# UNITED STATES DISTRICT COURT
# NORTHERN DISTRICT OF NEW YORK

TOWN OF VERONA, TOWN OF VERNON, ABRAHAM ACEE and ARTHUR STRIFE,

*Plaintiffs,*

*-against-*

Civil Action No. 6:08-CV-00647-LEK-DEP

S.M.R. JEWELL, in her Official Capacity as United States Secretary of the Interior, and the UNITED STATES DEPARTMENT OF THE INTERIOR,

*Defendants.*

## PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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### THE DECISION BY THE DEPARTMENT OF THE INTERIOR WAS ARBITRARY AND CAPRICIOUS IN LIGHT OF THE TRIBE'S RECENT REVELATION THAT IT INTENDS TO FILE ANOTHER LAND TO TRUST APPLICATION FOR AS MUCH AS 12,000 ADDITIONAL ACRES

The Land Into Trust process has degenerated into an Alice-In-Wonderland "bait and switch" farce, where an Indian tribe can promise anything it wants in a land-into-trust application, and then turn around and subsequently do whatever it desires, once the application is approved. *See, e.g., In re Gambling Ordinance of the Ponca Tribe of Nebraska*, National Indian Gaming Commission, dated December 31, 2007 (approval of a tribal gaming ordinance submitted after the same tribe had promised State authorities it would not gamble on the land in exchange for the State's dropping its opposition to the Tribe's land into trust application). A copy of the National Indian Gaming Commission's decision is appended as Exhibit "A" to the Declaration of Cornelius D. Murray, dated April 1, 2014, submitted herewith. Even the Commission bemoaned the fact that apparently the Tribe had led the State "down the primrose path with promises it never intended to keep." *Id.* at 17. If, as the Governement argues, the Department of the Interior has no "authority to impose restrictions on a Tribe's future use of property taken into trust..." (Dkt. No. 65-1 at 29), this entire charade is a pointless exercise in futility.

In the present case, the Government's Memorandum of Law, however, blithely says, in effect, "not to worry," because the Department of the Interior need not "speculate on what

the Nation ***might*** do in the future, particularly in the absence of any evidence that the Nation is considering an alternative use" (emphasis supplied) [Dkt No. 65-1 at 12].

Quite to the contrary, no such speculation is required here. We now know, and the Court now knows, that the Oneida Nation of Indians has plans for a future trust application that goes well beyond the 13,000 acres the Department of the Interior ("DOI") has already approved. Indeed, the Settlement Agreement with the State and Oneida and Madison Counties, approved by this Court on March 4, 2014, makes it clear that the Oneida Indian Nation intends to take not just the 17,000 acres it had originally sought to have taken into trust (which DOI itself reduced to 13,000), but that it intends to take up to 25,000 acres, regulatory control over which will also be removed from localities. *New York State v. Jewell*, 6:08-CV-644, LEK-DEP [Dkt No. 341].

This begs the question how the Government could possibly justify to this Court its approval of the current land into trust application, when it is abundantly clear that the initial 13,000 acres to be taken into trust is only the proverbial "nose in the tent" and that the Tribe plans to file a subsequent application to expand DOI's trust holdings to 25,000 acres, including acreage which DOI itself had previously rejected in order to accommodate the requests expressed by, among others, "local governments" (like the towns of Vernon and Verona). *See* Record of Decision, Dkt. No. 47-4 at 19.

While, to be sure, and as the Government's Memorandum of Law points out, a Court's review of agency action is limited and it may not substitute its judgment for that of an administrative agency (Dkt No. 65-1 at 12), it is also true that a Court is not a mere rubber stamp that must bless whatever the bureaucracy serves up by turning up a blind eye and a

deaf ear to reality. *See* the Second Circuit's recent decision in *Guertin v. United States of America*, 743 F.3d 382 at 385-386 (2d Cir. 2014), *citing National Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 658 F.3d 200, 215 (2d Cir. 2011) ("Record must show that the Agency examined the relevant data and articulated a satisfactory explanation for its action"). Here, the Department of the Interior has not assessed the potential impact of the recent decision by the Oneidas to submit a new application to expand the amount of trust land to 25,000 acres. Nor has it explained how, after it previously rejected a 17,000 acre application, it can approve a 25,000 acre application that includes some of the very same property it decided to exclude from the first approval.

This Court should not allow DOI to approve this application in a vacuum or in piecemeal fashion. Everyone is now on notice as to OIN's real intentions and this land to trust application should therefore be rejected because it does not tell the whole story, and until OIN finds a new application that does, it is premature for DOI to act.

## CONCLUSION

For all the foregoing reasons, the determination of the DOI to approve the OIN's land to trust application was arbitrary and capricious and should be vacated by this Court.

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April 1, 2014

Respectfully submitted,
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