 .[25] Even if that were not so, plaintiffs point to no actual harm that would result from the trust acquisition. Even plaintiffs' complaints about existing conditions, including the locating of Turning Stone at a New York State Thruway exit that happens to be located two miles from school facilities (Pls. Mem. 108), or minor construction that was underway in 2005 and in any event was completed long ago (Pls. Mem. 109), do not identify any harm, much less harm that could be attributed to trust status. The removal of State and local regulatory authority

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agreements regarding utilities and infrastructure—and, indeed, quickly resolved National Grid's APA challenge by such an agreement. Stipulation and Joinder of Dismissal (July 29, 2009) (DE. 45), *Niagara Mohawk Power Corp. v. Salazar*, No. 5:08-cv-649 (N.D.N.Y). The only connection plaintiffs identify is a state regulation, 16 N.Y.C.R.R. pt. 753, requiring notice of a proposed excavation near buried utility lines. (Pls. Mem. 110.) Nothing in the administrative record suggests any concern about lack of such notice. (*See* AR04354-56.)

[25] Plaintiffs claim that DOI failed to take jurisdictional conflicts seriously because DOI staff members told Malcolm Pirnie that jurisdictional conflicts were not an issue to be addressed in the EIS. (Pls. Mem. 105.) But that misses the difference between the NEPA standards that govern the EIS and the Part 151 regulations governing DOI's trust decision. NEPA is concerned with real impacts on the *physical environment*, not abstractions such as regulatory authority. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). Allegations of economic injury do not give rise to a NEPA claims, *Cent. N.Y. Fair Business Ass'n v. Salazar*, Mem. Decision & Order 18-19, and neither do conflicts over jurisdiction. Malcolm Pirnie was hired to assist in preparing the EIS, not to make decisions under DOI's Part 151 regulations. Thus, Malcolm Pirnie had no reason to address section 151.10(f).

(Pls. Mem. 109), is the whole point of trust status, not a harm that DOI can view as precluding a trust transfer under section 151.10 (f), absent special factors not found here.

E. DOI Considered Its Ability to Discharge Its Responsibilities. 25 C.F.R. § 151.10(g).

DOI addressed all of the requirements of 25 C.F.R. § 151.10, including that it consider its ability to discharge responsibilities arising from the acquisition.[26] ROD 69-70; *see also* Nation SJ Mem. 50 (discussing DOI compliance with 25 C.F.R. § 151.10(g)); U.S. SJ Mem. 6364 (same). DOI noted that the trust acquisition "is anticipated to impose limited additional responsibilities." ROD 69. For example, it is unlikely that DOI will be asked to approve many leases, because the Nation does not plan to lease its land. *Id.* And the Nation will not depend on DOI to provide municipal services. *Id.* The exclusion of land located farther away from the Nation's principal facilities also reduces the burden on DOI. *Id.* There was no reason for the ROD to address the use of Trial Priority Allocation (TPA) funds, which is independent of the trust decision. (Pls. Mem. 112.)

None of plaintiffs' reasons for questioning DOI's ability to carry out its responsibilities come anywhere close to the "arbitrary and capricious" line. DOI has trust responsibility in connection with commercial and gaming properties like the Nation's all across the country. *See City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003) (California); *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (Michigan); *Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225 (10th Cir. 2010) (Kansas). The delay in DOI's acknowledgement of the transfer of the 18-acre Air Force parcel does not call into question its ability to manage trust land, and the distance

[26] There was no reason to address this issue in the EIS. (*See* Pls. Mem. 114-15.) Although plaintiffs obtained drafts and other pre-decisional material in discovery on the basis of its seemingly-abandoned bias claim, a *draft* response to a comment on the EIS has no bearing on whether DOI adequately addressed this issue in the ROD.

between the Nation and BIA's Eastern regional office is not an impediment in this day of air travel and email, as shown by the time devoted to site visits in conjunction with the EIS by Eastern Regional office staff. AR081543-613; AR081785-86. Finally, the Nation's lack of sovereignty over the land is the reason to take the land into trust—like any other trust acquisition. It is not an obstacle to DOI's exercise of its responsibilities, as trust status will eliminate the lack of sovereignty. *See City of Sherrill*, 544 U.S. at 221 (trust status is proper way to restore sovereignty).

VI. THERE IS NO REASON TO ADDRESS FUTURE TRUST APPLICATIONS.

Plaintiffs ask the Court to address the legality of hypothetical trust decisions. It is true that DOI did not preclude the Nation from applying to have additional land taken into trust. But no such application is under consideration by DOI. There is no final agency action reviewable under the APA other than DOI's May 20, 2008 ROD. Plaintiffs' anticipatory protests against a decision that has not been made are statutorily and constitutionally unripe.

CONCLUSION

Plaintiffs' motion for partial summary judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 30, 2012, I caused to be filed with the Clerk of Court via the CM/ECF system the foregoing opposition to plaintiffs' motion for partial summary judgment, together with the accompanying objections and responses to plaintiffs' statement of material facts, and the accompanying declaration of Michael R. Smith. The parties' counsel of record in this action are registered on the CM/ECF system, which will send those counsel notification of filing.

Michael R. Smith
Michael R. Smith