STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

GEORGE E. PATAKI
GOVERNOR

RICHARD PLATKIN
COUNSEL TO THE GOVERNOR

January 30, 2006

VIA FACSIMILE (615-564-6701) AND U.S. MAIL

Mr. Franklin Keel
Regional Director
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive – Suite 700
Nashville, TN 37214

Re: Land-In-Trust Application of Oneida Indian Nation of New York

Dear Mr. Keel:

This letter (and accompanying Memorandum and Report) is submitted on behalf of the State of New York ("State") in opposition to the application (the "Application") of the Oneida Indian Nation of New York (the "OIN") to have various properties owned by the OIN in fee taken into trust by the United States. This Application to take into federal trust status over 17,000 acres of land consisting of hundreds of different properties scattered throughout Oneida and Madison Counties in upstate New York is unprecedented and would have profound negative impacts to the State, its political subdivisions, residents and citizens.

As explained in the attached Memorandum, no land within this State has ever been held in federal trust status on behalf of any Indian nation, tribe, group or individuals. I find no legal authority for the Secretary of the Interior ("Secretary") to act on the instant Application. The only possible statutory basis for the Secretary to act is 25 U.S.C. § 465, which was enacted as part of the Indian Reorganization Act of 1934 ("IRA"). However, the IRA has not been recognized to apply to tribes in New York. Following enactment, the OIN (as well as all other New York Indians) voted to reject the IRA. Consequently, Section 465 is not and cannot be available to the Oneidas.

This conclusion is in no way altered by Section 2202 of title 25, which states that "[t]he provisions of this title shall apply to all tribes notwithstanding the provision of Section 478 of this title." Section 2202 must be read together with Section 2201 which defines "tribe" to mean "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, *the United States holds lands in trust*." [Emphasis added]. To reiterate, no land within New York State has ever been held in federal trust status.

It is inconceivable that Section 465 would be a source of authority for the federal government to move massive amounts of land within New York State off of the local tax rolls and outside of the regulatory jurisdiction of the State and local governments. The discretionary authority contained in that section was not intended to be used to create a permanent checkerboard reservation. To the contrary, the legislative history makes clear that Congress intended this section to be used to consolidate checkerboard reservations that were created by federal allotment policy codified by the Dawes Act of 1887 (also inapplicable in New York).

There is no statutory authority for the Secretary to act here, but even assuming for the sake of argument that some such authority exists, the Application could not be approved because it fails to comport with the requirements for taking land into federal trust status.

The land into trust process was designed to provide for acquisition of small tracts of land to allow landless Indians or tribes to become economically self-sufficient. There is no basis for contending that the 17,000 acres owned in fee by the OIN needs to be taken into trust for the economic self-sufficiency of that tribe. Moreover, it is clear that the OIN has the capacity to use its land in an economically productive way absent trust status.

I also note that the Application omits any mention of the fact that some of the land which the OIN seeks to have taken into trust is the site of a Class III gaming facility that is being operated in violation of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq* ("IGRA"). As you are aware, the Supreme Court of the United States determined in the *City of Sherrill* case that the OIN does not exercise governmental jurisdiction over the lands where the Turning Stone Casino is located and, therefore, such lands are not "Indian lands" as defined by IGRA. As you are also aware, gaming activities at Turning Stone are not being conducted pursuant to a valid tribal/state compact because New York State's highest court determined that former Governor Cuomo lacked authority to enter into such a compact absent legislative authorization or approval.

If the purpose of the Application is to attempt to cure the legal infirmities of the Turning Stone Casino, it is misguided. The Secretary lacks the statutory authority to acquire lands on behalf of the OIN and, therefore, the only potential cure for the fact that Turning Stone is not located on "Indian lands" would be land claim settlement legislation enacted by Congress. Moreover, even if the Secretary had the authority to take the lands on which Turning Stone is located into trust, which she does not, such lands would only be eligible for gaming under IGRA if the Secretary makes a two-part determination under 25 U.S.C. § 2719(b)(1)(A) and then the Governor concurs in such determination. Further, the only possible cure for the lack of a valid tribal-state gaming compact would be the enactment of State legislation to authorize or approve such a compact.

At the heart of the *Sherrill* decision is the profound concern that allowing tribally-owned land scattered throughout communities in Central New York to be removed from state and local jurisdiction would fundamentally and irreparably injure the affected communities. These communities cannot be maintained without the ability to govern in a coherent and comprehensive fashion. Piecemeal removal of land from state and local jurisdiction threatens the regulatory scheme as a whole because land use, environmental and other laws are effective only if they apply uniformly and equitably over an extended geographic area.

Sherrill made clear that the history and character of the affected areas had created justifiable expectations that should not be upset by permitting the OIN to exercise sovereignty over land interspersed in existing communities long governed by state and local governments. This Application for hundreds of parcels to be taken into trust status *en masse* is a blatant effort to circumvent the concerns articulated by the Court.

While we strongly object to this Application, the State remains committed to working toward a comprehensive land claim settlement that avoids costly and disruptive litigation. To facilitate meaningful settlement discussions, however, the OIN must abandon its unilateral strategy of seeking federal trust status and commit to working cooperatively on a settlement.

In the event that the BIA proceeds to act on the Application, the State would of course cooperate in the Bureau of Indian Affairs' ("BIA") review under the National Environmental Policy Act. As detailed in the accompanying Report prepared by the firm of O'Brien & Gere, it is imperative that the BIA prepare a comprehensive Environmental Impact Statement to fully analyze all of the potential environmental impacts presented by the Application. To coordinate the State's multi-agency effort to participate in this process and to ensure that the State's interests are fully conveyed to the BIA, the Governor has directed Commissioner of Environmental Conservation, Denise Sheehan to coordinate these activities.

This letter and accompanying Memorandum and Report together constitute the State's comments on the Group I and Group II parcels. The State will be submitting further comments regarding the Group III parcels. The Report may also be accessed on the Department of Environmental Conservation's website at www.dec.state.ny.us/website/ogc/oneida/index.html.

Thank you for your cooperation in this matter.

Sincerely,

Richard Platkin
Counsel to the Governor

cc (w/o accompanying Report):

Harriet Miers, White House Counsel
Gale A. Norton, Secretary of the Interior
James Cason, Associate Deputy Secretary for Indian Affairs
David Moran, Solicitor's Office
Philip Hogen, Chairman, National Indian Gaming Commission
Alberto R. Gonzales, United States Attorney General
Glenn Suddaby, United States Attorney, Northern District of NY
Senator John McCain
Senator Charles Schumer
Senator Hillary Clinton
Congressman Richard Pombo
Congressman Sherwood Boehlert
Congressman John McHugh
Congressman James Walsh
Eliot Spitzer, New York State Attorney General
Senator Joseph Bruno
Speaker Sheldon Silver
Denise Sheehan, Commissioner of Environmental Conservation
Rocco DiVeronica, Chairman, Madison County Board of Supervisors
Joseph Griffo, Oneida County Executive

MEMORANDUM

To: Department of the Interior, Bureau of Indian Affairs, Eastern Regional Office

Re: Comments Of The State of New York With Respect To The Land-In-Trust Application Of Oneida Indian Nation Of New York

Date: January 30, 2006

This memorandum is submitted on behalf of the State of New York ("State") to address the application (the "Application") of the Oneida Indian Nation of New York (the "OIN") to have various properties owned by the OIN in fee taken into trust status by the United States Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA"). The State objects to, and opposes, the OIN's Application for the following reasons: 1) there is no constitutional or statutory basis for granting the Application; 2) the relevant criteria set forth throughout 25 C.F.R. § 151 disfavor the Application; and 3) the Indian Gaming Regulatory Act ("IGRA") requires the concurrence of the Governor for lands to be taken into trust and used for gaming. Each of these arguments are set forth in more detail below.

I. There Is No Constitutional Or Statutory Basis For Granting The Application

A. Section 465 Does Not Apply To The Oneidas And Was Never Intended To Serve As A Vehicle For Moving Massive Amounts Of Land Located In Eastern States Such As New York Into Trust Status

There is no specific statutory authorization for taking OIN lands into trust status. Therefore, the only possible statutory basis for granting the OIN's application is the discretionary

authority contained in 25 U.S.C. § 465.[1] Section 465 was enacted as part of the Indian Reorganization Act of 1934 ("IRA"). That statute was intended to put a stop to allotment of Indian lands pursuant to the federal policy set forth in the Dawes Act of 1887; and to redress the loss of Indian lands under the allotment system. See, e.g., Hearings before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 1934 ("Hearings") at 26 (Act "aims to prevent further alienation and dissipation of Indian lands" through the allotment system and "to restore to landless Indians some of the lands improvidently alienated in the administration of the allotment system . . ."). See also County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 255 (1992) ("The policy of allotment came to an abrupt end in 1934 with the passage in 1934 of the [IRA]"); F.S. Cohen, Handbook of Federal Indian Law (1941) at 84.

The Dawes Act -- and the federal policy of allotment -- have never been applied in New York. See Laurence M. Hauptman, The Iroquois and the New Deal (1981) at 22 ("In New York, where the Dawes Act had not been applied . . ."). Indeed, the Dawes Act specifically excepted the Seneca Nation of Indians (the only tribe in New York with any significant land holdings at the time) from the Act's application. See 25 U.S.C. § 339. Consequently, Section 465 was not directed at New York. Not surprisingly, no Indian land in New York has ever been held in trust status for the Oneidas or any other group.

In any event, Section 18 of the IRA (25 U.S.C. § 478) conditions application of the IRA on a vote of the affected Indians. When a majority of the adult Indians in a reservation "shall

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[1] The OIN's application concedes as much. The only statutory authority cited is 25 U.S.C. §§ 465, 2202 and 2719. Section 2202 (discussed in footnote 4) merely addresses when Section 465 is applicable and does not provide an independent basis for taking land into trust. Similarly, Section 2719, which provides when land taken into trust after 1988 may be used for gaming, does not provide an independent source of authority to take land into trust. It merely imposes additional requirements for taking such action when the land is to be used for gaming. See, e.g., 25 U.S.C. § 2719(b)(1)(A); Artichoke Joe's California Grand Casino v. Norton, 278 F. Supp. 2d 1174, 1883 (E.D. Cal. 2003) (stating that § 2719 "imposes additional requirements for gaming on lands acquired in trust . . .").

vote against application" of the Act, it "shall not apply." 25 U.S.C. § 478. Following adoption of the IRA, the Oneidas (as well as all other New York Indians) voted to reject the IRA. See Michael T. Smith, Memorandum to Director, Office of Indian Services, Bureau of Indian Affairs, dated Feb. 24, 1982, at 8 ("Initially the Oneida were considered not eligible, but in a reconsideration based on the discussion in the case of U.S. v. Boylan, the Department of Interior changed its position and called for a referendum on June 17, 1936 . . . [t]he vote rejected the IRA 12 to 57"); see also Letter from Curtis Berkey, Indian Law Resource Center to Ray Halbritter, et al., dated June 30, 1986, at 2 ("[T]he Oneidas have rejected the IRA"). Consequently, under the plain terms of Section 478, Section 465 is not available to the OIN. Section 2202 of title 25, cited by the OIN in its Application, does not alter this conclusion.

Section 2202 does state that "[t]he provisions of this title shall apply to all tribes notwithstanding the provision of Section 478 of this title," but Section 2201 defines "tribe" to mean "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). Since the United States holds no lands in trust for the OIN, the OIN are not a "tribe" within the meaning of Section 2202; and the latter section therefore does not make Section 465 available for the OIN.[2]

Even if Section 465 did apply, which it does not, the discretionary authority contained in that section was never intended as a mechanism to move massive amounts of land off local tax

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[2] We also note that Section 465 permits land to be taken into trust status for the "purpose of providing lands for Indians." Section 479 (Section 19 of the IRA) defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." There are serious questions as to whether in 1934 the DOI recognized the Oneidas in New York as a tribe. See also John R.T. Reeves Report to the Commissioner of Indian Affairs, Dec. 26, 1914; Nat'l Archives, Record Group 75, file New York, 100086-14-013, at pp. 1, 4 (reporting that Oneidas had "sold all their land except about 350 acres to the State . . . . as a tribe, these Indians are known no more in that State").

rolls and outside local regulatory jurisdiction, or to create a permanent checkerboard reservation. The land into trust and land transfer sections of the [IRA] were designed to provide for acquisition of "small tracts of land" to allow "landless" Indians or tribes to become economically self-sufficient. See 78 Cong. Rec. 11123 (1934) (a purpose is to "provide for the acquisition, through purchase of land for Indians now landless who are anxious and fitted to make a living on such land ... [I]f we could put them on small tracts of land ... they could make their own living"); 78 Cong. Rec. 11730 (1934) ("Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land...").

There is no legitimate basis for contending that the 17,000 acres owned by the OIN must be taken into trust to secure the economic self-sufficiency of that tribe. Over the last decade the OIN has earned hundreds of millions of dollars from its business activities. The tribe today generates income of over $100 million a year -- a figure approaching $100,000 per tribal member. See 2005 Fact Sheet, "Positive Economic Impact of the Oneida Indian Nation," Feb. 22, 2005 at 3 (located at <<oneidanews.net/media/631.pdf>>, last visited Jan. 25, 2006). That is presumably in addition to income earned by tribal members through jobs in the OIN's businesses. Section 465 was never intended to serve, and cannot properly be used, as a vehicle to enable a tribe to accumulate vast wealth at the expense of the surrounding non-Indian population.[3]

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[3] As the BIA itself has recognized: "[W]e will not take additional land in trust for Indians who now have the ability to manage their own affairs. I see no reason why an Indian quite able to successfully manage his own affairs should be permitted to acquire additional land in trust and receive a variety of free real estate services and tax exemption for his newly acquired land." Memorandum, dated April 21, 1959, from Commissioner of DOI, BIA, to All Area Directors and Supervisors at 1. Although the policy set forth in the 1959 memo was revised in 1960, the Commissioner reiterated that "when trust status would place [the applicant] in a position where the trust status is being used as a 'tax dodge' by a 'big operator,' or where the trust status is being abused in various ways" trust status

In addition, the OIN's request to have large numbers of non-contiguous parcels taken into trust is at odds with the policies underlying Section 465. The IRA specifically sought to promote the "consolidation of [existing] checkerboarded [sic] reservations". See 78 Cong. Rec. 11732 (1934). The legislative history identified the "break-up of restricted lands into units unfit for economic use" as one of the major problems in "the administration of the allotment system." Hearings at 26. The revestment of tribal ownership over allotted lands "combined with the consolidation of the checkerboard reservations is an essential part of the proposed program . . ." 78 Cong. Rec. 11730 (1934). See also Hearings at 24-27 (the Act "aims to consolidate allotted lands into proper economic units"). The OIN's Application flies in the face of this goal.

B. In The Circumstances Present Here Section 465 Is An Impermissible Delegation Of Legislative Authority[4]

Particularly in light of the fundamental policy considerations that a land into trust application of this magnitude raises, there are serious questions as to whether the delegation of authority contained in 25 U.S.C. § 465 is constitutional. It is fundamental that Congress may not delegate its policymaking functions to an administrative agency. Under the Constitution, Congress may only delegate authority to an administrative agency when it articulates an "intelligible principle" that limits agency's exercise of that authority. See Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001), quoting J.W. Hampton, Jr., & Co. v. United

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is properly denied. See Memorandum, dated August 3, 1960, from Commissioner of DOI, BIA to All Area Directors.

[4] Section 465 is constitutionally infirm on other grounds as well. For example, to the extent it displaces state sovereignty over the land, it violates the Tenth Amendment, and exceeds Congressional authority under the Indian Commerce Clause. See Printz v. U.S., 521 U.S. 898, 935 (1997) ("The Federal Government may [not] issue directives requiring the States to address particular problems . . . [i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty"). But see Carcieri v. Norton, 423 F.3d 45, 58 (1st Cir. 2005). In addition, taking the land into trust would effectively deprive the State of its property interests created by the 1788 Treaty of Fort Schuyler without just compensation, in violation of the Fifth Amendment. See U.S. Const. Amend. V; see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 291 (1983).

States, 276 U.S. 394, 409 (1928). This requires Congress to state the policy behind its legislation, and set boundaries or standards to limit the agency's power. See Am. Power & Light Co. v. Secs. & Exch. Comm'n, 329 U.S. 90, 104 (1946).

Section 465 violates these precepts by giving the Secretary of the Interior ("Secretary") unbounded discretion to acquire land for Indians. "There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority except that the acquisition must be 'for Indians.' It delegates unrestricted power to acquire land. . . ." See South Dakota v. United States Dep't of Interior, 69 F.3d 878, 882 (8th Cir. 1995), vacated, 519 U.S. 919 (1996).[5] The IRA states a purpose, but a purpose is not a standard. The power to acquire land for the "purpose of providing land for the Indians" tells who will benefit from agency actions, but it provides no guidance whatsoever as to how much, from where, or for what use the Secretary may acquire land. See id. at 882-83 ("Despite the government's broad, inherent power to acquire land for public use, the nondelegation doctrine surely requires at a minimum that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition").

Neither the statute itself nor agency regulations contain limiting standards. The regulations list factors that the Secretary should consider when taking land into trust status, not boundaries to authority. More importantly, however, even if the regulations contained some acceptable standard, which they do not, administrative adopted standards cannot cure an unlawful delegation. Congress' fundamental function is to make public policy and legal

[5] Although the Eighth Circuit's decision declaring the land acquisition provision of the IRA to be an unconstitutional delegation of legislative authority was vacated, the Supreme Court did not issue a decision indicating the basis for its ruling. See also Shivwitz Band v. Utah, 428 F.3d 966 (10th Cir. 2005) (rejecting the delegation argument).

standards. It may never delegate this function to an agency. See Yakus v. United States, 321 U.S. 414, 424 (1944).

The problem is highlighted in this case by this Application to the Executive Branch. The OIN seeks to have the Secretary approve trust status for 17,000 acres of land consisting of hundreds of separate parcels scattered among non-trust lands in two counties that are populated almost exclusively by non-Indians. To approve such an application, the Secretary necessarily would have to perform Congress' social policymaking function.[6]

The OIN's application is, in substance, an effort to avoid having Congress perform that function. The current application follows years of unsuccessful efforts by parties to the Oneida land claim to resolve that claim by settlement, efforts that were thwarted in large part by the OIN. In the context of a settlement, which would require legislative approval, Congress would fulfill its role in making critical policy judgments about the total amount and configuration (e.g., concentration and contiguity) of land to be taken into trust for the tribe. It is entirely inappropriate to use Section 465 to circumvent that Congressional function.

Notably, in the context of Eastern land claim settlements, where Congress has expressly authorized the Secretary to take land into trust for the benefit of a settling tribe, it is unheard of for anything approaching 17,000 acres of land in the middle of populated areas to be taken into trust. See, e.g., 25 U.S.C. §§ 941-941n (Catawba/South Carolina settlement providing for a reservation of up to 3600 acres); 25 U.S.C. §§ 1751-60 (Mashantucket Pequot/Connecticut

[6] It is true that some decisions have found that Section 465 does not involve an improper delegation. See South Dakota v. United States Dep't of the Interior, 423 F.3d 790 (8th Cir. 2005); Carcieri, 423 F.3d 45; United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999). However, those cases involved trust applications for small tracts of land, many of which were rural and undeveloped. The tracts were either near or on reservation land or only partially located in non-Indian cities. In such cases, the Secretary's decision to place land in trust is practically ministerial and would not affect state or federal policies.

settlement providing for 200 acres of state transferred land and 800 acres of land to be purchased for tribe to be added to 220 acre reservation); 25 U.S.C. §§ 1775-75h (Mohegan/Connecticut settlement providing for 700 acres to be purchased for tribe and 175 acres to be transferred to tribe by state); 25 U.S.C. §§ 1771-71i (Gay Head/Massachusetts settlement providing for approximately 400 acres to be given to and purchased for tribe); 25 U.S.C. §§ 1701-1716 (Narragansett/Rhode Island settlement providing for a total of 1800 acres to be transferred by state and purchased for tribe).[7]

The Department may not use Section 465 to confer benefits on the OIN that could not be obtained either through litigation or legislative action.

II. The Relevant Factors Under 25 C.F.R. Part 151 Do Not Support The Application

A. To The Extent There Is Any Statutory Authority For Action On The Application, The Relevant Criteria Are Those Set Forth In 25 C.F.R. § 151.11

As a preliminary matter, the application should be treated under 25 C.F.R. § 151.11 (as opposed to Section 151.10) since the land which the OIN seeks to have taken into trust is not within an existing reservation.[8] That conclusion is clearly demonstrated by the relevant case law and required by the DOI's own regulations.[9]

The Court in Sherrill expressly determined that the OIN could not "unilaterally revive its ancient sovereignty, in whole or in part, over" parcels purchased in fee by the Oneidas within the last decade that were located within the boundaries of "the area that once composed the [Oneida

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[7] The only instances where large quantities of land were authorized to be taken into trust in the context of an Eastern Indian land claim settlement involved undeveloped, wilderness land.

[8] As to land on which the OIN seeks to conduct gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., the DOI must apply the two-part determination procedure required by Section 20(b)(1)(A) of IGRA, 25 U.S.C. § 2719 (b)(1)(A), which would require the concurrence of the Governor. See discussion at pp. 31-33 below.

[9] As to seven parcels in the town of Vienna, Oneida County, the land is not even within the boundaries of the area set aside for the Oneidas in the 1788 Treaty of Fort Schuyler and acknowledged in the 1794 Treaty of Canandaigua. This point is addressed in the submissions of Oneida County.

OIN's] historic reservation." 125 S. Ct. at 1483. "The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." Id. Consequently, fee lands purchased by the Oneidas in recent years are not exempt from local real estate taxes, and other state and local regulatory law. See id. at 1483, 1493. Although the Supreme Court declined to expressly decide whether the former Oneida reservation was diminished or disestablished by the 1838 Treaty of Buffalo Creek (id. at 1490 n. 9), the decision makes clear that the area set aside for the historic Oneida Indian Nation by the State in the 1788 Treaty of Fort Schuyler and acknowledged by the United States in the 1794 Treaty of Canandaigua is not a reservation.

As reflected in the DOI's own land into trust regulations, an "Indian reservation" is an area in which a tribe is "recognized by the United States as having governmental jurisdiction. . . ."[10] See 25 C.F.R. § 151.2. The definition contained in the regulations is consistent with the cases which have repeatedly recognized that one of the distinguishing characteristics of an Indian reservation is the right of the tribe to exercise sovereignty over the land. See United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" (emphasis added)). As the Supreme Court noted in United States v. Santa Fe Pac. R.Co., "Indian

[10] Judge Hurd's decision in Oneida Indian Nation v. Madison County, 401 F.Supp.2d 219 (N.D.N.Y. Oct. 27, 2005) ("Madison County"), is not persuasive. The court in that case did not consider the significance of the Supreme Court's finding of no sovereignty on the issue of the reservation status of the land. Moreover, that case improperly relied on the earlier decision by the Second Circuit as to reservation disestablishment. Id. at 231. The reversal of the Second Circuit's decision deprives it of any preclusive effect. See Stone v. Williams, 970 F.2d 1043, 1054 (2d Cir. 1992) ("A judgment vacated or set aside has no preclusive effect" (citations omitted)); Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1146 (2d Cir. 1992) ("It is well-settled in this circuit that a vacated order has no collateral estoppel effect"), aff'd 510 U.S. 86 (1993).

nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive...." 314 U.S. 339, 348 (1942) (inner quotations and citations omitted).

The central feature of Indian country, which is defined to include Indian reservations (see 18 U.S.C. § 1151(a)), is also the tribe's sovereignty within the land so designated. See generally Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987) ("The Indian country classification is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian lands"); Felix S. Cohen, Handbook of Federal Indian Law 27 (Rennard Strickland ed., 1982) ("[F]or most jurisdictional purposes the governing legal term is 'Indian country'").

By deciding that the OIN has no right to exercise tribal sovereignty on fee land within the former reservation, the Supreme Court found in substance that the land lacked reservation (and Indian country) status. The Court's language, which repeatedly characterized the reservation in the past tense, is entirely consistent with that conclusion. See Sherrill, 125 S. Ct. at 1483 (describing OIN land as land "that once composed the Tribe's historic reservation") (emphasis added); see also id. at 1488.[11] Indeed, Justice Stevens, in dissent, recognized that the majority had "effectively proclaimed a diminishment of the Tribe's reservation." Id. at 1496.

The recent Second Circuit decision in Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), confirms that the Sherrill decision should not be narrowly cabined but should be accorded its necessary and logical import. As the Second Circuit recognized, Sherrill "dramatically altered the legal landscape against which we consider plaintiff's claims."

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[11] We also note that even before Sherrill the United States had repeatedly recognized that with the possible exception of the 32 acres addressed in United States v. Boylan, 256 F. 165 (2d Cir. 1920), the area set aside in the Treaty of Fort Schuyler is not today a reservation. See S. Rep. No. 1836, 81st Cong., 2d Sess. (1950) at 3, 5.

See Cayuga, 413 F.3d at 273. The Court there read Sherrill broadly, holding that "the broadness of the Supreme Court's statements indicates to us that Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas... but rather, those equitable defenses apply to 'disruptive' Indian land claims more generally." Id. at 274.

Under Sherrill, the land which is the subject of the OIN's application is not recognized as land on which the OIN exercises governmental jurisdiction, and consequently cannot be considered a reservation.

B. The Factors Set Forth In Sections 151.10 And 151.11 Militate Against Taking OIN Land Into Trust

1. There Is No Statutory Authority For Granting The Application (25 C.F.R. § 151.10(a))

There is no specific statutory authorization for taking OIN fee lands into trust, and as noted above, the general discretionary authority contained in Section 465 is not a proper basis for approving the OIN's application. The State also notes that as to land on which the OIN is currently conducting gaming operations or intends to conduct such operations in the future, the land cannot be taken into trust unless the BIA makes the two-part determination set forth in Section 20(b)(1)(A) of IGRA, 25 U.S.C. § 2719(b)(1)(A), and the Governor concurs in the determination. This issue is discussed in more detail below.

2. There Has Been No Demonstration Of Tribal Needs (25 C.F.R. § 151.10(b))

The OIN has shown no need for the quantity of land at issue. The DOI's policy favoring tribal economic development is not a license to make small tribal groups wealthy at the expense of the surrounding non-Indian communities, which is precisely what the OIN seeks to accomplish here.

As discussed above, removing 17,000 acres of land from local tax rolls so that the OIN can operate a massive casino and entertainment complex that produces $100 million of annual revenue for a tribe with a claimed membership of 1,100 hardly fulfills the intended function of Section 465. The OIN has the capacity to use the land it owns in an economically productive way without having it held in trust status. There is no reason why the OIN needs to, or should, enjoy the significant economic advantages over surrounding non-Indian businesses that come with having its land exempt from state and local taxes and, potentially, state and local regulatory requirements.

3. The Purpose For Which The Land Will Be Used (25 C.F.R. § 151.10(c)); Taking The Land On Which The Turning Stone Casino Is Situated Into Trust Will Perpetuate An Ongoing Violation Of Federal And State Law

The OIN's application omits any mention of the fact that some of the land which it seeks to have taken into trust is the site of a Class III gaming facility that is being operated in blatant violation of IGRA, 25 U.S.C. § 2701 et seq. The OIN's operation of the casino is unlawful for at least the following reasons:

(a) The land on which the casino is located does not fall within any of the categories of "Indian lands" enumerated in Section 2703(4) of IGRA. As set forth above, the land is not an Indian reservation. The legislative history of IGRA provides further support for the conclusion, required by Sherrill, that the Property is not located in an "Indian reservation" within the meaning of the "Indian lands" definition in IGRA. That legislative history confirms that in order to be Indian lands, whether as an Indian reservation or as land held in trust for a tribe, the land in question must be subject to tribal jurisdiction. The Report of the Senate Committee on Indian

Affairs issued as part of the 1988 enactment of IGRA equated "Indian lands" with lands over which a tribe (and not the State) has jurisdiction:

> It is a long- and well-established principle of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands . . . . In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land.

See S. Rep. No. 100-446 (Aug. 3, 1988) at 5, reprinted in 1988 U.S.C.C.A.N. 3071, 3075. Moreover, the floor debates on the bill emphasized that the definition of "Indian lands" was premised on tribal jurisdiction over such lands:

> Mr. Evans. It is my understanding that the references in the bill to "Indian lands," "Indian lands of the Indian tribe," "Indian lands over which the tribe has jurisdiction," and "lands owned by the Indian tribes" are meant to be interpreted the same way to apply to all lands within reservation boundaries and trust lands outside the reservations. Is my understanding correct?
>
> Mr. Inouye. The Senator from Washington is correct.

134 Cong. Rec. 24,025 (Sept. 15, 1988).

The case law addressing the definition of Indian lands recognizes that sovereignty is an essential element of all categories within that definition. See Kansas v. United States, 249 F.3d 1213, 1228 (10th Cir. 2001) (In order for a tract to qualify as "Indian lands" under IGRA, "the Tribe must have jurisdiction over the tract. . . .").[12]

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[12] The view of counsel to the National Indian Gaming Commission ("NIGC") that despite the lack of OIN sovereignty over the land, it is still reservation land (see letter of Penny Coleman to Richard Platkin, dated October 27, 2005) is inconsistent not only with the clear intent of the statute, but also NIGC's own practice. Recognizing the essential link between sovereignty and reservation status, in determining whether a tribe has jurisdiction on land for purposes of IGRA the NIGC "presumes" jurisdiction where the land is reservation land. See, e.g., Gaming on Fee

Nor does the OIN land come within any other category of "Indian lands" as defined by IGRA. The land is not trust land nor, as demonstrated below, is it land that is subject to restriction against alienation. See id. § 2703(4)(B). In any event, as Sherrill demonstrates, the land cannot be IGRA Indian lands because under Sherrill, the OIN does not "exercise[ ] governmental power" over such land. See id.

(b) Even if the land could somehow be viewed as Indian lands under IGRA, the absence of tribal sovereignty precludes the OIN from validly conducting Class III gaming on the land. IGRA requires that Class II and III gaming activities be conducted pursuant to a tribal ordinance or resolution adopted by the governing body of the tribe having jurisdiction over such lands. See id. §§ 2710(b)(1), 2710(d)(1). As the Supreme Court determined in Sherrill, the OIN cannot exercise tribal sovereignty over the land; consequently, it does not exercise jurisdiction over the land.

(c) Gaming at Turning Stone is not being conducted pursuant to a valid tribal/state compact. See id. § 2710(d)(1)(C). As the BIA is well aware, the New York Court of Appeals has determined that the Governor of New York is not empowered to enter into a tribal-state gaming compact without legislative authorization or approval. Specifically, in 2003, the Court decided a case brought by a group of legislators, organizations and individuals opposed to casino gambling challenging the authority of the Governor "to permit casino gaming on Indian reservations." See Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047, 1049, cert. denied, 124 S. Ct. 570 (2003). In that case the plaintiffs alleged that by negotiating and signing the 1993 compact with the St. Regis Mohawk Tribe ("Mohawk") without legislative

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Land at Pyramid Lake Paiute Indian Reservation, August 12, 2005, at p. 4. Here, there is no jurisdiction as a result of Sherrill and the land cannot be considered reservation land.

authorization or approval, former Governor Mario Cuomo violated the principle of separation of powers under the New York State Constitution. Id. The Court affirmed a decision in favor of plaintiffs holding that, absent legislative authorization or approval, the Governor lacked authority to allow "Class III gaming activities on the Tribe's reservation." See Saratoga County Chamber of Commerce, Inc. v. Pataki, 293 A.D.2d 20, 21, 740 N.Y.S.2d 733 (3d Dep't. 2002). In upholding that decision, the Court held that entering into a gaming compact with an Indian tribe involved making policy choices that epitomized legislative powers, and the Governor could not do so without legislative authorization or approval. Saratoga County, 798 N.E.2d at 1060.

Following the Court's decision in Saratoga County, the New York State Supreme Court for Oneida County issued a final determination in a suit asserting claims identical to those asserted in Saratoga County, but addressed to the 1993 Nation-State gaming compact that former Governor Cuomo entered into with the OIN. By order dated July 28, 2004, that court found, unsurprisingly, that Saratoga County was equally applicable to the Oneida Compact and granted Plaintiffs' motion for summary judgment. See Peterman v. Pataki, 4 Misc.3d 1028(A), 798 N.Y.S.2d 347 (Sup. Ct. Oneida Cty. 2004) (unreported disposition). The Appellate Division, Fourth Department has affirmed that decision. See Peterman v. Pataki, 21 A.D.3d 1387, 801 N.Y.S.2d 212 (4th Dep't 2005).

The New York Court of Appeals' determination that only the legislature can authorize tribal gaming is controlling for purposes of IGRA. The federal courts addressing the issue of whether a state has validly bound itself to a compact, including who within the state government has the authority to bind the state, have found that the issue is strictly one of state law. See Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1557-58 (10th Cir. 1997) (stating that "Congress

intended that state law determine the procedure for executing valid gaming compacts" and following the decision of the New Mexico Supreme Court (internal quotations omitted)); Rhode Island v. Narragansett Indian Tribe, No. Civ. A. 94-0619-T, 1995 WL 17017347, at *3-4 (D.R.I. Feb. 3, 1995) ("Governor Sundlun's authority to act on behalf of the State ... must be determined by reference to state law").

Such deference is fully supported by current Supreme Court case law. See Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 493 (1979) (finding controlling Washington Supreme Court determination as to what action was required under state law for state to assume jurisdiction on Indian lands authorized by federal statute). As the Supreme Court stated in Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978), where it sua sponte certified a question of state law to the Maryland Court of Appeals, "[i]n a federal system, it is obviously desirable that questions of law which ... are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts." It is "difficult to imagine a matter more closely related to internal self-government than the question of how a state's powers are allocated among its elected officials." Narrangansett Indian Tribe, 1995 WL 17017347, at *4.

Even if taking the land on which the Turning Stone Casino sits into trust would address -- on a prospective basis only -- the status of the land, it does nothing to alter the fact that gaming at the Casino is not conducted pursuant to a valid compact. Land into trust applications were not intended by Congress to assist Indian tribes in escaping compliance with existing regulatory laws or to facilitate an ongoing violation of federal criminal law. Unless and until the OIN negotiates a valid compact with the State, the Secretary should not accept the land into trust.

4. There Will Be Severe Adverse Consequences To The State And Its Political Subdivisions Resulting From The Removal Of The Land From Tax Rolls (25 C.F.R. § 151.10(e))

(a) The Land Is Not Subject To Restriction Against Alienation And In Any Event Is Currently Taxable

For purposes of the land into trust application process, the land should be treated as land that is not subject to restriction against alienation. There is no basis for concluding that the restriction against alienation contained in the so-called "Non-Intercourse Act" provision (the "NIA") of the Indian Trade and Intercourse Act applies to land purchased by the OIN in fee simple, as the OIN has recently asserted. The State understands that the OIN argues that the NIA restriction that allegedly applied to the historic Oneidas' possessory interest in the 1790's continues to apply today to land purchased by the OIN in fee. The Supreme Court in Sherrill rejected the theoretical framework for that argument. The Court refused to adopt the so-called "unification" theory of the OIN advanced in that appeal, namely, that by acquiring ancient reservation land in the open market, the OIN has "unified fee and aboriginal title." See Sherrill, 125 S. Ct. at 1489-90 ("We now reject the unification theory of OIN and the United States . . . ."). By doing so, the Court necessarily also rejected the OIN's related contention that recently purchased land is subject to any restriction against alienation that applied to the Oneidas' possessory interest 200 years ago. Put another way, since open market purchases of fee interest in land did not unite that fee interest with the Oneidas' former possessory interest, any restriction on alienation that once applied to the possessory interest does not attach to the OIN's fee ownership.

This reading of the Sherrill decision is supported by a recent letter from James E. Cason, Associate Deputy Secretary of the Department, to Hon. Ray Halbritter. "While we would

agree . . . that the Supreme Court's Sherrill decision did not disturb the Court's 1985 decision on the OIN's land claim litigation that Section 177 provides the OIN's right of action to damages for trespass based on its original grant of rights in the lands at issue, we do not agree with [the] assertion that the Court's ruling in Sherrill recognizes the continuation of restriction on alienation protections over recently re-acquired lands."

Nor does the NIA apply to the conveyance of land acquired by the OIN in fee through open market purchases from private property owners. Since any restriction against alienation applicable to the historic Oneidas' possessory interest that may have existed in the distant past no longer applies, the fee interest in the land acquired by the OIN is freely alienable. No case has held that former reservation land that has become freely alienable can thereafter become subject to the NIA when re-acquired by the tribe that may have once held aboriginal title to the land. The Supreme Court expressly declined to reach that issue in Cass County v. Leech Lake Band, 524 U.S. 103, 115 n.5 (1998). Cases decided before and after Cass County have refused to find the NIA applicable in these circumstances. See, e.g., Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993); Bay Mills Indian Cmty. v. State, 244 Mich. App. 739, 746, 626 N.W.2d 169, 172, 174 (2001), cert. denied, 122 S. Ct. 1303 (2002); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wash. 2d 862, 877, 929 P.2d 379, 387 (1996).[13]

[13] With the exception of Judge Hurd's recent decision in Madison County, which the State contends was wrongly decided , see n. 10, supra, none of the cases cited by the OIN in recent litigation sustained a claim that the NIA prevented transfer of unrestricted fee land purchased by a tribe in modern times. Tuscarora Indian Nation v. Federal Power Comm'n, 265 F.2d 338 (D.C. Cir. 1958), rev'd 362 U.S. 99 (1960), involved land purchased by the United States for a tribe adjacent to an existing reservation owned and occupied by the tribe with funds generated by the sale of their tribal land located elsewhere (id. at 342), and the Supreme Court overturned the court of appeals' decision that the NIA barred taking of the land by eminent domain. In Alonzo v. United States, 249 F. 2d 189, 196 (10th Cir. 1957), the land had been owned in fee by the tribe since before the U.S. acquired the territory in which the land of those Indians (the Pueblo) was located in the mid-1800's and had been made inalienable by a specific federal statute in 1924. See id. at 191, 195. The language in Tonkawa Tribe v. Richards, 75 F.3d 1039, 1045 (5th Cir. 1996), suggesting that the NIA applies to tribal land no matter how acquired is dictum; the decision rejected a

Finally, we note that Mr. Cason in his June 15, 2001 letter makes clear that the recordation by the BIA of deeds to OIN properties "did not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177." See also id. ("please be advised that the BIA is in the process of taking appropriate action to clarify that its recent recordation of OIN deeds does not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177").[14]

In any event, there is no question that the OIN fee lands are subject to local real property taxes. That is the clear and unmistakable holding of Sherrill. Taking the land into trust will remove the land from the tax rolls, and the impact of that transfer is therefore a pertinent consideration on the OIN's application.

(b) The Removal Of Thousands Of Acres Of Land From Local Tax Rolls Would Have A Significant Adverse Impact On The Communities In Oneida And Madison County And Ultimately On The State Of New York

The impact of removal of the OIN properties from local tax rolls on Madison and Oneida Counties and taxing jurisdictions located within those counties is addressed in the accompanying O'Brien & Gere Report. In addition, the State refers to the submissions of the Counties and other municipalities and taxing jurisdictions made to the BIA.

Under any measure, the economic impact of removal of OIN land from local tax rolls would be substantial. The amount of lost tax dollars is dramatic, both in absolute and relative terms. The annual anticipated loss of county, municipal and school taxes resulting from the

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tribal claim that the tribe had received a vested interest in property by virtue of an 1866 Texas statute and dismissed the tribe's NIA claim.

[14] Judge Hurd's decision in Madison County also ignores the view expressed in the Cason letter and the fact that in Sherrill the OIN advanced and the Supreme Court rejected the argument that the NIA continued to apply to Oneida land.

removal of Group 1 properties (based on current use and assessments) is estimated to be nearly $14.3 million. The taxes lost from the removal of Group 2 properties is estimated to be approximately $1.5 million, bringing the annual total lost tax revenue for the two groups to approximately $15.8 million. This number does not take into consideration increases in the taxes on the properties resulting from future development and improvement of the property. Given the extensive development that has occurred to date, it is reasonable to assume that OIN will continue to develop its properties, and that the loss of future tax revenue will be substantially greater than reflected by the current figures.

We understand from the counties that the OIN property represents a substantial portion of the property in relevant taxing jurisdictions. Thus, for example, OIN Group 1 properties represent approximately 40% of the taxable property in the Vernon-Verona-Sherrill Central School District ("VVSCSD"); and 25% of the real property in the Stockbridge Valley Central School District. The lost taxes represent a significant portion of the total potential tax revenues for the taxing units in question. We further understand that, in Madison County, payment by OIN of its tax bill for 2004 would have reduced the tax bills for other properties in the County by 5%. The numbers would be more dramatic for individual taxing jurisdictions, such as the VVSCSD.

The tax effect is exacerbated by the unfair competitive advantage that the OIN would receive by having the land held in trust status. Non-Indian businesses unable to compete may shut down, with an additional loss of tax revenues.

The loss of taxes imposes the costs of local services -- schools, road maintenance and repair, police and fire protection -- on a smaller group of property owners, increasing the unit

cost for those services. Since the Oneidas are entitled to the benefit of those services -- e.g., Oneida children attend local schools, individual Oneidas and the OIN and customers of OIN businesses use local roads, and receive police and fire protection -- the non-Indian community is footing the bill for these services for the OIN. This effect imposes real and ongoing hardship on the non-Indian portion of the community.

The effect is particularly acute because in some cases the demand for the services has actually increased as a result of OIN activity on OIN-owned land. For example, the Turning Stone Casino has resulted in dramatically increased traffic on local streets and higher demand for emergency services.

The OIN's system of voluntary payments is no substitute for mandatory tax payments. Regardless of the OIN's statements, there is no requirement that the OIN make "silver covenant claim" payments, and its past conduct has made clear that the OIN may use these payments to pressure municipalities to follow OIN dictates. An example is the OIN's withholding of payments from the Stockbridge Valley Central School District because the town refused to accede to the OIN's demand to fire a teacher who was critical of the OIN. The municipalities should not be put in a position where they are hostage to unreasonable OIN demands as a condition of receiving revenues that they would otherwise receive outright through payment of real property taxes.

The Verona volunteer fire department, which provides fire protection services to the Turning Stone Casino and related facilities, is another example. Providing services for heavily-used large, multi-story buildings has dramatically increased the demands on the department. Until recently, the OIN had paid for fire services under a negotiated formula based on the square

footage of the buildings serviced. I am advised that the OIN has now unilaterally decided it will provide funds only up to a limited dollar limit regardless of growth of the casino complex. Such an abrupt and unilateral limited imposition of a cap on funding may impede the department from acquiring much-needed equipment. Absent the ability to impose charges for the services, the department (and the non-Indian community that supports it) will in effect be subsidizing the OIN's business.[15]

5. Taking The OIN's Lands Into Trust May Result In An Unworkable Jurisdictional Patchwork (25 C.F.R. § 151.10(f))[16]

(a) The Patchwork Jurisdictional Pattern That May Result From Taking OIN's Land Into Trust Directly Contravenes The Concerns Expressed In City Of Sherrill

A central concern of the Supreme Court in Sherrill was that "disruptive practical consequences" would occur if the OIN were allowed to unilaterally assert sovereign control over any land acquired in fee:

> The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians . . . . A checkerboard of alternating jurisdictions in New York State -- created unilaterally at OIN's behest -- would 'seriously burde[n] the administration of state and local governments' and would adversely effect landowners neighboring the tribal patches.

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[15] It is important to recognize that even if the fire department was not required to provide services to OIN land if the land is taken into trust, it may nevertheless feel obligated to do so in order to fulfill its responsibilities to protect non-Indian property owners. Because of the proximity of OIN facilities to non-Indian properties in the community (including a public school), a fire or other catastrophe on OIN land may threaten adjacent non-Indian land which the fire department is required to protect.

[16] The Supreme Court has made clear that lands held in trust enjoy no absolute immunity from state law. See, e.g., Nevada v. Hicks, 533 U.S. 353, 362 (2001); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977). See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 (1987). The State believes that state and local regulatory laws, including zoning, land use and environmental laws, should continue to apply to the OIN land even if it is taken into trust. See Sherrill, 125 S. Ct. at 1489 n.6 (2005) (Stevens, J., dissenting) ("Given the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere"). Nonetheless, it is clear that the OIN will resist any application of state and local regulatory law if the land is taken into trust and, therefore, this letter (and the O'Brien & Gere report), address the serious difficulties that would be created if the OIN's position were to be sustained.

Sherrill, 125 S. Ct. at 1493.

At the heart of the Court's decision is the concern that allowing tribally-owned land located randomly throughout communities in central New York to be removed from state and local jurisdiction would fundamentally and irreparably injure the affected communities by disrupting the "governance of central New York in counties and towns." Id. at 1483. The Court's language reflects a recognition that communities cannot be maintained without the ability to govern in a coherent and comprehensive fashion. As discussed below, land use, environmental and other laws are effective only if they apply uniformly over an extended area. Piecemeal removal of land from state and local jurisdiction threatens the regulatory scheme as a whole.

The Supreme Court made clear that the history and character of the affected areas had created "justifiable expectations" in the non-Indian community that should not be upset by permitting the OIN to exercise sovereignty over land interspersed in existing communities long governed by state and local governments:

> Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

Id.

The OIN's effort to have the BIA take the hundreds of parcels it owns in fee into trust en masse is a blatant effort to circumvent the concerns articulated by the Court.

It is also fundamentally at odds with one of the core purposes of the IRA, namely to consolidate Indian holdings. The OIN's effort to institutionalize a patchwork of tribal land holdings is totally inappropriate for this reason as well.

(b) The Widely Disbursed And Non-Contiguous Character Of OIN Holdings Would Create A Host Of Jurisdictional And Regulatory Problems If The Land Is Taken Into Trust

Each of the points outlined below is discussed in detail in the accompanying O'Brien & Gere report. The Application threatens the ability and effectiveness of many state and local regulatory laws, and it does so on multiple levels:

(1) In many instances, such as land use and environmental laws, the effectiveness of a body of regulatory law rests on the ability of the state or local government uniformly to enforce those laws throughout a broad geographic area. To the extent taking land into trust removes a particular piece of land from the scope of the regulatory law, it does more than just exempt that parcel from the law, it may render the law ineffective as to surrounding land as well;

(2) Granting the Application may place OIN land beyond the reach of the State's comprehensive environmental protection program, frustrating an important New York state policy of environmental protection; and

(3) Placing OIN land into trust may render a significant number of laws and regulations that are intended to protect the health and safety of guests and employees of business establishment inapplicable to OIN lands, preventing the State from providing such protection to its Indian and non-Indian citizens alike.

It is impossible to design and implement a unified and coherent zoning and land use plan when randomly located parcels within the community are not subject to local land use laws and

can be developed for uses inconsistent with the overall regulatory framework. To the extent that OIN land when taken into trust status would be exempt from zoning and other land use laws, it would pose a major obstacle to the non-Indian communities' legitimate land use planning. The effect can be particularly acute on individual landowners whose property is located adjacent to a non-conforming tribal use. Similarly, the inability of local officials to monitor and enforce compliance with building and fire and safety code requirements, poses risks not only for those who visit unregulated facilities but also for surrounding properties.

The Court in Sherrill was particularly concerned about the effects on local zoning and land use controls of the OIN's position: "If the OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." 125 S. Ct. at 1493.

Similar considerations apply with particular force in the context of environmental laws. The purpose of environmental laws is to protect human health and the environment through uniform and systematic requirements designed to ensure that certain activities (such as disposal of waste, discharge of pollutants, storage of petroleum, filling of wetlands) are controlled in terms of location, design, construction, operation, maintenance and monitoring. These environmental laws require, among other things, permits to construct and/or operate landfills, air emission sources, water discharge points and mines. They also regulate the design, installation and maintenance of underground storage tanks and the dredging and filling of wetlands. The State and its political subdivisions require all who are subject to their jurisdiction to comply with

environmental laws because avoidance of such laws by some results in the detriment to all who share the same environment and natural resources.

Further, through the mandated environmental review required by New York's State Environmental Quality Review Act ("SEQRA"), and New York Environmental Conservation Law ("E.C.L.") Article 8, the permitting and other authorizing decisions of any New York governmental body—local and state agencies, governments, and bodies—are required to take into account the environmental impacts that may be created by the action requiring a permit or other approval. E.C.L. § 8-0109(2). See also Coca-Cola Bottling Co. v. Bd. of Estimate, 72 N.Y.2d 674, 536 NY.S.2d 33 (1988) ("SEQRA's fundamental policy is to inject environmental consideration directly into governmental decision-making; thus, the statute mandates that '[s]ocial, economic, and environmental factors shall be considered together in reaching the decision on proposed activities.'"). Unlike federal law, SEQRA also imposes an obligation on the regulating state agency to "minimize or avoid" adverse impacts "to the maximum extent practicable . . . ." E.C.L. § 8-0109(1).

In contrast, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., essentially is procedural and places no obligation on a federal agency to mitigate the environmental impacts of an action it approves or permits. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415 (1986) ("Moreover, unlike its Federal counterpart and model, [NEPA} . . . , SEQRA is not merely a disclosure statute; it 'imposes far more 'action-forcing' or 'substantive' requirements on state and local decision makers than NEPA imposes on their federal counterparts.'") (citations omitted). See also 2 Gerrard, Environmental Impact Review in New York, § 8.03[1]. Further, environmental reviews are much more likely to occur under

SEQRA than would under NEPA, in part because, unlike under NEPA, the possibility of a significant adverse impact alone is sufficient to trigger full SEQRA review. Id.; Chinese Staff & Workers Ass'n v. New York, 68 N.Y.2d 359, 365 (1986). In short, SEQRA clearly provides for more stringent environmental review than NEPA.

The effect of non-compliance with environmental standards or failure to mitigate adverse impacts is not limited to the parcel on which the offending conduct occurs. It invariably extends beyond that property to surrounding areas. The potential inability of state and local governments to enforce state environmental laws, or mandate measures that will reduce or eliminate adverse impacts, may effectively prevent the state from protecting the environment for non-Indian property owners of tens of thousands of acres of land that adjoin or are proximate to OIN land.

The State's law and regulations governing subsurface discharges of pollutants further underscore the difference between state and federal law. Contamination of groundwater occurs through discharges of wastewater from sewage treatment plants and other operations, and spills of toxic chemicals and petroleum products which can have far-reaching impacts through migration in the underlying aquifer, affecting wells and even surface waters miles away from the initial contamination source. Before discharges of even sanitary wastewater from a water treatment facility, for instance, to a holding pond or the ground may occur, a person seeking to discharge must apply for a DEC permit even before construction is begun. The permit review will include not only technical issues and direct impacts to the environment, but would require mitigation of any adverse effects found, including those that do not relate directly to the discharge of wastewater. In contrast, while any project undertaken on OIN lands arguable would be subject to federal law, the federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"), only

addresses surface waters, not discharges to groundwater. Moreover, federal permits are not required for facility construction. With one narrow exception, CWA permitting relating to all discharges are exempt from NEPA review. See 33 U.S.C. § 1371(c)(1) (exempting permitting decisions under CWA § 402 made by EPA). Similarly, petroleum spills that contaminate land but do not flow into navigable surface waters are not subject to federal control under the CWA or the federal Oil Pollution Act, 33 U.S.C. § 2701 et seq., but are subject to State environmental laws such as the State's Navigation Law.

Wetlands protection is another example of the importance of state regulation. Wetlands cover extended areas; they are not limited by plot or parcel. The development of individual properties within a wetlands area may effect an extensive area in a number of ways. By altering drainage patterns involving a wetland, development can increase or change runoff patterns, potentially contributing to flooding. In addition, it can subject surface and ground water to contaminants contained in runoff, such as fertilizer, herbicides and pesticides applied to land, and oil and heavy metal contamination in runoff from paved surfaces.

State law protects wetlands 12.4 acres in size or greater and smaller wetlands of local importance. While the CWA protects wetlands smaller than 12.4 acres, the Army Corps of Engineers, which administers CWA § 404 regarding wetland filling and dredging, nonetheless allows clearing of vegetation and converting a wetland to open water, which reduces or eliminates the filtration and cleaning function that wetlands perform. In addition, under New York law, activities within a 100 foot buffer area surrounding a wetland are forbidden absent a permit. There is no similar restriction under federal law. Finally, under state law, SEQRA reviewed must be performed, and if there may be a significant adverse impact from any activity

affecting the wetland, an environmental impact statement ("EIS") must be performed and adverse impacts mitigated or avoided. In contrast, under federal law, it is the unusual case that requires an EIS under NEPA because the Army Corps has issued many nationwide permits that allow considerable dredging and filling of small wetlands, and in general, only the impacts of dredging and filling on the wetland are evaluated rather than other environmental impacts stemming from an applicant's proposed activities.

Consequently, without the ability to apply regulatory law to tribal property, state and local authorities would be unable to protect the property and health of residents in the surrounding community or the surrounding environment. Contamination issues are of particular concern in central New York where many residents rely on ground water as a source of water for household use.

The State has a longstanding and strong commitment to the protection of the environment, which is reflected in a comprehensive scheme of environmental protection and plant and animal protection laws. In many instances those laws are more comprehensive, more focused and impose more stringent standards than federal environmental law.

Even where the federal law closely parallels state law, the removal or substantial impairment of state law protection would have a significant adverse effect on state environmental interests. As a practical matter, state and local agencies have the greatest interest in enforcing environmental law at the local level, and are in the best position to do so. The potential elimination or substantial limitation of state jurisdiction would have a significant adverse impact on enforcement of environmental laws and will interfere with the implementation of a vital state policy.

Taking land into trust may also prevent enforcement of other state and local laws designed to protect the interest of all citizens, non-Indians and Indian alike, who visit or use tribal property or facilities. For example, taking land into trust would arguably prevent enforcement of the following state and local laws on tribal property:

- food handling laws
- clean indoor air act (smoking restriction)
- adolescent tobacco use prevention act
- bottle redemption and deposit

Not only might state and local government lose the capacity to enforce these laws on tribal land, but the divergent application of the laws to tribal property on the one hand and non-tribal property on the other hand, would have an unfair impact within the community. A non-Indian resident who seeks to run a business has to comply with all local regulations while his counterpart tribal business across the street does not, resulting in a significant competitive business disadvantage for the non-Indian resident.

6. The OIN Has Failed To Demonstrate That Taking The Land In Question Into Trust Will Have No Significant Effect On The Environment

In an apparent effort to come within one of the categorical exclusions contained in Section 1.4 of the DOI Implementing Procedures, 62 Fed. Reg. 2379 (1997), the letter of Ray Halbritter, OIN Representative conveying the OIN's application asserts: "[w]ith respect to the environmental effect of trust acquisition, please be advised that there is no anticipated change in the use of any of the land that is the subject of this request. All uses have been in place for many years." See Letter of Ray Halbritter to Franklin Keel, Regional Director, Eastern Regional Office, Bureau of Indian Affairs, dated April 4, 2005, at 1.

The position taken by the Oneidas is disingenuous. Because of the Oneidas' ill-advised and incorrect assertion that its property was exempt from state and local regulatory laws, which has now been unequivocally rejected by the Supreme Court in Sherrill, the uses of, and activities engaged in on, the lands in question for a period of years have not been subject to state or local land use or environmental review. Nor, as far as we are aware, have such uses been subject to all appropriate assessments under federal environmental laws. By way of example only, the Oneidas have recently constructed and commenced operation of a cogeneration plant near their Turning Stone Casino without having first obtained the necessary permits and approvals under the Clean Air Act.

Moreover, it is apparent based on the rapid development of all land by the OIN that there will be continued development of OIN land. The suggestion that the transfer of the land into trust will not result in any changes entirely ignores this point and is clearly a ploy to avoid the rigors of a complete environmental review.

It is therefore essential that the Secretary perform a full assessment of potential environmental reports through the preparation of an EIS; and that the EIS should consider the likelihood and likely impact of future development of OIN lands.

C. The Acceptance Into Trust Of All The OIN's Lands Would Impose A Significant Burden On The BIA (25 C.F.R. § 151.10(9)

In total, the OIN seeks to have 444 separate parcels of land taken into trust status. The OIN Application contains no assessment of the extent to which the BIA Agency and Regional Office would be impacted by taking the vast array of properties into trust, or having to administer those properties, or how federal environmental enforcement authorities would be impacted by having to serve as the sole or primary environmental law enforcement agency.

Given the apparently limited, or non-existent, enforcement of federal environmental law requirements during the past 10 years when the OIN asserted that it was not subject to state and local jurisdiction, there appears to be a serious question as to the capacity of federal authorities to perform the increased administrative and enforcement obligations that granting the application will entail.

D. The OIN Would Have To Satisfy Outstanding Tax Liens Before The Land Could Be Taken Into Trust

25 C.F.R. § 151.13 mandates that prior to taking land into trust the Secretary must require the elimination of liens, encumbrances and infirmities that make title to the land to be taken into trust unmarketable. We understand that BIA policy is to refuse to take land into trust until outstanding tax liens have been extinguished. There are very substantial outstanding tax liens on the OIN property resulting from the OIN's refusal to pay real estate taxes required by Sherrill. Specifically, the State understands that there are approximately $26.2 million in unpaid real property taxes due taxing jurisdictions in Oneida County and an additional $7.5 million of unpaid taxes due to taxing jurisdictions in Madison County. The liens relating to those tax liabilities would have to be eliminated before the land could be taken into trust.

III. Land On Which Facilities Used For Gaming Are Located Cannot Be Taken Into Trust And Used For Gaming Without The Concurrence Of The Governor

Section 2719(a) of IGRA permits gaming to be conducted on lands acquired by the Secretary in trust for the benefit of a tribe after October 18, 1988 only in very limited circumstances. None of the circumstances contained in 25 U.S.C. § 2719(a) apply here. The land which is the subject of the OIN's land into trust application is not within the boundaries of an existing Oneida reservation. See 25 U.S.C. § 2719(a)(1). That fact is made clear not only by

the case law but by the definition of the term "reservation" in the DOI's land into trust regulations. As discussed above, the regulations (25 C.F.R. § 151.2(f)) define Indian reservation to mean "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." In light of Sherrill, the OIN does not have (and necessarily cannot be recognized as having) governmental jurisdiction over the land at issue. Consequently, that land is not within an Indian reservation.[17]

Nor can the OIN come within subdivision (2) of subsection (a) of Section 2719. In order for that exception to apply the OIN must have had "no reservation as of October 17, 1988". The DOI has previously taken the position that the 32 acres at issue in Boylan was an Oneida reservation as of October 17, 1988. See 53 Fed. Reg., No. 165, at 32462 (August 25, 1988). See also Sherrill, 125 S. Ct. at 1488 n.3. Therefore, the BIA cannot consider the OIN a tribe which did not have a "reservation" as of that date for purposes of the statute.

Consequently, OIN-owned fee land cannot be taken into trust for gaming unless one of the exceptions contained in Section 2719(b) applies. The only possible exception available for the OIN is that contained in Section 2719(b)(1)(A). That exception applies, however, only if the Secretary first makes the two-part determination set forth in Section 2719(b)(1)(A) and then "only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

The DOI's guidelines indicate that the two part determination under Section 2719(b)(1)(A) is distinct from the Part 151 notification process. See Office of Indian Gaming

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[17] The view of the NIGC's counsel that the land is within the limits of a reservation cannot be squared with either case law or the DOI's own definition of an Indian reservation contained in the land into trust regulations. See 25 C.F.R. § 151.2. Nor can it be squared with the NIGC's own recognition that tribal sovereignty is an essential component of a reservation. See footnote 12 above.

Management, Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and IGRA Section 20 Determinations, dated March 2005, at 8 ("[I]t is very important that [the consultation process under 2719(b)(1)(A)] be differentiated from the Part 151 notification process which requires the 30-day notice for determination of taxation, special assessment, services, zoning, etc..."). As far as the State is aware, the DOI has not initiated the consultation process required by Section 2719(b)(1)(A).