To:	Franklin Keel, Regional Environmental Scientist, Environment and Cultural Resources, Bureau of Indian Affairs, Eastern regional Office, Nashville, TN	*cc:*
From:	O'Brien & Gere Engineers, Inc. on behalf of Seneca County and Cayuga County, NY	
Re:	DEIS Comments - Cayuga Indian Nation of New York Trust Acquisition submitted by O'Brien & Gere Engineers, Inc. on behalf of Seneca County and Cayuga County, NY	
File:	2069/44347	
Date:	July 2, 2009	

O'Brien & Gere Engineers, Inc. was retained by the State of New York to review and prepare comments on the report titled "Cayuga Indian Nation of New York, Draft Environmental Impact Statement, Conveyance of Lands into Trust, Cayuga and Seneca Counties, New York" dated May 2009. This report is submitted on behalf of the State of New York, and I n support of comments submitted by Cayuga County and Seneca County.

The BIA's Land-in-Trust Application Process is Flawed Resulting in Little Accountability for Decisions

1) In a July 2006 report of the U.S General Accountability Office (GAO)[1], the GAO found that the BIA's regulations for taking land into trust "are not specific, and BIA has not provided clear guidelines for applying them." Therefore, there are wide discrepancies in land in trust decisions, and no guidance to the agency as to what constitutes a significant impact. The GAO specifically addresses the issue of the evaluation of lost tax revenue by states and localities; there are no thresholds, definitions or criteria as to what amount "might constitute an acceptable level of lost tax revenue and, therefore, a denial of an application." Further, the GAO report makes a critical comment, that "the BIA does not provide guidance on how to evaluate lost tax revenue, such as comparing lost revenue with a county's total budget or evaluating the lost revenue's impact on particular tax-based services, such as police and fire services" (page 17). In both 25 CFR 151.10 and 151.11 for On-reservation acquisitions and Off-reservation acquisitions, respectively, there is explicit language that state or local government be afforded the opportunity to provide written comments on the "acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." However, the BIA provides no information in its DEIS as to how it intends to assess these impacts and, therefore, local and state governmental entities can not comment on the BIA's conclusions. In short, the BIA in its DEIS appears to place little or no importance on these issues, especially the loss of regulatory jurisdiction, a validation of the evaluation in the GAO report.

   The comment regarding tax-based services is a contentious one, in that the BIA in its DEIS, and the CIN, have given short shrift to the cost of additional police services required given the traffic volume to the area during the operation of the gaming facilities, let alone the additional police services that will be required when the CIN places the additional 765 acres it has acquired into trust, as is its announced attention, or of the 64,000 acres in total (representing the original alleged claim area located in Seneca and Cayuga Counties) it has announced that it will acquire and place into trust. Also, emergency response services (EMT) and fire protection service needs, and their costs, will increase dramatically; this is particularly a concern with fire services, since the CIN's development projects will not be subject to inspection for conformance to codes, and there is no tribal or federal authority that will replace local and state regulations, codes and oversight.

2) The CIN has publicly and repeatedly announced that it intends to place into trust 765 acres of land that it has recently acquired, and additional land up to about 64,000 acres that it will acquire, as well. The BIA, in its

[1] U.S. Government Accountability Office. 2006 (July). Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications. Report No. GAO-06-781. Washington D.C.

DEIS, has not addressed this publicly and repeatedly announced plan of the CIN in the discussion in the DEIS of cumulative impacts. This, in itself, is a serious deficiency of the DEIS, and a failure to perform the requisite hard look on the issue related to the proposed action. Additionally, the GAO report noted above criticizes the BIA's regulations and decision process for taking land into trust because the criterion for the evaluation of tax revenue "does not require deciding officials to consider the cumulative tax losses resulting from multiple parcels taken in trust over time – a practice some state and local governments would like to see instituted" (page 17). Although this report, critical of the BIA's land in trust process, was released in 2006, three years later the BIA's DEIS for the CIN application continues to propagate the same deficiencies and inadequacies in its process, guidance, and decision-making.

The BIA's Land in Trust Process is Deficient in Additional Aspects

3) The July 2006 report of the GAO also criticizes the BIA for its deficiencies with several other aspects of the land in trust process. There are two components of the application evaluation that drew the criticism of the GAO and are particularly applicable to the DEIS for this application

- There is no guidance in the regulations as to how the BIA should evaluate CIN's ability to discharge governmental functions it will now be charged with undertaking. The placement of these lands into trust by the BIA will remove them and the activities that will occur on them, including the potential for complete build-out for many of the properties, especially in conjunction with additional properties up to 64,000 that it intends to acquire and place in trust, from the regulation and oversight of the state and local governments. The removal of this property from the jurisdiction of state, county and local governments not only negatively impacts taxes and the ability of these governments to provide necessary services, as noted previously (and elsewhere) herein, but by removing the ability for governments to regulate important issues also negatively impacts issues of employee health safety protection (state workplace smoking restrictions and other health and safety regulations and ordinances); building, fire, and code reviews; environmental regulations; and others. The DEIS does not specify how federal regulations will be enforced so as to address these legitimate public health and safety issues on the CIN properties, and whether the mechanism for implementing them meets minimal standards to protect public health and safety. The silence of the BIA in the DEIS on this issue is a serious flaw in the DEIS, and in its evaluation.

  This is not a unique issue to this DEIS and the CIN application; the GAO notes that this is common issue that state and local governments have raised repeatedly and, although there is an explicit requirement to address it in 25 CFR 151 as part of this process, the BIA has historically and repeatedly failed to do so. This application should be denied on this basis alone.

  In both 25 CFR 151.10 and 151.11 for On-reservation acquisitions and Off-reservation acquisitions, respectively, there is explicit language that state or local government be afforded the opportunity to provide written comments on the "acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." However, the DEIS places little or no importance on these comments, and particularly ignores comments regarding the loss of regulatory jurisdiction and other issues raised by the counties and state during the scoping phase and the pre-publication DEIS comment phase of the NEPA process for this application.

- In accordance with 25 CFR 151, the Secretary must determine that the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)). However, the GAO report criticizes the BIA since "the regulations do not define or provide guidance on

the type of need to be considered and how the level of need should be evaluated" (page 18), nor has the BIA developed guidance on this topic to direct consistency and benchmarks into the decision-making process. As a result, the DEIS is completely silent on this issue (see comment directly following).

The GAO report reviewed 87 land-in-trust applications with decisions in Fiscal Year 2005 (Appendix III). Of these applications:

- The average acreage in an application for placement in trust was 67.47 acres
- Of the 87 applications 43 (49%) were for less than 10 acres of land
- 26 (30%) of the applications listed the proposed use as agriculture, 19 (22%) for housing
- 13 (15%) were applications for over 100 acres. Of these applications, the purpose of only one (for 180 acres) was for "Increase land base." None was for gaming.
- Two applications, each for 2 acres, also listed "Increase land base" as the purpose, while one for 9.04 acres listed "Convenience store, gas station, restaurant, video arcade, and 300 parking spots.

Using the record of 2005 as a benchmark, there are few applications of a nature and size similar to that of the CIN. Therefore, the absence of any guidance in the manner in which the regulations are applied apparently provides an opportunity for the BIA to use discretionary authority and ignore these economic and jurisdictional issues in the DEIS completely.

4) Although the central purpose of an EIS is to analyze the environmental impact of the proposed action, the DEIS is structured in such a way as to avoid undertaking that analysis. Since its purchase of the parcels that it now seeks to have taken into trust, the CIN has developed parcels without compliance with state and local environmental and land use laws on the basis of its erroneous assertion, conclusively rejected by the Supreme Court in the *City of Sherrill* case,[2] that the CIN had tribal sovereignty over the land simply by virtue of its purchase in fee. In fact, the DEIS indicates that those development activities have had adverse environmental impacts on the CIN land and surrounding properties (including the identification of "recognized environmental conditions"[3] on several of the CIN properties). By taking the land into trust, the BIA would effectively recognize those earlier extra-regulatory development activities as acceptable without subjecting them to any environmental review. The DEIS lacks any discussion of the issue.

The DEIS is Fatally Flawed Since it Has Not Properly Evaluated the Basic Premise of Need for the Proposed Action

5) The BIA has incorrectly applied the NEPA process in this instance, and the DEIS reflects this flaw. The action under consideration is the land-in-trust application of the Cayuga Indian Nation. Therefore, the NEPA analysis must include a critical review of the necessity for this action, that is, whether the acceptance by the BIA of the land into trust is necessary in order to further the purposes of the application, and in accordance with the applicable statutory criteria applied to such an application. However, the DEIS presents no such analysis. The DEIS asserts that taking the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)). However, this DEIS does not evaluate quantitatively whether this action is necessary to achieve these objectives. The DEIS fails to undertake an objective, quantitative review of the CIN Applications and CIN's past operations to determine, for example, whether the objectives of tribal self-

[2]City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005).
[3] "Recognized environmental conditions" as defined in ASTM's Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" E 1527-05.

determination and economic independence could or have been achieved without placing the land into trust. Therefore, The DEIS, and the NEPA process as conducted by the BIA, is fatally flawed.

6) The CIN continues to acquire land, and at prices that exceed market value. Additionally, the CIN has publicly and repeatedly announced that it intends to place into trust the reported 765 acres of land that it has recently acquired, and additional land up to about 64,000 acres that it will acquire, as well. The DEIS, in its description of the need for placing the present lands into trust, does not describe the source of the funding for the purchase of the property acquired by the CIN, or for the continued purchase of lands up to its repeatedly announced target of all of the alleged claim area. The ability to make these land purchases at prices that exceed market values raises the question as to why the placing the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)), that is, why is it an economic necessity to grant the CIN Applications given that the CIN has already demonstrated that it has more than adequate financial means to continue to acquire properties and further its self-determination and financial independence. The failure of the DEIS to analyze this issue constitutes a failure of the BIA to perform the requisite hard look on the issue related to the proposed action.

7) In the absence of more recent guidance, past BIA policy statements (see Memorandum from Commissioner, DOI BIA to all Directors and Superintendents, April 21, 1959; Memorandum from Commissioner, DOI BIA to All Area Directors, August 3, 1960) have set forth clear criteria to guide the BIA in determining when it should deny the taking of land into trust from Indian tribes, including denying such as applications when tribes have demonstrated "the ability to manager their own affairs" and "who have been highly successful through their own efforts." The DEIS should, but does not, address that agency guidance to analyze whether the acceptance or denial of the proposed action would support a similar conclusion. This is one aspect of the positive benefit of the No Action Alternative that has been completely ignored in the DEIS. If the need for the land to be taken into trust is to preserve the Tribe's culture, ensure their self-sufficiency, and ensure economic independence, then the analysis must include an answer to these questions, and the analysis must indicate:

   - whether the CIN is capable of accomplishing these goals based on the economic success of their commercial operations,
   - the ability to use and develop the properties included in this trust application within the reasonable regulations under which property owners operate for the benefit of the community,
   - the ability similarly to use and develop the 765 additional acres that the CIN has acquired, and
   - whether the CIN is capable of accomplishing these goals in consideration of the financial resources that the CIN has available to acquire all of these properties, and the oft-announced intent similarly to acquire the claim area.

8) Although the ostensible purpose for taking land into trust for the CIN is to foster tribal self-determination and tribal economic self-sufficiency, there is no meaningful analysis that would support a conclusion that taking land into trust is actually necessary to facilitate tribal self-determination or tribal economic self-sufficiency as required by 25 CFR 151.3(a)(3). Regardless of the availability of other guidance, the DEIS fails to identify the criteria used by the BIA for assessing economic self-sufficiency, and the DEIS does not cite any data which would support any finding that the CIN may only achieve economic self-sufficiency if all or even most of the land is taken into trust subject to the CIN Applications, or with the additional land that the CIN already has acquired, if and when future applications are made. The DEIS fails to evaluate the ability (if any) of the existing CIN governmental structure to regulate Tribal internal affairs (given previous submissions demonstrating a serious rift in the leadership of the CIN, and internal questions regarding the legitimacy of the representatives making the CIN Applications, including Mr. Halftown); this is a legitimate analysis that

should be undertaken. Further, given the difficulties that the CIN has had with governance without the added burden of the lands included in the CIN Applications, the implication in the DEIS that the CIN has the capacity to, and does, manage Tribal programs, and the tribe's economic development requires further analysis. This issue of being charged with governance of the CIN properties becomes even more critical if the CIN Applications are granted because the DEIS acknowledges that few members of the CIN actually reside in the project area and, therefore, Tribal control would be at a distance.

9) The BIA in its pre-publication version of the DEIS, stated in its analysis of Purpose and Need that "In 2003 a four year plan was created by the Nation" (page 1-2). However, in the DEIS issued for public comment there is no mention of this plan, to what extent it was completed, and to what extent it contemplated additional growth and development beyond that on the properties. Further, the DEIS does not analyze whether the CIN's plan is inconsistent with the oft-repeated contention that "The Nation presently has no plans for further development of the properties subject to this application" (DEIS page 1-3, and numerous other places in the document). Lastly, the BIA in its DEIS has failed to make this plan has not been made available for public review, a critical deficiency given the impact that additional development will have on the environment.

The DEIS Does Not Satisfy the Criteria for an EIS

10) 40 CFR 1507.1 obligates all federal agencies to comply with the NEPA regulations of the Council on Environmental Quality (CEQ), contained in 40 CFR Chapter V. 40 CFR 1502.1 states that the primary purpose of an environmental impact statement is to serve as an action-forcing device to ensure that NEPA's policies and goals are infused into the ongoing programs and actions of the federal government. An EIS must provide full and fair discussion of significant environmental impacts and must inform the decision-maker and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. An EIS must be analytic [40 CFR 1502.3] and must serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made (40 CFR 1502.2(g)). Indeed, the Department of the Interior's own guidance admonishes that "care should be taken to ensure an objective presentation [in the DEIS] and not a justification" (USDOI Manual 516 DM 4, Section 4.9 (concerning the discussion of purpose and need in a DEIS)). The EIS must "rigorously explore and objectively evaluate all reasonable alternatives." (40 CFR 1502.14(a)). As shown below, the DEIS is inadequate and should be rewritten in its entirety; a number of these comments were made in the matter of the recent Oneida Indian Nation land-into-trust application, but the BIA continues to ignore even these basic issues:

- ***The DEIS does not reflect a good faith effort to take into account the values that NEPA seeks to safeguard.*** The DEIS's structure, which discusses the alternatives before any substantive discussion of impacts, reflects an apparent intent to achieve an outcome furthering CIN's goals rather than to provide an objective analysis of environmental impacts: the CEQ regulations contemplate that the section of the DEIS concerning alternatives should follow, and be based on, the information and analysis presented in the sections of a DEIS concerning the Affected Environment and Environmental Consequences so that the environmental impacts of the proposed action and alternatives can be presented in comparative form, "thus sharply defining the issues and providing a clear basis for choice among options by the decision makers and the public" (40 CFR 1502.14). The DEIS, however, reverses this order: alternatives are considered first and then the environmental analysis occurs in order to justify how those alternatives have been described. The objectivity the CEQ regulations obligate federal agencies to exercise in their environmental evaluations of proposed actions, in 40 CFR 1502.14(a), is lacking when the tribe's goals of economic self-sufficiency and self-determination

are given precedence over the requirement that "the policies and goals defined in the Act [*i.e.*, NEPA] are infused" into the agency's actions (40 CFR 1502.1).

- ***Reasonableness of the scenarios, assumptions and alternatives proposed for evaluation.*** The DEIS provides neither a reasonable identification, nor analysis, of alternatives; indeed, the DEIS is skewed to favor the Proposed Action. Since a key consequence of placing land into trust is the potential loss of state and local regulatory control over the trust lands, the decision-maker and the public must be able to understand exactly what legal protections – especially in the areas of public health, safety, and welfare and of the environment – will, and will not, continue as a result of the proposed action. Clear explanations of the differences in reach and standards among federal, state, local, and CIN regulations, laws, and ordinances applicable to environmental review are needed, but are absent from the DEIS. Instead, the descriptions of the proposed action contain unreasonable and/or illogical assumptions.

  Additionally, reasonable alternatives to placing the land into trust that have the potential to meet the CIN's objectives are completely absent, with no justification given as to why such alternatives are not available.

  The failure to include in its description of the proposed action known, ongoing or planned projects and activities, as well as those that are reasonably foreseeable future activities, circumvents the necessary analysis required to objectively evaluate the effects from the proposed action. By failing to adequately describe the proposed action, segmentation will inevitably occur when other projects and activities are carried out by the CIN in furtherance of its plans, even if unwritten. Further, the DEIS is flawed because it fails to acknowledge the inevitable build-out of the properties and so, at the very least, build-out scenarios must be considered, particularly given CIN's objectives, and the BIA's own experience with similar trust processes elsewhere around the country. The proposed action will not result in a parcel reasonably compact, contiguous, and limited in size, with easily recognizable boundaries, but in a scattering of holdings across two counties and a number towns, villages, and school districts, which is the classic checkerboard reservation scenario which is contrary to BIA's own guidance and applicable law.

  The CIN has not registered its underground petroleum bulk storage tanks at the LakeSide Trading stations with NYSDEC, nor does the DEIS provide that the inventory control, monitoring, and other requirements of NYSDEC petroleum bulk storage tank regulations are being met for the protection of public health and the environment. The DEIS has an obligation to evaluate the CIN's past and current refusal to abide by controlling environmental and safety regulations. BIA cannot simply acknowledge in its DEIS that the CIN consistently has violated the law in the past and refuse to evaluate the impact of such violations.

  The DEIS does not address the potential for settlement of land claims made by the CIN, and what the implications of such settlements, if they were to occur, are to this action.

  The DEIS inadequately discusses the No Action Alternative. The No Action Alternative retains the *status quo* in which local, New York, and federal law continue to provide the legal, fiscal, and personnel resources to ensure the level of protection of the public health, safety, and welfare and of the environment that the citizens of New York have come to expect of their state and local governments, and retains in the local citizens and their communities the governance that they have had for nearly 200 years.

The DEIS does not analyze the loss of legal remedy for liability of the property owners on these properties. If the CIN maintains or operates its properties in a manner that causes injury, taking the land into trust separate the CIN from accountability for its failure to meet generally recognized standards, and local or state laws, regulations and guidelines. In addition to standards, and local or state laws, regulations and guidelines, recourse through the courts offers a powerful incentive to property owners and operators to maintain and operate their properties in a manner that is protective of public health and the environment. Placing these lands into trust will remove this incentive to the CIN.

The No Action Alternative description in the DEIS also omits a very important consequence: lands not taken into trust will continue to be subjected to the environmental, health, and safety regulations of New York State and local governments. In the environmental area, for example, these regulations are often more stringent than those imposed by the federal government and are enforced by an impartial third party (*e.g.*, the NYSDEC). In contrast, the DEIS's reliance on CIN's "policies" that cannot be enforced by third parties does not ensure that groundwater, soil, surface water, wetlands and other environmental media at neighboring properties are not adversely affected by actions at CIN-owned property.

Note that nothing in the No Action Alternative prevents the CIN from continuing to provide for the location of government and administrative buildings, housing for its members, agriculture, hunting, fishing, *etc.* if it chooses to do so. Similarly, the No Action Alternative does not prevent the CIN from protecting historical and cultural sites by continuing to own and preserve them, albeit not under CIN sovereignty, as the CIN so chooses and as any landowner can through restrictions it can impose on the use of the land and enforce through deed restrictions properly filed in local real property records or through the use of tax-exempt entities for eligible purposes. The BIA is silent on this aspect of the No Action Alternative.

It should be noted that foreign nations conduct business in the State of New York either directly or through wholly-owned corporations. These nations pay taxes or negotiated payments in lieu of taxes and comply with state laws, including those regulating land use and those protecting the public health, safety, and welfare and the environment. In respecting the CIN's claims of sovereignty, even if they did apply which they do not, the CIN could do the same as these sovereign countries either directly or through a wholly-owned corporation or other entity. BIA provides no reasonable basis for its assumption that all CIN-owned businesses will fail if they are required to comply with state and local laws, including those regarding taxes and protection of the public health, safety, and welfare and the environment. Indeed, it fully appears that CIN enterprises including those located on trust property, as well as those on property not subject to the CIN Applications, have been and continue to be successful.

- ***The DEIS fails to discuss the adequacy of CIN's legal, fiscal, and personnel resources to govern effectively.*** The DEIS does not discuss the adequacy of the CIN's legal, fiscal, and personnel resources dedicated to public health, safety, and welfare and environmental protection. Nowhere in the DEIS is the extent of the exercise of that governmental authority explained or evaluated; nor is the alleged commitment to environmental protection and safety verified or the specifics of that commitment evaluated. In reality, the CIN environmental record contains many environmental transgressions, which are not mentioned, let alone evaluated, in the DEIS that put into question the depth of CIN's commitment to environmental protection and safety (included among those

transgressions associated with the CIN Properties includes those at the gasoline operations, among which are the failure to register USTs, the failure to demonstrate that leak detection or inventory reconciliation has been undertaken (a procedure protective of the environment and human health, notwithstanding the state regulatory requirements), and the use of pesticides apparently not in accordance with law, and other transgressions). The DEIS does not discuss or analyze CIN's fiscal and staffing capacity to undertake governmental activities over such a checkerboarded area in a manner that continues New York residents' reasonable expectations regarding the quality and quantity of, and responsiveness in providing, governmental services. Nor does it provide either the laws, ordinances and regulations of the CIN or an objective analysis of those laws and regulations to enable a decision-maker and the public to evaluate whether the CIN regulatory regime that may replace the existing state and local regulatory regime will provide a level of public and environmental protection less than, equal to, or greater than that under the existing regulatory regime, or a level of regulation and environmental protection and protection of human health that meets even the most minimal of standards.

For example, there is no demonstration in the DEIS that the CIN has the resources, experience, and will to implement and enforce effective remedial, bulk petroleum and chemical storage, and petroleum/chemical release response programs. Without knowing what type of regulatory structure the CIN has established for these properties (since the DEIS does not provide it as an appendix and, in contrast to the state's regulatory structure, any such ordinance or regulation is not publicly available), the decision-maker and the public cannot determine whether adequate controls would be in place and would be enforced so as to prevent releases/exposures and to respond to releases that occur.

For spill response scenarios, it is not clear how spills that migrate between CIN parcels and non-CIN parcels would be managed; and this is a significant and substantive concern.

The DEIS fails to provide specific requirements relative to the development, issuance, and maintenance of, compliance with, and enforcement of, water supply regulations; health and building codes; sanitary codes; food protection requirements; weights and measures; measures to address contamination from sources on CIN parcels taken into trust migrating to non-trust properties; measures to ensure that CIN parcels taken into trust will not adversely affect the state's achievement of the goals in its State Implementation Plan under the Clean Air Act; measures to ensure that state-listed endangered or threatened species would be protected on CIN parcels taken into trust, *etc.*, to enable the decision-maker and the public to evaluate the extent of the loss of such protection and how CIN's and the federal government's regulatory programs can fully compensate for that loss.

There is no discussion of the need to ensure that outdoor advertising activities do not have a detrimental visual impact on the environment and do not create safety issues for the traveling public. The state presently controls outdoor advertising along interstate and primary highways in New York State, pursuant to agreements with the federal government and through federal and state law and regulations. These laws allow the state to control the placement of outdoor advertising signs into certain designated areas, in addition to controlling the size, spacing, and lighting of these advertising devices. CIN parcels taken into trust would no longer be subject to state regulatory control. The potential loss of state regulation could result in visual clutter and distractions to drivers with no spacing, lighting, or size requirements in place.

The DEIS fails to show how the CIN and the federal government will provide a level of environmental and public safety protection at least equal to that presently provided by state regulation

or that would meet any minimum standards. The same concern and obligation applies to all areas where CIN and federal regulation will replace state and local regulation. 25 CFR 151.10(g) requires the Secretary to consider whether "the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. The DEIS contains no assessment of the extent to which the BIA would be impacted by taking the CIN properties into trust, or having to administer these properties, or how federal environmental enforcement authorities would serve as the sole or primary environmental law enforcement agency. There appears to be a serious question as to the capacity of federal authorities to perform, or be willing to perform, the increased administrative and enforcement obligations this application will entail. Additionally, there is no assessment of the ability of the BIA to perform its role as required by 25 CFR 151.10(g) given the recent placement of 17,000 acres into trust by the Oneida Indian Nation. The Eastern Regional Office of the BIA is located in Nashville, about 800 miles from the project area. Although the BIA has a field office in Syracuse, it is small and does not appear to have the capacity to properly administer the Oneida Indian Nation properties, particularly when the CIN properties are added to its responsibilities. Therefore, the BIA has the obligation to include in the DEIS a full, specific, transparent and unbiased description as to how such monitoring, regulation and enforcement will be performed. This is not a new issue to the BIA, since the GAO report discussed earlier in these comments noted this as a continuing governmental issue in land-in-trust application processes. Yet, the BIA continues to ignore these concerns, or potential responses to them, in this DEIS.

The DEIS is silent on the presence of future projects planned by others, especially plans by non-Indian residents, business, municipalities, governmental agencies or developers, in proximity to the proposed trust lands; NEPA requires that the DEIS evaluate the cumulative impacts of the proposed action in light of these plans by others. However, it is not known whether no such plans by others were identified, if the DEIS is deficient in that such review was never conducted. The DEIS notes that there are no "similar" plans, without defining whether "similar" refers strictly to land-in-trust applications, or has wider application.

- ***Discussion of Environmental Consequences is narrowly focused without justification.*** The DEIS implies that the proposed action would not result in ground disturbance and would not have direct effects on physical resources because it is essentially only an action on paper, with no direct changes to the environment. NEPA requires proposed actions to account for the degree to which the actions may establish a precedent for future actions with significant effects. 40 CFR 1508.8 requires federal agencies to contemplate "indirect effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." The DEIS does not, but needs to, evaluate potential impacts from actions that may reasonably result from, or be facilitated by, the federal action. Since the CIN very reasonably will need to further develop these properties to some extent in the future to achieve its objectives of need, which may include to provide additional economic development and housing opportunities for its members, it is reasonable to assume that direct impacts on the environment will occur. These impacts need to be evaluated in the DEIS. The DEIS should provide supporting documentation or information for the conclusion that future CIN development activities will not adversely impact the environment. The documentation should be more than a statement that indicates "the property will continue to be used as it is now." Instead, the DEIS must fully evaluate the evidence, if any, that the CIN is able meet its objectives without further development, is able to and will protect the physical resources on the lands, and offer an explanation of what NEPA review process or legal enforcement options are available at the federal level to ensure that these commitments to "continued use as it is now" are met. Again, expressing a hope that the CIN will not adversely impact the environment is not an appropriate evaluation of environmental

consequences, particularly in light of the identified "recognized environmental conditions" noted in the DEIS, and other adverse environmental impacts documented in the DEIS.

The BIA in the DEIS has Failed to Review Even the Most Basic Alternatives to the Proposed Action

11) In its discussion of Purpose and Need, the DEIS at page 1-2 that "...operations at these gaming facilities were temporarily suspended due to threats of litigation from local governments. Upon suspending the gaming operations, the Nation was left to depend on revenues from its convenience store sales, car wash, and gas and cigarette sales to fund all tribal programs and activities." Further, the DEIS on page 1-3 states that "The reestablishment of gaming facilities as a revenue resource is critical to the Nation's fiscal and cultural well being." These statements provide an impression that the option of placing the land into trust was the only reasonable alternative available to the CIN, and therefore, the only alternative that the BIA was obligated to review and evaluate in this DEIS. This position by the BIA is a complete failure to comply with the basic tenets of NEPA. A very reasonable series of alternatives that the BIA failed to review and evaluate should include other commercial uses of the properties that have the potential to provide the CIN with sufficient income for it to achieve its objective of "tribal self determination, economic development, or Indian housing." The DEIS fails to address any alternative economic plans that would advantage the CIN in achieving its goals. This is a major, basic failure that only serves to emphasize the inadequacies of the DEIS and of the BIA to fulfill its role under NEPA.

The BIA in the DEIS has Failed to Address One of the Most Significant Impacts of the Proposed Action, the Loss of State and Local Jurisdictional Authority, as required by 25 CFR 151

12) The DEIS is essentially silent with respect to one of the most critical environmental impacts of the proposed action, which is the loss of state and local regulatory jurisdiction over environmental and other regulatory issues on the affected properties. There are several aspects of this critical issue, none of which have been addressed by the BIA Firstly, there is no analogous federal jurisdiction for many aspects of state and local regulation and, therefore, there will not be continuing oversight and protection by federal agencies. Examples include state environmental regulations, many of which are stricter and more protective of the environment, public health, and public safety, or reflect state and local philosophies with respect to social and community character. Additional regulations for which there are no federal counterparts include land use and zoning regulations, building regulations, and land use control laws. Examples of these federal, state and local jurisdictional items are presented in the following table.

Potential permits, approvals, and reviews.

	Permit	Activity	Agency
	Federal		
1	Section 404 of the Clean Water Act	Work within waters of the United States. Includes work in Cayuga Lake (*i.e.*, construction of marina docks or boardwalks; SPDES-permitted discharge outfalls).	USACE
2	Section 10 of the Rivers & Harbors Act of 1899	Work within navigable waters of the United States. Includes work in the Cayuga Lake (*i.e.*, marina docks or boardwalks; construction of SPDES-permitted discharge outfalls).	USACE
3	Spill Prevention, Control & Countermeasure (SPCC) Plan (40 CFR Part 112)	To prevent discharge of oil into navigable waters of the United States or adjoining shorelines.	USEPA

Potential permits, approvals, and reviews.

	Permit	Activity	Agency
	State		
4	Section 401 of the Clean Water Act (Water Quality Certification)	Review of activities within federally regulated water bodies to ensure there is no contravention of state water quality standards.	NYSDEC
5	Protection of Waters (6 NYCRR Part 608)	Work within navigable water bodies, disturbances to the bed or banks of protected streams, or water impoundments.	NYSDEC
6	Water Supply Permit/Modification (6 NYCRR Parts 601)	Permit to supply water to newly created or extended water district, such as build-out scenario, or for additional 765 acres	NYSDEC
7	Approval of Plans for a Wastewater Disposal Facility	Approval of plans associated with sanitary wastewater treatment and conveyance system (*i.e.*, treatment facility, conveyance and SPDES-permitted discharge) or on-site septic system (septic system would also require local and NYSDOH approvals)	NYSDEC
8	Permit to Construct an Air Emission Source (Article 19 of ECL; 6 NYCRR Part 201)	Permit to construct and operate an air emission source or identification of exempt activities/facilities	NYSDEC
9	Hazardous Substance (Chemical) Bulk Storage (Articles 17, 37 & 40 of the ECL; 6 NYCRR Parts 595-599)	Tank registrations (SPR [6 NYCRR Part 598])	NYSDEC
10	Petroleum Bulk Storage (Articles 17, 37 & 40 of the ECL; 6 NYCRR Parts 610 and 612-614)	Tank registrations	NYSDEC
11	SPDES General Permit for Storm Water Discharges from Construction Activity (GP-02-01)	Storm water discharges from construction phase activities of one-acre or more. Includes preparation and implementation of SWPPP.	NYSDEC
12	SPDES Permit	Permit to discharge treated sanitary flows to surface (*i.e.*, Cayuga Lake) or ground water.	NYSDEC
13	Mined Land Reclamation Permit Program (Article 23 of the ECL; 6 NYCRR Parts 420-425)	Excavation from which a mineral (including sand) is to be produced for sale or exchange, or for commercial, industrial or municipal use. Removal of more than 1,000 tons or 750 cubic yards, whichever is less, during 12 successive calendar months requires a permit.	NYSDEC
14	Approval of Plans for Public Water Supply Improvement (10 NYCRR Part 5)	To construct a new water supply system or improve, modify or extend an existing system.	NYSDOH
15	Highway Work Permits (Section 52 of the NYS Highway Law)	Work within the ROW of state highway (highway and utility improvements).	NYSDOT
16	State Preservation Laws (Sections 3.09 and 14.09 of the NYS Parks, Recreation and Historic Preservation Law)	Activities affecting historic, architectural, archaeological and cultural resources.	NYSOPR&HP

Potential permits, approvals, and reviews.

	Permit	Activity	Agency
17	Underwater Land Grant/Easement	New York is sovereign owner of the beds of numerous bodies of water in the state. Various activities relating to the use of this land under water require permission from the state (*i.e.*, installation of discharge outfalls)	NYSOGS
18	New York State Clean Indoor Air Act (CIAA) (Public Health Law, Article 13-E)	Smoking ban in work places	NYSDOH
19	State Environmental Quality Review Act (SEQRA) (Article 8 of the ECL; 6 NYCRR Part 617)	Environmental impact assessment.	Lead Agency (coordinated review)
	Local		
20	Rezone	Rezone of sites to allow proposed use.	Town Board
21	Site Plan Approval	Review of site improvements	Town Planning Board
22	General Municipal Law (GML) Section 239-m	County Planning Board review of activities located within 500-feet of state or county highway.	Cayuga County Planning Board
23	Highway Work Permit	Work within Town or County ROWs (highway and utility improvements).	Towns, Cayuga County
24	Building Permit	Building code compliance.	Towns
25	Certificate of Occupancy	Approval to occupy building.	Towns, County
26	Water/wastewater	Discharge permits, septic system approvals, construction of wastewater treatment plants	County Sanitary Codes
27	SEQRA (Article 8 of the ECL; 6 NYCRR Part 617)	Environmental impact assessment.	Lead Agency (coordinated review)

Acronyms/Abbreviations
ECL – New York State Environmental Conservation Law
GML – General Municipal Law
GP – General Permit
NOI – Notice of Intent
NYCRR – New York Codes, Rules and Regulations
NYS – New York State
NYSDEC – New York State Department of Environmental Conservation
NYSDOH – New York State Department of Health
NYSDOS – New York State Department of State
NYSDOT – New York State Department of Transportation
NYSOGS – New York State Office of General Services
NYSOPR&HP – New York State Office of Parks, Recreation & Historic Preservation
PDD – Planned Development District
ROW – Right-Of-Way
SEQRA – State Environmental Quality Review Act
SPCC – Spill Prevention Control & Countermeasure
SPDES – State Pollutant Discharge Elimination System
SPR – Spill Prevention Report
SWPPP – Storm Water Pollution Prevention Plan
USACE – United States Army Corps of Engineers
USEPA – United States Environmental Protection Agency

Source: O'Brien & Gere Engineers, Inc.

In addition, the BIA in its DEIS failed to analyze the impacts of the loss of jurisdiction with respect to the activities of the following county agencies that will no longer apply to the properties subject to the CIN Applications when these properties are taken into trust:

- Cayuga County Water Quality Management Agency 2009 Work Plan, approved 3/5/09
- Cayuga County Water Quality Management Agency (WQMA)
- Cayuga County Health and Human Services Environmental Division Sewage Disposal System Site Assessment Protocol
- Cayuga Lake Watershed Intermunicipal Organization
- Cayuga Lake Watershed Restoration & Protection Plan, 2004
- Cayuga Lake Watershed Network.

The table represents a summary of state and local jurisdictional authority impacted by activities on the current CIN parcels; those 765 acres that have been acquired by the CIN, are not part of the CIN Applications despite the obvious cumulative impact of future applications nonetheless are ignored by the BIA in this DEIS; and those that may be purchased by the CIN in the future. This list is representative of the types of jurisdictional issues, but is not meant to be all-inclusive. The list is provided to illustrate the established governance and potential disruption of settled expectations and services, which governance (and the related regulatory jurisdiction) provides to the affected communities. Any loss of these jurisdictions will result in a significant on- and off-site threat to the environment and public health and safety. The CIN has already proven that it can not self-regulate with respect to environmental regulations. Such loss will hinder state and local governments' protection of residents, employees and visitors alike from impacts to the environment, public health and safety. For purposes of this table, "ability" or "loss" includes actual or potential loss or diminishment of jurisdiction or ability to regulate.

Moreover, reliance on federal law alone provides inadequate coverage and protection to the environment and public health and safety. In many aspects of regulatory jurisdictions the laws of the State of New York are more stringent and/or more specific than federal law.

13) To fully comprehend the areal extent of potential impacts, it is important to understand that environmental impacts do not recognize property boundaries. Activities on CIN-owned properties do not just have the potential to impact resources within the parcel boundaries, but the impacts may extend beyond property limits onto non-CIN lands. This also holds true for non-CIN activities, although such activities are required to undergo environmental reviews and obtain permits so that impacts are eliminated or reduced to protect public health and the environment. The loss of jurisdictional authority guarantees that these environmental realities will fail to be addressed by the CIN. This eventuality is dangerous to the Cayuga Lake watershed, and to the lake, which is within only a few hundred feet of these properties.

This issue is relevant to this proposed action. Whether an on reservation or off-reservation acquisition of land in trust, 25 CFR 151.10(f) and 151.11(a) require that the Secretary consider "Jurisdictional problems and potential conflicts of land use which may arise..." Given that there are only eight such required criteria in this provision, the importance of reviewing and evaluating this issue is obvious. However, this issue remains essentially unaddressed in the DEIS, despite the fact that its importance was noted by New York State during the NEPA scoping process for this application.

Additionally, as noted earlier herein, in both 25 CFR 151.10 and 151.11 for On-reservation acquisitions and Off-reservation acquisitions, respectively, there is explicit language that state or local government be afforded the opportunity to provide written comments on the "acquisition's potential impacts on regulatory

jurisdiction, real property taxes and special assessments." However, the BIA in the DEIS pays little or no attention to the comments provided by the counties, particularly during the scoping phase and the pre-publication DEIS phase of the NEPA process and, especially the loss of regulatory jurisdiction [a validation of the deficiencies in the BIA's land-in-trust procedures as contained in the GAO report].

Interestingly, however, with respect to this topic, the BIA in Section 4.11(D) of the DEIS acknowledges that "Jurisdictional impacts of each proposed action are considered in the review process required by this regulation. Therefore, cumulative jurisdictional impacts under the Nation's proposed alternative and the Enterprise Properties Alternative are not considered significant" (page 4.11-2). This brief statement, buried far in the DEIS and not mentioned, acknowledged or evaluated elsewhere in the DEIS, is very significant. With respect to the entirety of the DEIS other than this section, the BIA has been completely silent on jurisdictional implications of the proposed action, as noted in several of these comments herein. This is a significant failure on the part of the BIA and deficiency of this DEIS.

14) Notwithstanding the fact that there are few residents of the CIN in the central Finger Lakes Region, and that the BIA in its DEIS has stated repeatedly that "No additional development or disturbance to the subject properties is anticipated to occur" (page 4.1-1, and many other instances in the DEIS) such that new housing reportedly will not be constructed on these properties, any such residents will continue to qualify for a wide range of benefits through the counties and the state. Typically these benefits would be funded by taxes paid to the state and flow to the counties, or to the counties directly. However, when these properties are taken into trust, they will not be subject or contribute to state and local taxes and fees. Therefore, the residents and business will be unfairly and unreasonably subsidized by the other residents of the state and locales.

The Cayuga County Department of Health has indicated a number of these benefits that would accrue to the members of the CIN:

- Home care through the Cayuga County Home Care Agency
- Early intervention services for pre-school children
- Women, Infant and Children's (WIC) Program
- Maternal and Child Health, nursing intervention
- Medicaid Obstetrical Maternal Services
- Communicable Disease Control and Reporting, include follow-up by a nurse assigned by the County; this also includes Isolation and Quarantine (I&Q), if justified by the nature of the disease.
- Healthy Men and Women Partnership Cancer Screening Services
- Lead Poisoning and Prevention services
- Wheelsport and Pedestrian Safety
- Asthma Education
- Eat Well Play Hard.

In addition, there are a number of environmental health programs that Cayuga County would be unable to enforce, and for which the BIA and CIN have not indicated there is a substitute program that one or both of these parties would enforce. Therefore, the members of the CIN and other residents on these properties would lose the public health and safety benefits of these laws, ordinances and regulations; if all of these jurisdictional issues are not applicable at this time, they will be when the CIN inevitable initiates its build-out of the properties, or of additional properties that it has announced multiple times that it will be placing into trust:

- Adolescent Tobacco Use Prevention Act (ATUPA) – The Cayuga County Health Department will be unable to enforce ATUPA, which prohibits tobacco sales to minors. Without enforcement of ATUPA, minors may be able to obtain cigarettes or other tobacco items. This includes minors from off these properties who obtain tobacco items at CIN businesses.

- Clean Indoor Air Act (CIAA) – The Cayuga County Health Department will not be able to enforce the state CIAA (Public Health Law, Article 13-E), which prohibits smoking in the public spaces, including the workplace. The inability to enforce this law could result in individuals exposed to second-hand smoke, which has been shown to negatively impact health.

- Drinking Water Supplies – The Cayuga County Health Department will not be able to enforce 10 NYCRR Part 5, the regulation regarding drinking water supplies. The purpose of this regulation is to protect present and future sources of water supply. This inability to enforce Part 5 could have significant implications for public health if some public water supplies are not adequately protected, treated, and monitored.

- Swimming Pools and Bathing Beaches - The Cayuga County Health Department will not be able to enforce 10 NYCRR Parts 6-1 and 6-2, the regulations regarding public swimming pools and bathing beaches. The purpose of these regulations is to assure a sanitary, healthful and safe environment for the public when using public swimming pools and bathing beaches.

- Children's Camps - The Cayuga County Health Department will not be able to enforce 10 NYCRR Part 7-2, the regulations regarding children's camps. The purpose of these regulations is to assure a sanitary, healthful and safe environment for children attending camp.

- Temporary Residences and Campgrounds - The Cayuga County Health Department will not be able to enforce 10 NYCRR Parts 7-1 and 7-3, the regulations regarding temporary residences and campgrounds. The purpose of these regulations is to assure a sanitary, healthful and safe environment for the public when staying at hotels, motels and campgrounds within Cayuga County.

- Nuisances - The Cayuga County Health Department will not be able to enforce 10 NYCRR Part 8, the regulation regarding nuisances which may affect life and health.

- Food Service Establishments – The Cayuga County Health Department will not be able to enforce 10 NYCRR Part 14, the regulation regarding food service establishments. The purpose of this regulation is to protect the public health. Under this regulation, owners and operators of food service establishments are to operate their premises in such a way as to avoid imminent health hazards. In addition, the Cayuga County Health Department will not be able to investigate foodborne outbreaks without the cooperation of effected individuals or restaurant owners.

- Mobile Home Parks - The Cayuga County Health Department will not be able to enforce 10 NYCRR Part 17, the regulation regarding mobile home parks.

- Lead Poisoning Control – The Cayuga County Health Department will not be able to enforce 10 NYCRR Subpart 67-2, the regulation regarding Lead Poisoning Control - Environmental Assessment and Abatement. If a child has been exposed to lead on property within the area of the Trust, the

Cayuga County Health Department will not be able to require that the property owner abate the lead hazard.

- Septic Systems – The Cayuga County Health Department will not be able to enforce the Cayuga County Sanitary Code that requires that all septic systems in Cayuga County have discharge permits and that all septic systems must be approved by the Cayuga County Health Department before they can be installed, modified or repaired. In addition, the Cayuga County Health Department will not be able to enforce the Sanitary Code's prohibition of wastewater discharging onto the ground surface or into a water body. This inability to enforce the Sanitary Code could have significant implications for water quality.

- Rabies - The Cayuga County Health Department will be unable to mandate capture of wild animals that may have exposed individuals to the rabies virus on properties that have been placed in trust. In addition, the Cayuga County Health Department will not be able to order the confinement of biting domestic animals. This may result in individuals potentially exposed to the rabies virus to receive post-exposure treatment, which could cost Cayuga County and New York State approximately $3,000 per patient, or more.

- Realty Subdivisions - The Cayuga County Health Department will be unable to enforce Article 11, Title II which requires the approval of realty subdivisions by the Health Department prior to offering lots for sale. This may result in lots being sold without adequate provision of sewage disposal or water supply, thus impacting adjacent properties not on lands placed into trust.

The BIA in its DEIS has provided no analysis of how the loss of jurisdiction with respect to these public health issues, as well as other issues of public health and environmental protection, will be implemented and enforced when the properties in the CIN Applications are taken into trust. The absence of implementation and enforcement of these measures will be to the detriment of all residents and visitors, whether on or off the CIN properties.

15) Further, through the mandated environmental review required by New York's State Environmental Quality Review Act (SEQRA), New York Environmental Conservation Law (ECL), the permitting and other authorizing decisions of any New York governmental body are required to take into account the environmental impacts that may be created by the action requiring a permit or other approval. SEQRA's fundamental policy is to inject environmental consideration directly into governmental decision making; thus SEQRA mandates that economic and environmental factors are to 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. In contrast, NEPA essentially is procedural and places no obligation on a federal agency to mitigate the environmental impacts of an action it approves or permits. Further, environmental reviews are much more likely to occur under SEQRA than under NEPA, in part because, unlike under NEPA, the possibility of a significant adverse impact is sufficient to trigger full SEQRA review. In short, SEQRA clearly provides for more stringent environmental review than NEPA.

16) If it intends to do so, the CIN has not indicated how it would regulate and provide protection to the environment and public health and safety in the face of the void created by the removal of jurisdiction by state and local governments. The DEIS is silent on whether the CIN will implement such a regulatory structure and how it will be implemented and how such a system of self-regulation would occur, how enforcement would be implemented, and what the architecture of such regulatory system would look like. In addition, under the

claim of sovereignty, it is unclear whether federal regulations have been adhered to by the CIN or enforced by the jurisdictional federal agencies. Furthermore, the decision to place lands into trust must take into consideration the BIA's ability (units and resources) to oversee these lands as a replacement to state and local public health and safety and environmental oversight.

The CIN has not indicated any success at self regulation to date. For example, as described in greater detail later herein, the environmental consultant to the CIN performed Phase I and Phase II Environmental Site Assessments (ESAs) as part of the development of this DEIS. The consultant found that for two properties with gas stations, the CIN was not managing the sites in a manner to protect the environment and public health, and specifically found "recognized environmental conditions" which indicate the potential for a past or current release of petroleum or other substances into the environment from CIN properties.

17) As one aspect of its review, the BIA also should have evaluated the ability of the CIN to self-regulate in the loss of state and local jurisdiction, if it is the intention of the CIN and contention of the BIA that self-regulation would be performed and would be adequate. However, the DEIS also is silent on whether the CIN has the resources (*e.g.*, knowledge and skill sets, personnel, finances) to do so. Given the number of land-in-trust applications that have been filed and approved by the BIA across the country, the BIA is in a position to benchmark whether other Tribes similar in character to the CIN have been able to adequately self-regulate in the absence of state and local jurisdiction. However, the BIA has failed to evaluate this issue and make any presentation in the DEIS regarding this question.

18) It must be asked "who is minding the store" when it comes to regulatory reviews and potential impacts on the environment and public health. The CIN applications fail to identify appropriate CIN programs that would operate in place of state and local programs to protect the environment and public health. While it may not be known what level of environmental detriment (short- and long-term) occurred as a result of past CIN-sponsored parcel operation, it is for that very reason that government at all levels has established reviews and regulatory procedures to understand the implications of such projects before they are initiated. Future development of the parcels that are the subject of the current applications, as well as lands that may be purchased in the future by the CIN, will also occur without the regulatory review and permitting or payment of taxes required for parcels not in trust. Federal, state and local governments also have procedures that allow jurisdictional authorities to monitor sensitive activities and operations so that public health and the environment continue to be protected. Consequently, the discussion of impacts associated with the parcels covers a variety of economic and jurisdictional issues highlighting the following general themes:

- Inability of non-CIN businesses to compete on an equitable basis with CIN businesses due to an "unlevel playing field" which results from the CIN refusing to collect sales taxes and remit them as required.
- No mechanism whatsoever to obtain from CIN financial support for maintenance and operation of public infrastructure including roads, public services and other community benefits (*i.e.*, taxes and special assessments) which the CIN will continue to use but for which it will not be required to contribute (and promises to enter into negotiations to pay some unspecified amount in the future, which does not address the issue).
- Ability for the CIN to expand its operations onto these properties without the ability of local governments to review CIN-proposed development to ascertain compatibility with local zoning and building code requirements and master plans (including compatibility with surrounding land uses).
- No review of potential adverse environmental and socioeconomic impacts associated with CIN-development when it eventually occurs, including short- and long-term, construction and operation phase, and cumulative impacts (*i.e.*, under SEQRA).

- No acquisition of permits for regulated activities resulting in loss of resources (*i.e.*, wetlands, threats to Cayuga Lake quality, or regionally important aquifers) and adverse impacts to the environment.
- No review of development or monitoring of operations to document compliance with design and operating standards (*i.e.*, buildings, storm water management facilities, driveways on state and local roads, etc.).

19) In consideration of the CIN applications (existing and future), the BIA has failed as required to balance the benefits stated by the CIN with the diverse adverse implications of loss of jurisdiction to the state, counties, and municipalities, as well as to the environment. As the CIN continues its efforts to diversify its operation and future development portfolio, the BIA reasonably had the obligation, but failed, to ask – at what and whose expense - and the loss of jurisdiction will ensure that there will be no entity to ask this question in the future, even if required by 25 CFR 151.

Jurisdictional Effectiveness is Further Undermined by The Patchwork Nature of the Proposed Trust Lands, and of Those to Follow

20) In its *City of Sherrill* decision, the U.S. Supreme Court refused to disrupt the longstanding governance of the State and local governments. Similarly, the patchwork pattern of the CIN request makes effective use of the state's jurisdictional authority with respect to the intervening properties and those properties adjacent and in proximity to the parcels difficult, if not impossible. As a practical matter, this lack of contiguity of the parcels (*i.e.*, "checkerboard sovereignty") will likely substantially impair the state's jurisdiction in a significantly larger area than just the parcels subject to the current applications. In addition, the impacts of any loss of the state and local governmental jurisdiction with respect to the parcels would significantly and negatively impact other properties in the region. The discontinuity of the relationships of these properties, combined with the jurisdictional losses, will be particularly detrimental to the environment; components of the environment are interrelated, making it impossible to disassociate the ecosystem simply by introducing artificial barriers by inserting property lines on a map.

The impacts resulting from the unusual lack of contiguity of the parcels in the CIN applications, as well as lands that may be purchased in the future, include, but will not be limited to, the following issues:

- *Emergency services.* Emergency services for the parcels included in the current applications are provided by the Montezuma, Union Springs, and Bridgeport Fire Districts at a significant negative financial impact to the fire districts. The fire districts have the obligation of providing services to these properties. The Cayuga County and Seneca County emergency services officials have serious concern for the public safety on and off the parcels should the loss or substantial impairment of local jurisdiction result in the acceptance of these applications. With the existing operations on the parcels and the potential for future development on properties that may be purchased, the acceptance of these applications will result in a significant risk to the public safety through the loss of local jurisdiction.

- *Utility easements and rights-of-way.* Water lines, sewer lines, electrical lines, natural gas lines, petroleum product lines may cross underneath, on or above these properties. Should these properties be placed in trust, there is the potential for the CIN to claim ownership and control of this infrastructure to the detriment of the public health and safety, and general public good, of the surrounding community. The legal status of community infrastructure on these properties is not known and represents an issue on which the BIA is silent in its DEIS.

- *Transportation corridors.* The maintenance of roads under state, county, or local jurisdiction which extend past and through the parcels should the applications for the placement of the parcels in trust be accepted is questionable. Both residents of the parcels, as well as non-residents, make use of these roads. The taxes paid for road maintenance ensure that the area roads are repaired as needed, and plowed in the winter, and that traffic control measures are provided and maintained to ensure safe and efficient flow of vehicles.

- *Wetlands.* Effective wetland protection cannot end at a property boundary. Any loss of jurisdiction resulting from an acceptance of these applications would place at risk the integrity of wetland ecosystems in the region, which are subject to protection by the NYSDEC and also the federal jurisdiction of the ACOE. The same characterization can be made for any ecological habitat.

- *Rare, Threatened and Endangered Species.* Additionally, with any loss of jurisdictional authority of the NYSDEC, the development of the parcels will impact RTE habitat and species on adjacent properties, including direct impacts on species and habitats (*i.e.*, loss of and segmentation of habitat). The patchwork pattern of the CIN applications would make effective management of the sensitive habitats of these species difficult, if not impossible, even with respect to the properties adjacent to the parcels. As a practical matter, this lack of contiguity would effectively impair the state's jurisdiction in these matters in a significantly larger area than just the parcels.

- *Clean Air.* The patchwork pattern of the CIN request would make effective management of the clean air by the state particularly difficult, if not impossible. As a practical matter, this lack of contiguity would effectively impair the state's jurisdiction for the protection of clean air in a significantly larger area than just the parcels since new air emission sources and the operations of existing sources might be conducted without the oversight normally performed pursuant to state regulations.

The Evaluation of the "No Action" Alternative by the BIA is Both Incomplete and Deficient to the Minimal Extent That It Was Conducted

21) The Preliminary DEIS couches the Public Need for the Proposed Action as the economic and cultural benefit of the Cayuga Nation: "If the Nation's fee-to-trust application is approved by BIA, the subject properties will be held by the United States for the use and benefit of the Nation to ensure the cultural preservation, expression and identity, self determination, self-sufficiency and economic independence of the Nation as a federally recognized Indian tribe."

However, the BIA has failed to demonstrate under the No Action alternative that this "self-determination, self sufficiency and economic independence" would not occur and could not occur under circumstances that are less impacting of resources, socioeconomics, and environmental regulatory management than under the proposed action.

- The BIA has failed to present evidence by comparison to other Indian tribes across the country in circumstances similar to the Cayuga Nation that this "self-determination, self sufficiency and economic independence" has not been and is generally not achievable by other means, or that those other means are not available in this instance. Therefore, there would be no need for the Proposed Action.
- The BIA has failed to demonstrate that the Cayuga Nation is capable of this "self-determination, self sufficiency and economic independence" and that the transfer of these lands into trust actually is the final step necessary to achieve that goal.

22) The DEIS at page 1 of the Executive Summary, and elsewhere states: "The Nation presently has no plans for further development of the...on the properties subject to the Proposed Action." This is a specious finding, made without substantiation; once accepted into trust, these properties can be developed to one of several maximum build-out scenarios, with no oversight as to the impacts or implications to environmental resources, surrounding properties, or the community. As important, the BIA in its DEIS presents no analysis of the credibility of such a statement, again, repeating a claim by the Cayuga Indian Nation with no substantiation.

There is ample precedent for questioning the credibility of such a statement. In its DEIS for the land-in-trust application of the Oneida Indian Nation, the BIA has made similar findings based on the contentions of the Oneida Indian Nation, including that only limited development would occur in the future. However, the Oneida Indian Nation was trumpeting development plans on its web site that it had been silent on in the BIA's DEIS, even as the DEIS was undergoing its NEPA public review process. Similarly here, the CIN has continued to acquire properties and operate businesses (including an ice cream store, among others) while this environmental review process is pending. Therefore, blanket statements like this have no place in the DEIS unless they are enforceable either administratively or judicially which, as a practical matter, they are not.

Additionally, in this instance, if we were to accept the statement made in the DEIS, the BIA has offered no credible evaluation of how the Cayuga Indian Nation can meet its Tribal objectives, consistent with the goals of 5 CFR 151, without development of the properties and, therefore, why the proposed action would be more successful at meeting tribal goals than under the No Action Alternative.

23) In making the statement that "The Nation presently has no plans for further development of the (Non-Enterprise) properties subject to the Proposed Action" the DEIS ignores potential reasonable future options for the property by the CIN, and the environmental impacts of such options. These potential future options include the development and full build-out of these properties by the CIN, an option that is in no way foreclosed by the land-in-trust action. This option is reasonable in the context of this NEPA review in that:

- The CIN has indicated that it plans to re-open its gaming facility and claims that it will not be expanded beyond the operation conducted previously, but the BIA in its DEIS does not state how the CIN will insure that it will not expand such gaming, nor how this contention by the CIN will be enforced by the BIA.

- Many other tribes have extensively developed their trust lands for gaming facilities after acceptance of the BIA of their land-in-trust applications, or expanded existing facilities. One geographically proximate example is the Oneida Indian Nation (OIN), which has well publicized and ongoing plans to expand its gaming facilities at the Turning Stone Casino, as well as other aspects of its entertainment facilities at that location. These development activities have continued after the BIA's acceptance of the OIN's land-in-trust application, even though in its application the OIN professed to plans for only limited additional development.

  The negative environmental implications of such development by the CIN are substantial since the extent and nature of the development are only limited by the size of the property. The physical dimensions of the properties are the only limitations to development since the CIN use of the property would be immune to state and local regulation under its claim of sovereignty. This full build-out scenario would encroach unimpeded on setback requirements, height restrictions, and other developments.

As a frame of reference to what such a development can become, the "footprint" of the Foxwoods Resort Casino located in Ledyard, CT, which is touted as the "largest resort casino in the world," is situated on approximately 54-acres of land (information obtained from www.foxwoods.com/aboutus/mediarelations/defaultpage.aspx). By comparison, the largest of the Union Springs parcels is 111 acres in size, about twice that of the Foxwoods development, one of the largest Native American casino and entertainment complexes in the country. The footprint of the Foxwoods facility includes:

- 340,000 sf of gaming operations (6 distinct casinos)
- over 35 food and beverage outlets, business conference facilities, multiple entertainment venues, and a wide variety of retail establishments
- 1,416 guest rooms and suites divided among 3 hotels
- 55,000 sf of meeting space
- 1,400 seat theatre
- salon and spa.

Foxwoods' owners estimate that more than 40,000 people visit the complex each day (www.foxwoods.com/aboutus/mediarelations/default Page.aspx).

As was the development of the OIN's Turning Stone facility, the CIN property in Union Springs is farm land. This comparison to the extent of the Foxwoods facility does not account for the additional 765 acres of land that the CIN has purchased (as of this writing) in the area of the properties included in this application, whether such properties are adjacent to the Union Springs parcel, or whether the CIN will obtain directly adjacent parcels that would further expand the potential size of any such development.

24) The evaluation of environmental consequences of the "No Action" Alternative with respect to this DEIS, and with respect to environmental resources, is fatally flawed. The DEIS does not indicate nor evaluate:

- The No Action Alternative in a sufficient manner, as the DEIS should at a minimum analyze whether the CIN's activities on the properties subject to the CIN Applications can continue to comply with federal, state and local laws such that the CIN would nonetheless achieve the objectives of "...to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)).
- What the range of such activities or development would reasonably include on the CIN properties.
- The potential that under the No Action Alternative the CIN could develop the properties and meet its objectives.
- What the likelihood is that such development under the No Action Alternative would nevertheless enable the CIN to meet these objectives.
- What the potential environmental consequences of such development under the No Action Alternative would be on the environmental resources in the vicinity of the affected properties compared to the environmental consequences of build-out under the other alternatives
- How under the No Action Alternative environmental resources would continue to be protected to the same degree as by state law and regulation, which would no longer apply if the proposed action is approved. Since state regulation of environmental resources is stricter, more specific, and more wide-ranging, the No Action Alternative would result in greater protection of environmental resources than under the proposed action.

The BIA has Failed to Evaluate Environmental Consequences Consistent with the Methodology in its Own NEPA Handbook

25) The BIA NEPA Handbook lists four potential classes of effects from the proposed action:

- Direct
- Indirect
- Cumulative
- Disproportionate

In accordance with BIA's NEPA Handbook, each potential effect should be analyzed in terms of whether they are short term, long term, irreversible and irretrievable. Except for its limited and seriously deficient discussion of cumulative impacts, the DEIS fails to address these aspects of impacts to environmental resources.

The DEIS Notes that Future Applications From the CIN are Possible but Neglects to Evaluate Cumulative Impacts

26) ***The obligation to address cumulative impacts.*** The BIA has an obligation pursuant to NEPA to ensure that cumulative effects from the proposed trust applications are evaluated. The Council on Environmental Quality's (CEQ) regulations (40 CFR Parts 1500 to 1508) implementing the procedural provisions of the NEPA define cumulative effects as:

> *"the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."*

Consistent with this definition, any review under NEPA (including alternatives) must account for the incremental effects of:

- Each of the parcels *individually* and then *collectively* and *cumulatively*, taking into account, as stated by the U.S. Supreme Court in its decision in *Sherrill*, the justifiable expectations of the people living in the area "grounded in two centuries of New York's exercise of regulatory jurisdiction" (*Sherrill v. Oneida Indian Nation of New York*).

- All of the parcels, rather than taken individually. Pursuant to NEPA, an analysis and assessment of the potential cumulative impacts of all of the parcels is required. Whether or not the parcels are developed, the individual properties have the potential to be developed. Further, it is neither reasonable nor prudent to disregard this prospect or discount the magnitude of potential impacts. Additionally, the impacts of the operations of existing development, as well as potential further future development, both individually and collectively raise substantive negative issues for the local communities, and for the state.

- The parcels taken collectively. The CIN has applied collectively for the parcels to be placed into trust. Any segmentation of these parcels and consideration of them in that manner represents an artificial construct that begs the regional proximity of the properties and the parcels to each other, the potential uses to which the properties will be placed, the collective impacts that their potential removal from

state and local jurisdiction will have on the surrounding communities, and the impacts that this "patchwork or checkerboard sovereignty" will have on the social fabric and community character of the region.

- Future land-in-trust applications (by the CIN or other Indian tribes). Other tribes or purported tribes have filed claims or expressed potential interest in similar land-into-trust applications in the region and the state. The BIA has an obligation to assess the impact(s) of the application for these CIN parcels in the context of other claims and applications. Given that there has not been a land-into-trust application accepted elsewhere in the state, there is an obligation for the BIA to perform a rigorous assessment of the cumulative impacts of the CIN applications with other Indian claims and potential trust applications.

To conduct an adequate assessment of cumulative impacts as described above, the BIA has an obligation to perform the following:

- A regional assessment to examine the interrelationships of all types of development expected in the geographical area encompassed by the parcels. Such development would include, but not be limited to, those similar to potential land development and present land uses associated with the CIN properties, such as retail stores, gas stations and associated stores, restaurants, gaming facilities (currently closed), and entertainment venues. Environmental, jurisdictional, land use, and economic impacts as described in this document must be addressed as part of this assessment.

- A programmatic assessment to study the impacts of related or similar projects expected to occur as part of the ongoing and future activities of the CIN. In addition to the cumulative environmental and jurisdictional impacts of such projects and ongoing operations, this assessment must include noncompetitive economic and market control in certain businesses where the CIN operations are not subject to land use, environmental, economic, or jurisdictional factors that non-CIN businesses must face. A lesser level of assessment would present an incomplete evaluation of the potential impacts, as well as an impermissible segmentation of the project.

27) ***Cumulative impacts on regulatory jurisdiction.*** As discussed throughout this document, the placement of CIN lands into trust will likely significantly impair the ability of state and local governments to regulate activities on specific trust parcels. A CIN development project on one or more contiguous parcels will likely impact environmental and socioeconomic resources that extend beyond those parcel boundaries. A development project combined with other CIN or non-CIN projects has a greater cumulative potential to impact resources and regulatory jurisdictions than the singular project alone. Simply stated, the non-contiguous characteristics of the CIN-owned lands would in and of itself create a significant impact that otherwise might be overlooked if the focus was solely on specific parcels. Impacts of placing these properties into trust occur across a variety of natural environments, each under the jurisdiction of separate governmental entities. It is not uncommon that several governmental entities control an environmental media, or an economic or other public function (*e.g.*, taxation, public safety). The cumulative impacts associated with the "checkerboard sovereignty" that would ensue if all the non-contiguous CIN lands were placed into trust would represent a worst case scenario, leaving an absence of social and environmental responsibility or accountability. Such a scenario would create multiple resource and jurisdictional impact zones ("black holes") with long-term effects; limit the effectiveness of government conduct, resource planning and environmental protection; and restrict the ability of the state and the localities to effectively protect the safety and social welfare of the public, and the quality of the environment. In its decision, the BIA must account for the spatial and life cycle impacts associated with the loss of regulatory jurisdiction including:

- past, present and future actions (parcel and cumulative impacts);
- focusing on each affected resource, ecosystem and human community;
- addressing additive, countervailing and synergistic effects;
- looking beyond the life of the action (*i.e.*, fully understanding the implications of placing the land into trust); and
- addressing the sustainability of resources, ecosystems and human communities.

28) ***Cumulative impacts on real property taxes and special assessments.*** Based on information provided by the affected towns and counties, the cumulative removal of the parcels from the tax rolls would result in an estimated annual reduction of over $80,000 in tax dollars and special assessments available to local and state governments. This data represents a snap-shot in time. Placement of CIN-lands into trust would have the cumulative long-term impact associated with non-payment of taxes in perpetuity and the associated impacts discussed herein.

29) ***Cumulative impacts on the environment.*** A review of environmental resource information for the parcels has been presented herein. It provides a clear perspective on the potential magnitude of the cumulative environmental impacts of the land-into-trust applications. Impacts to on site resources have been and continue to be serious in themselves. Ongoing operations and future development conducted without oversight and control continue to place at risk those environmental resources that are integrated with off-site properties. Wetlands are hydrologically and biologically connected and do not recognize property boundaries; other habitats similarly are not constrained by local jurisdictional definitions. Stream beds and flows that are modified impact the riparian lands formerly nourished, and modified drainage channels result in erosion, siltation, loss of topsoil, alterations in groundwater recharge patterns in a region where wells are used for water supplies, and a deterioration of surface water quality. As a result, the state's jurisdiction has been developed to provide an umbrella of environmental protection that supercedes local jurisdictional lines, as does the environment itself. The BIA must accept the statement of the CIN that it intends to purchase additional lands in the future should the applications be accepted. It must also then be recognized that the CIN will likely develop those lands to further the economic base for reestablishing the CIN's presence in the area. Under NEPA, the BIA is obligated to evaluate this statement in the perspective of the cumulative impacts of the current applications along with the stated objective to purchase additional lands in the future. The loss or significant impairment of an active state and local jurisdictional structure and function that is responsible for the protection of the environment and of the public health will not be replaced in whole or in part. It is not credible to assume that the cumulative environmental impacts of taking these properties into trust can otherwise be regulated, monitored or controlled. Therefore, the region's environmental resources and the public health will be severely and irreparably impacted over time.

30) In the "Cumulative Impacts" discussion of Section 4.8 (Socioeconomic Impacts) of the DEIS, the BIA makes the clear statement that "Future fee-to-trust applications from the Cayuga Indian Nation are possible" (page 4.8-15). This is a clear indication that the BIA recognizes the obligation to evaluate future trust applications as a component of this DEIS, then fails to do so and perform its obligatory evaluation across the board. With respect to Socioeconomic Effects, the BIA makes the claim that absent more detailed information about specific properties, cumulative impacts of socioeconomic effects can not be determined. This is not true, as sufficient information exists as to the real property holding of the CIN and its stated intent to make future land-in-trust applications. Moreover,, with respect to that claim for this category of effects, the IMPLAN model used to evaluate economic impacts derived from the CIN operations can be used to evaluate general economic scenarios relating to the CIN particularly where, as here, the data on the CIN inventory of real property is readily available and that is a common use of the model as evidenced in the literature. Secondly,

nowhere else in the DEIS does the BIA indicate why it has failed to evaluate the cumulative effects of these future trust applications. At a minimum, the BIA is able to evaluate the cumulative implications of the additional 765 acres that have been acquired by the CIN into trust in conjunction with the properties contained in this application. Those additional acres are well defined, and offer considerable additional development opportunity to the CIN. The BIA has failed in its NEPA obligations by ignoring this aspect of the DEIS. The obligation to address cumulative impacts is one that underscores the value of NEPA, and has been strongly and repeatedly upheld by the courts.

The BIA has Failed in its NEPA Obligation to Evaluate Cumulative Impacts of the Proposed Action with Other Actions that May Reasonably Occur

31) The BIA has an obligation under NEPA to consider the cumulative impacts of this proposed action with other actions. The BIA NEPA Handbook reinforces this obligation to evaluate cumulative impacts by requiring consideration of "past actions, plus proposed action, plus present action by others, plus reasonably foreseeable future actions by anyone" (BIA NEPA Handbook, Section 4.4.F and Section 6.4.E).

The DEIS's evaluation of cumulative impacts of this action with other actions is seriously lacking. The DEIS presents no evaluation of the cumulative impact of this proposed action with the similar application made recently by the Oneida Indian Nation, or similar proposals that may be contemplated by other Indian Nations within New York State. These are like actions that, in aggregate, have the potential for cumulative impacts if implemented; no mention is made of potential ramifications of these actions when taken together. The EIS in Section 4 of the DEIS notes in most instances that "Tribal fee-to-trust applications in other New York counties are also not anticipated to produce statewide cumulative impacts, since any impacts associated with.... from other proposals, if any, would be localized." This rote language is used to obscure the fact in that for 10 of the 12 resource categories in Section 4 of the DEIS, the BIA assumes that the environment is compartmentalized into fragments delineated by county political boundaries – the fact that environmental impacts transcend these limits is comfortably ignored.

32) As of this writing, the CIN has purchased an additional 765 acres in the area of the properties included in the application. The BIA in its DEIS has failed to address:

- the potential for these purchases to occur, even though they were ongoing as this DEIS was being prepared and issued.
- the cumulative environmental impacts that these additional properties will have with the properties in the proposed action should an application for such properties to be placed into trust be made. The CIN has publicly indicated its intentions to apply to have properties that it acquires placed into trust.
- The CIN has publicly announced its intentions to acquire up to 64,000 acres of property in the coming year in the area of the properties included in this application and apply for it to be placed into trust. This intention has been announced publicly numerous times. Yet the BIA has not evaluated the cumulative impacts of this clearly announced plan by the CIN.

The BIA Needs to Perform a Programmatic Cumulative Impact Assessment Relating to Probable Development Activities and Scenarios

33) It is well established that the CIN has acquired 765 additional acres that it has announced it will place into trust, and as part of these NEPA proceedings and independent of them has repeatedly and publicly announced that it intends to acquire and place into trust up to 64,000 acres. In the DEIS for the proposed action, the BIA

has ignored discussions of cumulative impacts, or has stated that the impacts will be minimal. The cumulative impacts of potential development by the CIN can occur under three scenarios:

- The CIN can develop the parcels that are the subject of this application to place land into trust. This scenario is not unreasonable given the CIN's objective "...to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)).
- The CIN has announced that it has already acquired an additional 765 acres and intends to apply to place this land into trust. It is not unreasonable that these lands may be the subject of development by the CIN, in whole or in part.
- The CIN has announced that it intends to acquire land up to a total of 64,000 acres and to place such land into trust. It is unreasonable to suggest that these lands, in whole or in part, would not be subject to a significant amount of development.

A programmatic EIS would perform an analysis that combines numerous probable development activities together and analyzes their collective impact on the environment, a step that the BIA declined to take in its evaluation of cumulative impacts for this DEIS. The advantage of this type of analysis under NEPA has been recognized for nearly 30 years.

> "The program statement has a number of advantages. It provides an occasion for amore exhaustive consideration of effects and alternatives than would be practicable in a statement of an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis."[4]

These analyses can take several forms, all of which are applicable to the NEPA process in this instance, and which the BIA has declined to address in its DEIS or elsewhere in the NEPA process:

- Combining several projects into a scenario of expected development in a geographic area, which would encompass the central Finger Lakes Region since it will be impacted by the development of the properties subject to this application, and in conjunction with the additional 765 acres that the CIN has already acquired and the additional 64,000 acres that the CIN has announced that it intends to acquire.
- An assessment of expected development of a less limited geographic area that would incorporate the recent placement into trust of lands by the Oneida Indian Nation and the planned actions listed above by the CIN.
- An assessment of an entire program of related or similar activities, such as the BIA's land in trust process, which would include an evaluation of the obvious deficiencies in the BIA's NEPA process, noted herein and by others, as regards the land in trust process.

A tool that the BIA would use in the programmatic evaluation would by an economic model such as the IMPLAN model that it used in the preparation of its DEIS in the instance of this DEIS. These models help predict and evaluate the implications of different development scenarios and can do so under a variety of assumptions that would span the range of reasonable options. One or another of the above options could and should have been performed by the BIA in this instance to evaluate cumulative impacts of the proposed action, but the BIA clearly ignored its obligation to do so.

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[4] Merson, A., and K. Eastman. 1980. Cumulative impact assessment of western energy development: Will it happen? Univ. Colo. Law Rev. 51:551-586.

The BIA has Failed to Address Environmental Issues That are Critical to the Local and/or Regional Environment

34) The BIA has evidenced its lack of knowledge about local environmental interests, concerns and factors that were appropriate and reasonable to address in its DEIS. Among these deficiencies, which are highlighted throughout these comments, are the following:

- Issues related to natural gas exploration and the economics of gas rights and gas production, including frack water generation and treatment – natural gas exploration has increased significantly from the central Finger Lakes Region south into Pennsylvania. The productive resource is known as the Marsellus Shale. The increase in natural gas prices in recent years has significantly increased the commercial interests in natural gas exploration and withdrawal in this region, to the financial windfall of some landowners. In fact, the CIN owns a natural gas extraction well on one of the properties that is the subject of the proposed action. The BIA in its DEIS did not address the potential for additional development of natural gas extraction on the CIN's properties, or on the significant acreage of additional properties that the CIN has announced it has or intends to acquire and place into trust (cumulative impacts), or its potential positive impacts on the CIN and, therefore, the CIN's ability to achieve its objectives without placing land into trust.

  Impacts associated with this issue include, but may not be limited to, water use, wastewater generation and treatment (*e.g.*, frack water), noise during exploration drilling, impairment of air quality from drilling equipment, petroleum releases from drilling and well installation equipment, release of gas into potable groundwater sources, releases of hazardous constituents of substances used on exploration and development sites into terrestrial or aquatic habitats, the jurisdictional issues associated with the failure to obtain appropriate permits and perform state SEQRA environmental reviews, the implications of the failure to pay appropriate state fees and taxes associated with the mineral extraction procedures, and the degradation of visual resources when viewed from Cayuga Lake or from other scenic locations along the lake shore. The application of these state and local jurisdictional controls and environmental protections will be lost if the CIN takes up an initiative with respect to this mineral resource.

- Finger Lakes Land Trust – Nowhere in the DEIS does the BIA mention the Finger Lakes Land Trust and its activities, which include having "...protected more than 10,000 acres of the region's wetlands, forests, farmland, grassland and gorges..." (http://www.fllt.org/) in the Finger Lakes, including properties in Seneca and Cayuga Counties. There is no indication of whether the properties that are the subject of this action will have any impacts on these protected lands. There is no indication whether the properties that are the subject of the proposed action have the characteristics of properties that the Finger Lakes Land Trust considers for acquisition and protection. The CIN has acquired and has announced that it plans to have placed in trust, also has announced that it will acquire and place into trust up to 64,000 acres – there is no indication in the DEIS of the impacts of these acquisitions on the lands protected by the Finger Lakes Land Trust, whether these additional properties (to the extent that they can be identified by the CIN) have the characteristics of properties that the Finger Lakes Land Trust considers for acquisition and protection, and whether the CIN's willingness to pay above market prices for land have impacted the ability of the Finger Lakes Land Trust to acquire and protect lands.

- Community Character - Community character is difficult for planners to define[5] and may be defined differently by urban, suburban and rural communities. Typical resources that define community character are (modified from Pivo, 1992):

  Enhancing Resources
  - Natural Resources – Water features, wetland areas, vegetation, unique natural areas.
  - Scenic Resources – Scenic vistas, scenic areas, scenic roads and scenic walkways or hiking areas.
  - Open Space – Dedicated, protected and managed open spaces; parks; preserves; undeveloped land, green spaces.
  - Historic Resources – Unique and locally characteristic historic resources that contribute to a sense of history, or that bind to a historic legacy.
  - Community Structure – Perception of the community as a functional and interactive unit.

  Enhancing or Detracting Resources
  - Residential Development – Can enhance character, but can affect and expend, or exhaust, resources and detract from character.
  - Business Development – Can contribute to character, but strip or big box development can detract from character, the magnitude depending on location.
  - Community Facilities – The type of community services and how and where they are provided can impact community character.
  - Transportation – Transportation infrastructure, its appearance, and its objectives can impact community character either positively or negatively.
  - Utilities – The deterioration of utility infrastructure can negatively affect community character, while the availability of utility infrastructure can focus or otherwise influence development.
  - Community Design – The use of design standards that favor a particular aesthetic can influence or complement community character.

  Handbooks have been developed for planners and community stakeholders to assist in establishing a consensus community character[6]. Since 1916 when New York City enacted a zoning ordinance to establish specific land use districts, zoning has been the tool for the implementation of land use policies. However, those policies depend on a consensus plan that establishes community goals and objectives, that explicitly or implicitly defines the community's character, and the measures deemed necessary to maintain that character. Zoning then can be appropriately focused, as can other local ordinances and policies, in maintaining community character objectives. Hibner[7] describes a series of characteristics of zoning that addresses community character

35) The unique scenic quality and sense of place of the Cayuga Lake area is derived from the interrelationship between rural farmland and the growth of viniculture and the winery industry, areas of undeveloped open space, the water based viewshed and recreational resource, and the hamlet centers. This rural character, graced with significant natural and historic resources is the quality that maintains the region's economic vitality as a visitor attraction, and also as an attractive place to live and work.

[5] Pivo, G. 1992. How do you define community character? Small Town, November-December: 4-17.
[6] New Hampshire Preservation Alliance. n.d. Preserving Community Character.
[7] Hibner, B. 2002. Zoning that addresses community character. Ideas at Work, 2(3):6-8 (Campaign for Sensible Growth).

The BIA has failed to address these aspects of community character in its DEIS, especially as regards the cumulative impacts of the development of the properties subject to this application, and in conjunction with the additional 765 acres that the CIN has already acquired, and the additional 64,000 acres that the CIN has announced that it intends to acquire.

The BIA's Description of the Affected Environment and of the Environmental Consequences of the Proposed Action are Deficient

General Environmental Protection

36) As discussed elsewhere herein, both the federal and state government share stewardship responsibilities in protecting by statute and regulations various resources (*e.g.*, land, air, water, flora/fauna, historic/cultural/archaeological/architectural resources, community services, and other critical resources). Under federal jurisdiction, wetlands and other waters of the United States are regulated under the Clean Water Act and Rivers & Harbors Act of 1899. State regulation of these resources is undertaken pursuant to, among others, the New York State's Environmental Conservation Law and various implementing regulations covering land, air and water related issues. These regulations were established to protect resources, including direct impacts on resources, as well as indirect, cumulative and offsite impacts (*e.g.*, viewshed impacts on a protected cultural/historic resource or migration of pollutants). Placement of land in trust undermines the requirement for the existing local, state and federal jurisdictions to be involved in the planning process, to ensure the protection of jurisdictional resources, and be involved in the evaluation and mitigation of potential impacts to resources on and proximal to lands identified in the CIN applications. In addition, the BIA process does not identify a surrogate process by which these resources will continue under the same level of protection as provided under current statutes and regulations and by current jurisdictions.

Land Resources

37) The evaluation of environmental consequences of the no action alternative with respect to this DEIS, and with respect to land resources, is fatally flawed. The DEIS on page 4.2-1 indicates that "the property would continue to be used as it is now..." The DEIS does not indicate nor evaluate:

- The No Action Alternative in a sufficient manner, as the DEIS should at a minimum analyze whether the CIN's activities on the properties subject to the CIN Applications can continue to comply with federal, state and local laws such that the CIN would nonetheless achieve the objectives of "...to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)).
- What the range of such activities or development would reasonably include on the CIN properties.
- The potential that under the No Action Alternative the CIN could develop the properties and meet its objectives.
- What the likelihood is that such development under the No Action Alternative would nevertheless enable the CIN to meet these objectives.
- What the potential environmental consequences of such development under the No Action Alternative would be on the land resources in the vicinity of the affected properties compared to the environmental consequences of build-out under the other alternatives
- How under the No Action Alternative land resources would continue to be protected to the same degree as by state law and regulation, which would no longer apply if the proposed action is approved. Since state regulation of land resources is stricter, more specific, and more wide-ranging,

the No Action Alternative would result in greater protection of land resources than under the proposed action.

38) The DEIS states on page 4.1-1 that "No additional development or disturbance to the subject properties is anticipated to occur, and as a result of this alternative, as a result of this alternative (Alternative 1: The Proposed Action), there would be no changes to onsite (sic) geology, topography, or soils. Therefore, there would be no significant impacts to land resources as a result of the Proposed Action." Again, the BIA continues to make the claim and take the narrowly focused an unjustifiable position that the present land use will continue into the future. However, once placed into trust there are no enforceable restrictions that would prevent the land from being developed into any number of potential maximum build-out scenarios. Since there are no restrictions on future development, the BIA is obligated under NEPA to address impacts from secondary growth, cumulative impacts, and not to segment the potential for future development from the NEPA process. These are the potential development impacts that the BIA, in the agency's own experience, has seen occur elsewhere in the country following acceptance of land into trust. Therefore, to ignore such implications of the land-in-trust process raises significant questions as to whether the agency has performed its requisite hard look under these circumstances; in fact, the agency's obvious silence clearly falls far short of what is required with respect to a requisite hard look.

39) Under its limited and inadequate discussion of cumulative impacts for this and other resources, the BIA in its DEIS concludes that "Tribal fee-to-trust applications in other New York counties are also not anticipated to produce statewide cumulative impacts, since any land resource impacts from other proposals, if any, would be localized" (page 4.1-1). This statement is made with no basis whatsoever; for example, there are no references to specific land resource characteristics impacted under these applications, or reference to the information and evaluation that underlies this conclusion. This conclusion is particularly suspect in light of other findings of the DEIS. For example, regarding land resources, this DEIS notes in Section 3.1 that:

- At the Seneca Falls and Union Springs properties "The abundance of lime in these layers of bedrock creates lime-rich soils that are good for agriculture," while at the Springport site "is characterized by numerous scattered concretions of calcium carbonate that contribute to productive agricultural soil."
- On site soils at the sites generally "are well suited to the type of farming common in the county" (page 3.1-4).
- The CIN properties in Seneca Falls, Springport and Union Springs contain soils which the USDA classifies as farmland of statewide importance.

Despite the above findings, the DEIS fails to analyze the potential impact to such soils from current operations (operations found to have resulted in "recognized environmental conditions" on the Union Springs and the Seneca Falls properties), from future development, and from the development of other projects in the area.

As noted elsewhere in these comments, the BIA in this DEIS fails to evaluate the potential environmental impacts to land resources from reasonable future uses of these properties, let alone:

- the potential complete build-out scenario for the 111 acre Union Springs property,
- the cumulative impacts associated with the CIN's acquisition of an additional 765 acres
- the potential cumulative impacts to land resources of those acres when they are also placed into trust, which is the often and publicly stated plan of the CIN

- the cumulative impacts associated with the CIN's continued acquisition of as much as 64,000 acres when they are also placed into trust, which is the often and publicly stated plan of the CIN.

40) The evaluation of the impact of the proposed action on land resources is seriously deficient on several fundamental levels under NEPA's hard look requirement, including its failure to address several basic issues associated with the action. The BIA in its DEIS does not acknowledge the value of lost, valuable farmland in its analysis of current CIN actions nor does it analyze the loss of valuable farmland under the reasonably likely future development scenarios. Under the DEIS's Cumulative Impacts Analysis in Section 4.2, there is no discussion of the implications of the loss of this valuable farmland in the collective context of other land-in-trust applications by other Nations around the state, the CIN's stated objectives of continued land acquisition to be placed into trust, or of loss of agricultural land in the state in general. Neither is there any discussion as to whether these lands are suitable for vineyards, or the impacts of the loss of these lands to the wine industry, which continues to undergo significant growth as an agricultural resource and as a focus for tourism to the Finger Lakes region.

Water Resources

41) The evaluation of environmental consequences of the no action alternative with respect to this DEIS, and with respect to water resources, is fatally flawed. The DEIS on page 4.2-1 indicates that "the property would continue to be used as it is now..." The DEIS does not evaluate:

- The No Action Alternative in a sufficient manner, as the DEIS should at a minimum analyze whether the CIN's activities on the properties subject to the CIN Applications can continue to comply with federal, state and local laws such that the CIN would nonetheless achieve the objectives of "...to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)).
- What the range of such activities or development would reasonably include on the CIN properties.
- The potential that under the No Action Alternative the CIN could develop the properties and meet its objectives.
- What the likelihood is that such development under the No Action Alternative would nevertheless enable the CIN to meet these objectives.
- What the potential environmental consequences of such development under the No Action Alternative would be on the water resources in the vicinity of the affected properties compared to the environmental consequences of build-out under the other alternatives
- How under the No Action Alternative water resources would continue to be protected to the same degree as by state law and regulation, which would no longer apply if the proposed action is approved. Since state regulation of water resources is stricter, more specific, and more wide-ranging, the No Action Alternative would result in greater protection of water resources than under the proposed action.

42) The evaluation of environmental consequences of the proposed action has significant deficiencies. At an area of 111 acres and only 500 feet from Cayuga Lake, the Union Springs property has the potential to undergo significant development in the future, with no oversight as to the impacts or implications to surrounding properties or the community. As described earlier herein, the Foxwoods Resort Casino encompasses only about 54 acres, about half the size of the Union Springs property. The potential environmental consequences of a full build-out development scenario for this property are particularly alarming given that the property is located within the Cayuga Lake watershed. Cayuga Lake is a drinking water source and regional, if not

national, natural resource that would be damaged by impacts from future development. Again, claims that there are no plans to develop these properties are beside the point, in that after placing these lands in trust, these significant lands could be developed essentially unchecked, unregulated or regulated by federal jurisdiction which is considerably less strict than New York state laws and regulations for protection of state waters, and without recourse to natural resource damages, or the loss of drinking water supplies. The BIA is obligated to evaluate such scenarios and not accept blanket statements regarding development planning without an eye to reality and precedent; the absence of a present plan to develop the site at this point in time does not reflect a commitment by the Cayuga Nation (which would be unenforceable even if offered) not to develop these properties. In fact, the Cayuga Nation would apparently not be meeting the criteria under the Indian Reorganization Act for such land-in-trust transfers if it does not develop or more fully develop the properties subject to the CIN Applications and, instead, actually took steps to severely restrict their development; further, if CIN too such steps, then CIN's actions would not be consistent with its stated goal of "self-determination, self sufficiency and economic independence."

43) The DEIS concludes that: "The Nation's property in Seneca Falls contains no New York State Wetlands" and "The Nation's property in Seneca Falls contains no wetlands mapped by the National Wetlands Inventory Wetlands (sic)..." (page 3.2-2). Similar conclusions are made with regard to other of the properties that are the subject of the proposed action. The presence of regulated wetlands is not limited to those wetlands that may be mapped under federal or state programs. There is an obligation to survey potential wetlands that may be present under appropriate environmental conditions; the document is silent on whether surveys to identify this critical resource have been performed at these properties. The document has not indicated whether there are wetlands, or potential wetlands, adjacent to or in close enough in proximity to the subject properties for activities on these properties to impact such wetlands, but by all appearances given the references to the NWI inventory, there is information to conclude that there are wetlands in proximity to several of the CIN properties. Moreover, the NYSDEC and the ACOE have a resource protection and regulatory interest in knowing how activities on these properties will impact nearby environmental resources. This question has not been addressed in this instance in the DEIS, and placing these properties in trust will effectively remove the ability of these agencies to protect these resources on behalf of the state and U.S. residents from impacts of uncontrolled operations on trust lands. The same applies to the property in Union Springs.

44) With respect to the Seneca Falls property, it has been reported that he two ponds on-site, which both have a National Wetland Inventory (NWI) classification of PUBHx, are likely the results of past mining activities. A 1902 map from the Annual Report of the University of the State of New York[8], shows that there is a thin saline waterlime deposit over the Salina Gypsum in this area. These two ponds are probably the result of the waterlime being mined in an attempt to access the more valuable gypsum below. A second explanation for these ponds and the other small depressions on the largest parcel is that they are sinkholes that have formed where the thin waterlime bedrock has collapsed over holes left by the dissolution of the underlying gypsum. In either case, this waterlime/gypsum combination lining the pond has created a very unique microhabitat for rare and endangered New York State fauna and flora. The DEIS's assumption that these are farm ponds devoid of rare herptofauna or endangered flora is a convenient shortcut by "experts" not familiar with local ecosystems. There is no documentation that the edges or waters of these ponds were checked for such unique species, that an analysis of their presence was performed, or that an analysis was conducted of impacts on these habitats of activities to be conducted on this property should the applications be accepted, or of the impacts of inevitable build-out scenarios on these habitats.

[8] State of New York. 1902. Annual Report of the University of the State of New York, Stratigraphic Map of the Region About Union Springs and Part of the City of Auburn Cayuga County. Albany, NY.

45) With respect to the Union Springs property, the two ponds on this property are very probably waterlime quarry holes which would create a very unique alkaline waterbody. Such a waterbody is an ideal calcareous habitat for *Potamogeton strictifolius* (narrowleaf pondweed) and *Clemmys guttata* (spotted turtle), and possibly for *Clemmys muhlenbergii* (bog turtle). The New York State Natural Heritage Program documents that *Potamogeton strictifolius* (narrowleaf pondweed) is a New York State endangered plant that is an aquatic plant of pond and lake margins, found in calcareous waters and is expected to occur in this area. It should be noted that BIA's consultant looked at the flora around the ponds in 2006 but not the flora in the ponds (page 3.6-3). The bog turtle is a New York State endangered species and the spotted turtle is a New York State species of special concern. The importance of these two ponds on the CIN's property should not be underestimated because juvenile turtles from similar ponds near this site can easily migrate to and breed in these two ponds. Again, due to the history of waterlime and gypsum quarrying in this area, it is highly unlikely that these ponds are "likely created through excavation for farming purposes." This erroneous assumption is then used to disregard the flora and fauna in the ponds. This appears to be a shortcut that allows the BIA to conduct less-than-thorough fieldwork and analysis of this issue.

The BIA in its DEIS finds that "farm ponds on Union Springs site showed evidence of turbidity from runoff." It should be noted that the two ponds are more likely to be cloudy due to high pH, not silt. Again these ponds are quarried in waterlime bedrock which would make their waters alkaline. In warmer weather a phenomenon known as the "whiting" effect causes cloudiness in alkaline (calcareous) waters such as this. This is another indication that these ponds may be very suitable for *Potamogeton strictifolius* (narrowleaf pondweed), *Clemmys muhlenbergii* (bog turtle) and/or *Clemmys guttata* (spotted turtle). Basically, one bad assumption (that these are farm ponds) leads to a second bad assumption, "farm ponds on Union Springs site showed evidence of turbidity from runoff," which leads to a faulty conclusion "and are therefore unlikely to support herptofauna that require less disturbed, more pristine wetland and open water conditions, such as spotted turtle or blue spotted salamander." These are not farm ponds, they are calcareous aquatic habitats that can support endangered species or species of special concern.

46) As noted elsewhere in these comments, the BIA in this DEIS fails to evaluate the potential environmental impacts to water resources from reasonable future uses of these properties, let alone:

- the potential complete build-out scenario for the 111 acre Union Springs property,
- the cumulative impacts associated with the CIN's acquisition of an additional 765 acres
- the potential cumulative impacts to land resources of those acres when they are also placed into trust, which is the often and publicly stated plan of the CIN
- the cumulative impacts associated with the CIN's continued acquisition of as much as 64,000 acres when they are also placed into trust, which is the often and publicly stated plan of the CIN.

In fact, the DEIS is distressing silent on even the potential impacts of the existing property uses on water resources, given the sensitivity of the Cayuga Lake watershed, in which the properties are located, in light of the "recognized environmental conditions" that the BIA in its DEIS notes on several of the CIN properties, and given the immediate proximity of several of these properties to the lake. Groundwater resources are not adequately identified, nor is there a discussion of the potential for impacts to groundwater resources, especially as they are a conduit to Cayuga Lake. The implications of the present uses of the properties to the groundwater resource, and to Cayuga Lake, is a significant issue given the failure of the CIN to follow even the most rudimentary regulations such as registering underground storage tanks (tanks with tens of thousands of gallons of capacity), follow regulations, including failing to follow even minimal steps that are the standard in the industry across the country, to prevent the contamination of groundwater that flows to Cayuga Lake. Groundwater protection in a watershed used for potable water is an issue of critical national interest, as

evidenced by the extensive watershed protection measures mandated by the USEPA for the drinking water supply watershed of New York City, and the attention paid to the watersheds of surface potable supplies around the country.

47) The environmental consultant to the CIN performed Phase I and Phase II Environmental Site Assessments (ESAs) as part of the development of this DEIS. First, the reason for performing a Phase I ESA of these properties is unclear – the objective of a performing a Phase I ESA is to protect the buyer of a property from potential Superfund liability should the property be discovered to be contaminated. In the context of the DEIS, the Phase I ESAs only serve to obscure the lack of thorough analysis in the DEIS of the protection of the environment and in the vicinity of the properties from degradation by the activities at the properties, and from the inevitable build-out scenarios that will follow the BIA's acceptance of the applications.

With respect to the Phase I ESAs that were performed, the consultant found that for two properties with gas stations, the CIN was not complying with applicable regulations nor managing the sites in a manner to protect the environment and public health. More specifically:

- For the 299 Cayuga Street Property in Union Springs[9], the consultant found that: "Registration for the current USTs was not up to date with NYSDEC. In addition, there was no documentation found for maintenance, leak detection, fluid measurement records, closure sampling related to the former underground tanks, or activities related to the former site building. Historical or undocumented spills could have contaminated soil and groundwater beneath the site." This finding indicates that the CIN has not been complying with the law in the past, and any suggestion that it will somehow regulate itself with respect to key state and federal regulations for protection of public health and the environment must be viewed with skepticism. Further, this finding indicates that the CIN has and will act in a manner that places the Cayuga Lake watershed and its residents at risk. Additionally, the loss of state jurisdiction upon placement of this property into trust, and the absence of any substitute third party oversight and enforcement mechanism, will result in the watershed and its residents to continue to be at risk. This loss of jurisdiction has been suggested by the CIN to be an issue of tax and tax loss; that is only partially true. This finding indicates that environmental regulations and the protection they provide to the environment and the public health also are being ignored, to the potential detriment of both, as well as the members of the CIN.

- Similarly, for the Phase I ESA performed at 2552 Route 89, Town of Seneca Falls[10], the consultant found that: "Registration for the current USTs was not up to date with NYSDEC. In addition, there was no documentation found for maintenance, leak detection, product inventory records, closure sampling related to the former underground tanks, activities related to the former dealership, or potential structures (dry wells, septic systems) related to the former site building.

In light of these findings, the failure to describe, evaluate the impacts on, and address in a meaningful way the groundwater resource is a significant deficiency with respect to this DEIS.

48) As noted elsewhere herein, the DEIS is essentially silent with respect to one of the most critical environmental impacts of the proposed action, which is the loss of state and local regulatory jurisdiction over

[9] AKRF, Inc. 2009 (April). Phase I environmental Site Assessment, 2552 Route 89, Town of Seneca Falls, NY. New York, NY.
[10] AKRF, Inc. 2009 (April). Phase I environmental Site Assessment, 299 and 303 Cayuga Street, Village of Union Springs, NY. New York, NY.

environmental and other regulatory issues on the affected properties. The BIA in its DEIS has oversimplified its review and evaluation of these water resource-related loss of jurisdiction issues by (1) failing to address "jurisdictional problems and potential conflicts of land use which may arise" as required by 25 CFR 151.10 and 151.11, and (2) failing to acknowledge, or ignoring, the following issues with respect to environmental consequences of the proposed action on water resources.

New York State enforces several regulatory programs aimed at protecting New York State's waters. Some of these programs are state-enacted, while others are activities where a specific state primacy agency has delegated enforcement responsibility to administer federal requirements. The breadth of topics covered by these programs is extensive, but the goal of all is to promote the safety and well-being of the state's residents, as well as protection of our shared environment.

The state's laws and regulations governing subsurface discharges of pollutants further helps underscore the critical difference between state and federal law as it relates to the protection of the environment. 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 NYSDEC permit before construction begins. 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 CIN land arguably would be subject to federal law, the federal CWA only arguably addresses surface waters, not discharges to groundwater. Similarly, petroleum spills that contaminate land but are not shown to emanate into or affect navigable surface waters may not be subject to federal control under the CWA or the federal Oil Pollution Act, but are subject to state environmental laws such as the state's Navigation Law.

These state water protection programs include:

- Protection of Waters (Article 15 of the ECL; 6 NYCRR Part 608) administered by the NYSDEC;
- Dam Safety (Article 15 of the ECL; 6 NYCRR Part 673);
- Flood Control (Articles 16 and 36 of the ECL; 6 NYCRR Parts 500 *et seq.*);
- Water Supply (Article 17 of the ECL; 6 NYCRR Part 601; State Sanitary Code; 10 NYCRR Part 5) administered by the NYSDEC and NYSDOH;
- State Pollutant Discharge Elimination System (Article 17 of the ECL; 6 NYCRR Part 750) administered by the NYSDEC;
- Approval of Plans for a Wastewater Disposal System (Article 17 of the ECL) administered by the NYSDEC;
- Approval of Realty Subdivisions (Article 11, Title II of the Public Health Law; Article 17, Title 15 of the Environmental Conservation Law) administered by the NYSDOH; and
- Wellhead Protection Program (1986 Amendments to the Safe Drinking Water Act) administered by the NYSDOH.

Potential loss of state jurisdictional oversight of these programs on the parcels would have implications ranging from direct impacts on CIN-owned lands (*i.e.*, future CIN economic diversification efforts, as well as indirect impacts on non-CIN lands) due to lack of oversight and review and the resultant environmental harm. With respect to these state programs:

- *Protection of Waters.* Parcels included in the proposed action are located within the Cayuga Lake drainage basin, as are all or some of the 765 acres of additional properties that the CIN has acquired and has announced that it plans to place in trust, and a proportion of the 64,000 acres that the CIN announced that it intends to acquire and place in trust. Drainage within this system is conveyed through a complex network of interconnected rivers, streams and ponds. The quality and aesthetics of the waters of Cayuga Lake and its tributaries are critical not only for their ecological value, but also their economic value. This area and the Finger Lakes region of New York State as a whole are internationally known for their recreational opportunities – direct contact, and fishing and other non-contact recreational activities – and drive a strong, year round economic tourist engine. These environmental attractions also serve the recreational needs of the regional resident population themselves.

  It is noted that all of the parcels included in the CIN's current applications are located within a quarter mile of the shores of Cayuga Lake or the Cayuga & Seneca Canal. Surface runoff or potentially leaking gasoline tanks from these parcels have an essentially direct pathway to the lake's waters, the latter by the migration of contaminants by way of groundwater. This path is highlighted by the fact that the topography of many of the CIN properties slopes toward the lake, and several properties are within only a few hundred feet of the lake. The lake and canal resources are necessary for drinking and bathing, agricultural, commercial and industrial uses, and fish and wildlife habitat. In addition, these waterways provide opportunities for recreation, education and research, and aesthetic appreciation.

  Certain human activities can adversely affect, even destroy the delicate ecological balance of these important areas, impairing the uses of these waters. The policy of New York State, set forth in Title 5 of Article 15 of the ECL, is to preserve and protect these lakes, rivers, streams and ponds. To implement this policy, the NYSDEC created the Protection of Waters Regulatory Program to prevent undesirable activities on water bodies by establishing and enforcing regulations that:

  - are compatible with the preservation, protection and enhancement of the present and potential values of the water resources;
  - protect the public health and welfare; and
  - are consistent with the reasonable economic and social development of the state.

  All waters of the state are provided a class and standard designation based on existing or expected best usage of each water or waterway segment.

  - The classification AA or A is assigned to waters used as a source of drinking water.
  - Classification B indicates a best usage for swimming and other contact recreation, but not for drinking water.
  - Classification C is for waters supporting fisheries and suitable for non-contact activities.
  - The lowest classification and standard is D.

  Waters with classifications A, B, and C may also have a standard of (T), indicating that it may support a trout population, or (TS), indicating that it may support trout spawning. Special requirements apply to sustain these waters that support these valuable and sensitive fisheries resources. Small ponds and lakes with a surface area of 10-acres or less, located within the course of a stream, are considered to be part of a stream and are subject to regulation under the stream protection category of Protection of Waters.

Certain waters of the state are protected on the basis of their classification. Streams and small water bodies located in the course of a stream that are designated as C(T) or higher (*i.e.*, C(TS), B, or A) are collectively referred to as "protected streams," and are subject to the stream protection provisions of the Protection of Waters regulations (6 NYCRR Part 608). Protected streams are illustrated on Figure 7 in Appendix A. No person, local public corporation, interstate or interstate authority may excavate from or place fill, either directly or indirectly, in any of the protected waters of the state or in wetlands that are adjacent (typically 50-feet horizontally from the mean high water line) to and contiguous at any point to any of the navigable waters of the state, and that are inundated at mean high water level or tide, without a permit issued by the NYSDEC.

These state-protected streams, as well as other streams (*i.e.*, not meeting the state's definition of "protected stream") also may be regulated by the ACOE under Section 404 of the Clean Water Act.

Any loss of jurisdiction to regulate these resources on CIN lands may have serious deleterious downstream impacts to water quality, stream stability, and habitat; potential upstream impacts include erosion and flooding.

- *Water Supply.* The NYSDEC exercises jurisdiction over the state's public water supply program. This program protects and conserves available water supplies by ensuring equitable and wise use of these supplies by those who distribute potable (drinkable) water to the public for domestic, municipal, and other purposes. The state's waters must satisfy domestic, municipal, agricultural, commercial, industrial, power and recreational needs and other beneficial public purposes.

  The program's implementing regulations (6 NYCRR Part 601) apply to any person or public corporation who is authorized and engaged in, or proposing to engage in, the acquisition, conservation, development, use or distribution of water for potable purposes, or who proposes to transport or carry water from this state to any location outside the state for use therein. A permit from the NYSDEC is required before a person or public corporation may take any of the following actions:

  - install a new water supply system;
  - acquire, take or develop any source of water supply in connection with a new water supply system;
  - acquire, take or develop any new or additional source of water supply in connection with an existing water supply system;
  - take or condemn lands for any new or additional sources of water supply or for the utilization of such supplies;
  - commence or undertake the construction of any works or projects in connection with proposed plans for a water supply system;
  - extend supply or distribution mains into a municipality, water district, water supply district, or other civil division of the state wherein it has not heretofore legally supplied water;
  - construct any extension of its supply mains, except within a service area approved by the department;
  - extend the boundaries of a water district;
  - supply water in or for use in any other municipality or civil division of the state which owns and operates a water supply system therein, or in any duly organized water supply or fire district supplied with
  - water by another person or public corporation;

- enter into a contract or other agreement for a supply of water;
- purchase or condemn any existing water supply system;
- sink or drill additional wells in connection with an existing water supply system;
- increase the amount of water diversion from a source of water supply already in use, by enlargement of the conduits, increased storage or by any other means;
- exercise any franchise hereafter granted to supply water to any inhabitants of the state; or
- transport or carry water through pipes, conduits, ditches or canals from any freshwater lake, pond, brook, river, stream or creek of this state or any groundwater of this state to any location outside the state for use therein.

The NYSDEC also issues permits associated with water districts, as well as to the regional water purveyors in the Village of Union Springs in Cayuga County and the Village of Seneca Falls in Seneca County which serve the parcels included in the current CIN applications. Depending on their locations, lands that may be purchased in the future by the CIN may be served by these water districts, other water districts, or by private wells. Approval of private wells remains the purview of the local and or state health departments.

In Cayuga County, the Village of Union Springs relies on two wells to supply water to the village as well as to significant portions of the Town of Springport. Testing has revealed that there is a contaminated groundwater plume extending from an unknown source in the City of Auburn, northeast of the village. The village is now using an air-stripping system to treat the contaminated groundwater. The Village of Union Springs and the Town of Springport have worked with the New York Rural Water Association (NYRWA) to develop a "Wellhead Protection Plan."

The Wellhead Protection Plan includes the designation of Wellhead Protection Areas and identifies land uses, potential sources of contamination, and safety measures meant to meet the objective of securing a continued safe, reliable, and affordable water supply for residents. The Wellhead Protection Areas include Zone 1 (the inner protection zone) and Zone 2 (the direct contribution area). Zone 1 is a circular area, approximately 1/2 mile in diameter, surrounding the two water supply wells, located entirely within the Village of Union Springs, and is considered to be the most critical area for protection of the wellheads. Zone 2, located primarily in the Town of Springport, is an area where groundwater flow is towards Zone 1.

The Union Springs parcel (included in the current CIN applications) that contains the Cayuga County gaming facility is within the critical Zone 1 Wellhead Protection Area.

Among the safety measures that have been identified to protect the water supply are controls on animal feeding operations; gas well operations which may generate a brine that is managed as a solid waste; and future development of lands for commercial, industrial, or residential uses.

Should the current CIN application to place lands in trust be accepted, it is the stated intention of the CIN to purchase additional lands to further reestablish its presence in the area. It is all but inevitable given the requirements under the IRA and CIN's stated intentions that such lands will be developed by the CIN. The state and local regulatory agencies to date have not had reasonable opportunity to plan, monitor, and control development and operations on the CIN parcels with respect to the critical local potable water sources (as well as other resource issues noted herein). The state and local regulatory agencies also will likely lose the ability to review proposed projects that could affect the water supply should the CIN's applications be accepted.

In Seneca County, the parcels included in the current application are served by the Village of Seneca Falls that withdraws water from Cayuga Lake. Future land purchases and potential development by the CIN in Seneca County may or may not continue to rely on the Village of Seneca Falls for water supply. Should other sources of water be required, the state and local government agencies would not have the ability to review those projects and their potential impact on water supply sources.

- *State Pollutant Discharge Elimination System.* Article 17 of the ECL entitled "Water Pollution Control" was enacted to protect and maintain surface and groundwater resources. Article 17 authorized creation of the State Pollutant Discharge Elimination System (SPDES) program to maintain New York's waters with reasonable standards of purity. The SPDES program is designed to eliminate the pollution of New York waters and to maintain the highest quality of water possible, consistent with:

    - public health;
    - public enjoyment of the resource;
    - protection and propagation of fish and wildlife; and
    - industrial development in the state.

  The NYSDEC issues permits associated with private, commercial and institutional discharges for the following activities:

    - constructing or using an outlet or discharge pipe (referred to as a "point source") that discharges wastewater into the surface waters or groundwaters of the state;
    - constructing or operating a disposal system such as a sewage treatment plant; and
    - storm water discharges associated with industrial activity from a point source.

  In addition, the NYSDEC is working with the USEPA to implement a federal regulation, commonly known as Storm Water Phase II, which requires permits for storm water discharges from Municipal Separate Storm Sewer Systems (MS4s) in urbanized areas and for construction activities disturbing general permits, one for MS4s in urbanized areas and one for construction activities. The permits are part of the SPDES program.

  Under the storm water SPDES program, permittees are required to prepare, implement and maintain Storm Water Pollution Prevention Plans (SWPPPs) that describe activities, mitigation (including an erosion and sedimentation control plan), and storm water management features aimed at controlling storm water quality and flows. Developing a SWPPP that complies with the requirements of the state's SPDES program does not relieve developers and contractors from meeting the requirements of the local governments having jurisdiction over areas including such projects. For example, additional reviews by the local government may be undertaken during the oversight of development and build-out activities (*i.e.*, site plan review, subdivision review, etc.).

- *Approval of Plans for a Wastewater Disposal Systems and Public Water Supply Improvements.* Pursuant to Article 17 of the ECL, as well as the state's sanitary code, the NYSDEC and NYSDOH working with county health departments have regulatory responsibility to review and approve wastewater disposal systems (*i.e.*, conveyance and treatment facilities including septic systems) and public water supply improvements. While existing CIN operations currently rely on public infrastructure, many of the more rural parcels rely on on-site water (wells) and wastewater (septic) systems. Future plans may entail the

development of CIN-operated potable water and wastewater treatment systems. Furthermore, it is reasonable to assume that future development of parcels where such public infrastructure remains unavailable, will require the CIN to implement additional on-site measures (*i.e.*, wells and septic systems). The CIN parcels are used for the CIN's commercial and gaming operations, which are intended to attract non-CIN visitors. Since 9/11, it is imperative that local, state and federal governments have the ability to review and approve of the design, capacity, reliability, and security issues associated with such facilities to ensure protection of public health and safety, as well as the environment.

- *Realty Subdivisions.* Under a Memorandum of Understanding with the NYSDEC, the NYSDOH has statewide responsibility for approval of all realty subdivisions, including the review and approval of plans for individual sewage treatment systems. NYSDEC retains responsibility only for the review and approval of plans for public or community sewerage. With the CIN's stated objective of reestablishing its presence on lands in the area, the proposed placement of the parcels, as well as parcels purchased in the future by the CIN, into trust highlights the need for continued local and state oversight of such projects.

- *Wellhead Protection.* The Wellhead Protection Program was created by the 1986 Amendments to the Safe Drinking Water Act. The NYSDEC developed New York's Wellhead Protection Program, which was approved by the USEPA in 1990. In 1998, administration of the Wellhead Protection Program was transferred from the NYSDEC to the NYSDOH and integrated into the NYSDOH's Source Water Assessment Program. The goal of the Wellhead Protection Program is to protect the groundwater sources, aquifers, and wellhead areas that supply public drinking water systems from contamination. New York's approach to wellhead protection recognizes and includes the existing federal, state and county programs that protect groundwater and complements these programs through a combination of activities and efforts using existing public and private agencies and organizations at all levels. As discussed above, the Village of Union Springs and the Town of Springport have worked with the NYRWA to develop a "Wellhead Protection Plan" with respect to the Village of Union Springs water supply wells.

  The ability of state and local governments to protect groundwater and public and private well supplies would be significantly hindered if access to CIN-related parcels is eliminated. The ability of state and local governments to protect the local watershed is vital to ensuring that groundwater resources, which supply local private and public well supplies, are protected.

- *Floodplain Development Permits.* The NYSDEC has statutory authority under Articles 16 and 36 of the ECL and its implementing regulations (6 NYCRR Part 500 *et seq.*) to regulate flood control issues in New York State. Local floodplain development coordinators work with the NYSDEC and Federal Emergency Management Administration (FEMA) to restrict and regulate development within floodplains and floodways, including review of flood-proofing and compensatory storage issues. Development that includes diverting streams, increasing impervious surfaces, or developing in floodplains has the potential to raise flood elevations that would impact both CIN and non-CIN properties. The inability for local and state planners to review development applications has severe ramifications relating to health, the environment and liability including:

  - loss of life from flooding, dam breaks and erosion;
  - economic loss to new and existing development; and
  - inability to exercise appropriate planning and decisions.

  Acceptance of the applications to place the parcels in trust would mean that the inevitable future development of these parcels, as well as parcels purchased in the future by the CIN, would not be subject

to any review and evaluation by state or local governments to ensure that flood control measures are included, where appropriate, to protect public health and property. While such reviews are critical (and required) in all flood regulated areas, land proximate to Cayuga Lake is especially sensitive to changes resulting from development activities.

49) The BIA in its DEIS has oversimplified its review and evaluation of these water resource-related loss of jurisdiction issues by (1) failing to address "jurisdictional problems and potential conflicts of land use which may arise" as required by 25 CFR 151.10 and 151.11, and (2) failing to acknowledge, or ignoring, the preceding issues with respect to environmental consequences of the proposed action on water resources.

Air Quality

50) The evaluation of environmental consequences of the no action alternative with respect to this DEIS, and with respect to land resources, is fatally flawed. The DEIS on page 4.3-1 indicates that "the property would continue to be used as it is now..." The DEIS does not indicate nor evaluate:

- The No Action Alternative in a sufficient manner, as the DEIS should at a minimum analyze whether the CIN's activities on the properties subject to the CIN Applications can continue to comply with federal, state and local laws such that the CIN would nonetheless achieve the objectives of "...to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)).
- What the range of such activities or development would reasonably include on the CIN properties.
- The potential that under the No Action Alternative the CIN could develop the properties and meet its objectives.
- What the likelihood is that such development under the No Action Alternative would nevertheless enable the CIN to meet these objectives.
- What the potential environmental consequences of such development under the No Action Alternative would be on the air resources in the vicinity of the affected properties compared to the environmental consequences of build-out under the other alternatives.
- How under the No Action Alternative air resources would continue to be protected to the same degree as by state law and regulation, which would no longer apply if the proposed action is approved. Since state regulation of air resources is stricter, more specific, and more wide-ranging, the No Action Alternative would result in greater protection of air resources than under the proposed action.

51) Under the Clean Air Act, activities on trust lands are subject to federal jurisdiction. Therefore, the acceptance of these applications may exempt the parcels, as well as parcels that may be purchased in the future by the CIN, from the state's air emission regulatory programs. No regulated facilities presently are evident on the parcels subject to the proposed action, not because of the absence of facilities that emit air contaminants, but due to the refusal by CIN to comply with state requirements. As a practical matter, this is a highly significant environmental and public health issue. Air emissions are not limited to property boundaries. Therefore, the impacts of air emissions are not restricted to the boundaries of the parcels on which the emissions sources are located, but rather, have impacts to the properties around them. Downwind receptors (residences, schools, hospitals, and similar sensitive land uses) are subject to the environmental and health impacts of the operations of any sources and sensitive receptors (*e.g.*, the Union Springs Central School is located less than 0.1 miles from one of the CIN parcels) are present in proximity to CIN parcels and operations. Therefore, clean air regulations and policy acknowledge and incorporate the important concept that impacts may extend far beyond the boundaries of a property.

52) There are several important aspects to this potential loss of jurisdiction of air quality by the State of New York:

New air emission sources. The CIN will continue to develop the parcels consistent with the CIN's prior development practices under the contention that its activities on these properties are not subject to state jurisdiction. Acceptance of this trust application will place such development beyond the environmental and public health jurisdiction of the State of New York. As a result, considerations for the protection of the environment and of the public health from the construction of new air emission sources through state jurisdiction will not be applied to such projects. New sources of air pollution in New York State must undergo permitting review to ensure there will be no adverse air quality impacts, and that appropriate air pollution controls are installed. Existing facilities located upon CIN parcels did not undergo this type of review, and future activities will avoid this review resulting in air quality impacts to New York State.

Existing emission sources. A loss of state jurisdiction to monitor and control air pollution from existing air emissions would be to the detriment of the environment and the public health. The CIN will not be obligated or accountable for the operations of equipment on its properties, making clean air policy as applied by the NYSDEC to this region of the state difficult to implement. The context of interaction and impacts of emissions from the parcels with other sources in the region, and the reverse, is a clean air protection policy that might lie outside the jurisdiction of the state to implement.

Mobile source program. The state's mobile source program is based on the California program rather than the less stringent federal program. If the applications for placing CIN parcels into trust were approved, provisions of that regulation would be nullified and the state will lose the ability to enforce the more stringent regulations relating to vehicle emission limits and vehicle inspections among other provisions. As part of its mobile source emission reduction strategies, New York State has promulgated and enforced regulations stating that "no person shall sell or supply gasoline to a retailer or wholesale purchaser-consumer, having a Reid vapor pressure greater than 9.0 pounds per square inch as sampled and tested by methods acceptable to the Commissioner of the NYSDEC, during the period May 1st through September 15th of each year" (6 NYCRR Part 225-3.3).

Loss of contiguity. The patchwork pattern of the CIN's requests makes effective management of the clean air by the state particularly difficult, if not impossible. As a practical matter, this lack of contiguity effectively hinders the state's jurisdiction for the protection of clean air in a significantly larger area than just the parcels since new air emission sources and the operations of existing sources may be conducted without the oversight normally performed pursuant to state regulations.

Sensitive receptors. One of the parcels is located near the Union Springs Central School. The potential loss of jurisdiction by the state with respect to clean air places the state in a position of being unable to protect and maintain the clean air and protect the health of the student population at the school.

Climate change. Greenhouse gas (GHG) emissions worldwide are under increased scrutiny and regulatory control for their impacts on climate change. These emissions from fossil and other carbon based fuels and other sources, are associated with combustion, such as internal combustion engines in vehicles, fuel used in energy production, and for heating and comfort cooling. As has been noted elsewhere herein, the regulations of the State of New York are more wide ranging and stricter than federal regulation in many instances. With respect to climate change, the NYSDEC has issued draft guidance for the consideration of the potential for climate change impacts from project proposals undergoing SEQRA review. Neither the CEQ, DOI nor the

BIA has developed or issued similar guidance to address this important environmental issue relating to air emissions. This emphasizes:

- The implications of the loss of jurisdiction on the environment that will result if this application is approved. Although the NYSDEC policy has been issued as draft guidance, it is being utilized as a benchmark by SEQRA Lead Agencies across the state in the preparation and review of EISs.
- As noted previously herein, the BIA has failed to adequately address reasonable alternatives in this DEIS. In making the statement that "The Nation presently has no plans for further development of the (Non-Enterprise) properties subject to the Proposed Action" the DEIS ignores potential reasonable future options for the property by the CIN, and the environmental impacts of such options. These potential future options include the development and full build-out of these properties by the CIN, an option that very well may be explored by the CIN if the land-in-trust applications are granted. This option is reasonable in the context of this NEPA review in that:
    - The CIN has indicated that it plans to re-open its gaming facility and to expand the gaming facility in size from that in the past.
    - Many other tribes have extensively developed their trust lands for gaming facilities after acceptance of the BIA of their land-in-trust applications, or expanded existing facilities. The negative environmental implications of such development by the CIN are substantial since the extent and nature of the development are only limited by the size of the property. The physical dimensions of the properties are the only limitations to development since the CIN use of the property would be immune to state and local regulation under its claim of sovereignty. This full build-out scenario would have potentially significant implications for climate change, since these facilities would require energy generation, resulting in an increase in direct or indirect emissions in the area of the CIN properties. The BIA in its DEIS is completely silent on these potentially significant climate change implications to the environment.

Hazardous Materials

53) Section 3.4 of the DEIS continues to indicate the complete lack of familiarity of the BIA and its consultant with the area in which the properties are located. As a result, the DEIS is replete with inaccuracies that go to the credibility of the document as a whole, the review and evaluation process for the application, and of any decision of the BIA using the DEIS as a basis for its decision. In this section, the DEIS presents a description of the 13.99 acre property located in the Town of Seneca Falls, and makes reference to neighboring properties. In doing so, the DEIS states that "The property area was bordered by undeveloped land and Eisenhower College to the north..." (page 3.4-2). However, Eisenhower College closed in 1983, over 25 years ago. This property was purchased by New York Chiropractic College in 1989 (see the college's web site at: http://www.nycc.edu/AboutNYCC_history.htm), where it opened its new main campus in 1991. Elsewhere in the DEIS, the college is referred to as "New York Chiropractor College". Obvious inaccuracies such as this bring into question the accuracy of information contained in the DEIS and, therefore, any evaluations and conclusions based o this information.

54) In addition, in its evaluation of the potential environmental consequences of hazardous materials at the properties, the DEIS at Section 4.4 is grossly inadequate. The DEIS states on page 4.4-1 with respect to the gas station properties in Seneca Falls and Union Springs, "Other than the possibility of a release from continuing operations at each retail filling station, no significant adverse impacts related to hazardous materials would result from proposed activities on the land trust parcels." There is no further description of:

- the consequences of these releases,
- the likelihood that they would occur,
- the implications for the environmental quality of subsurface soils and groundwater,
- the implications for nearby Cayuga Lake and the potential for water quality degradation from groundwater transport of contaminants due to these releases,
- potential for impacts of these releases for water supplies, both groundwater and surface waters,
- potential exposures to terrestrial and aquatic (Cayuga Lake) wildlife of toxic contaminants from petroleum releases, and
- potential exposures and health impacts to the public health of toxic contaminants from petroleum releases.

55) The DEIS is inadequate in its description and discussion of Hazardous Materials Effects in that it does not address several topics that may apply to the properties included in this application; their present operation or cumulatively with respect to other properties in the area, other properties that the CIN has acquired and that it has announced that it intends to place into trust; and additional properties up to 64,000 acres that the CIN has announced that it intends to acquire and place into trust. These topics that should have been included in the evaluation of Hazardous Materials Effects, but on which the DEIS is silent in this category are:

- petroleum bulk storage
- chemical bulk storage
- oil and gas exploration
- inactive hazardous waste sites and brownfields sites.

The absence of any attention to these issues by the BIA in its DEIS represents a major deficiency in the document and in the NEPA process. As noted earlier herein, this is especially true with respect to the evaluation of cumulative impacts, wherein the BIA ignores the very reasonable and widely announced plans of the CIN to acquire up to 64,000 acres and place them in trust, 765 acres of which the CIN has already acquired. Addressing cumulative impacts associated with these plans of the CIN is reasonable and would be subject to review and anticipated to have been addressed by any other federal agency under analogous circumstances.

56) Petroleum Bulk Storage

The State of New York is authorized to regulate petroleum bulk storage facilities. Pursuant to Article 10 of the ECL, the state adopted Petroleum Bulk Storage (PBS) regulations in 1985 that established requirements aimed at preventing petroleum spills from contaminating the lands and waters of the State (6 NYCRR Parts 612-614). Those regulations include requirements for: registration of facilities (tanks and connecting piping) having a combined storage capacity of more than 1,100 gallons and recent amendments that regulate smaller containers; storage and handling, including requirements relating to inventory monitoring, periodic testing and inspection of equipment; tank closures; reporting of spills; and construction, design and installation requirements for new or substantially modified facilities. It is known that the CIN have facilities that are subject to the PBS regulations. Gasoline station tanks and facilities with fuel tanks typically exceed the threshold storage capacities that would make those facilities subject to the design, construction, and registration requirements of the PBS regulations. Other than the gas stations, it is unknown how many other facilities within the parcels are subject to the state's PBS regulations, since the CIN has declined to register or otherwise report such storage units. The CIN properties essentially represent a regulatory "black hole" in the

region that persists due to the CIN's lack of compliance with state PBS tank registration procedures. The inability to identify, track, regulate and monitor these facilities on CIN and non-CIN lands due likely has resulted in unreported and uncontained releases, spills or leaks, improper designs, and/or inadequate best management practices (see information from Phase I ESAs, below).

Petroleum spills pose a significant threat to the lands, natural resources, and waters (including groundwater) of the State. There are approximately 16,000 spills reported annually in the state. It has been estimated that a single quart of gasoline can render 100,000 gallons of water unfit for drinking water purposes. Accordingly, Navigation Law Article 12 prohibits the discharge of petroleum, requires persons responsible for a discharge to notify the NYSDEC within two hours, and imposes strict liability on the discharger. Pursuant to Article 12, the NYSDEC has exclusive responsibility to clean up discharges of petroleum, either through state-standby contractors or by the responsible party under careful NYSDEC oversight. Consistent with that responsibility, Article 12 expressly grants the NYSDEC authority to enter property to investigate suspected or actual spills and to clean up petroleum contamination. Absent notice of a spill, the NYSDEC will be unable to ensure that the petroleum is contained and cleaned up to meet standards. Finally, lands taken into trust will no longer be subject to this NYSDEC regulation and oversight, with no federal or Tribal entity assuming the level of active regulation and oversight as practiced by NYSDEC in its PBS program.

As noted previously herein, the attitude of the CIN to local and state regulatory programs is evident with respect to the petroleum bulk storage units at the CIN's gas stations: they are unregistered and potentially operating to the detriment of the environment, especially groundwater quality and, indirectly via groundwater transport of petroleum contaminants, the degradation of water quality in Cayuga Lake. The environmental consultant to the CIN performed Phase I and Phase II ESAs as part of the development of this DEIS. The consultant found that for two properties with gas stations, the CIN was not managing the sites in a manner to protect the environment and public health. More specifically:

- For the 299 Cayuga Street Property in Union Springs[11], the consultant found that: "Registration for the current USTs was not up to date with NYSDEC. In addition, there was no documentation found for maintenance, leak detection, fluid measurement records, closure sampling related to the former underground tanks, or activities related to the former site building. Historical or undocumented spills could have contaminated soil and groundwater beneath the site." This finding indicates that the CIN can not self-regulate with respect to key state regulations for protection of public health and the environment; this finding indicates that the CIN has and will act in a manner that places the Cayuga Lake watershed and its residents at risk. Additionally, the loss of state jurisdiction upon placement of this property into trust, and the absence of any substitute third party oversight and enforcement mechanism, will result in the watershed and its residents to continue to be at risk. This loss of jurisdiction has been suggested by the CIN to be an issue of tax and tax loss; that is only partially true. This finding indicates that environmental regulations and the protection they provide to the environment and the public health also are being ignored, to the potential detriment of both, as well as the members of the CIN.

- Similarly, for the Phase I ESA performed at 2552 Route 89, Town of Seneca Falls[12], the consultant found that: "Registration for the current USTs was not up to date with NYSDEC. In addition, there

[11] AKRF, Inc. 2009 (April). Phase I environmental Site Assessment, 2552 Route 89, Town of Seneca Falls, NY. New York, NY.
[12] AKRF, Inc. 2009 (April). Phase I environmental Site Assessment, 299 and 303 Cayuga Street, Village of Union Springs, NY. New York, NY.

was no documentation found for maintenance, leak detection, product inventory records, closure sampling related to the former underground tanks, activities related to the former dealership, or potential structures (dry wells, septic systems) related to the former site building.

These findings indicate that the CIN has been operating the gas stations in non-compliance with both the letter and the spirit of New York State regulations to protect the environment and the public health. In light of these findings, the failure to describe, evaluate the impacts on, and address in a meaningful way the impacts of PBS hazardous materials is a significant deficiency with respect to this DEIS.

57) Chemical Bulk Storage

Similar issues apply with respect to chemical bulk storage (CBS), although it is unknown whether the CIN has, or plans to have, CBS units at its facilities. Articles 37 and 40 of the ECL prohibit releases of hazardous substances and authorize the state to regulate the storage and handling of hazardous substances. Pursuant to that authority, the state adopted CBS regulations in 1994 designed to prevent releases in the first instance (6 NYCRR Parts 595-599). Those regulations establish reporting requirements for releases of hazardous substances; over 1,000 substances are currently listed in the regulations as hazardous substances. The CBS regulations also include requirements for: registration of tanks (aboveground tanks with a capacity of 185-gallons or more, and any underground tank); storage and handling, including requirements relating to inventory monitoring, periodic testing and inspection of equipment; tank closures; and construction, design and installation requirements for new or substantially modified facilities. Facilities that may have storage tanks subject to the CBS regulations are, for example, water and wastewater treatment plants and those with swimming pools that may store chlorine, as well as facilities that may store various solvents. The number of CBS facilities within the parcels that may be subject to the CBS regulations is unknown due to the aforementioned "black hole" effect (see Petroleum Bulk Storage). Similar to the PBS discussion, lands taken into trust will no longer be subject to this NYSDEC regulation and oversight, with no federal or Tribal entity assuming the level of active regulation and oversight as practiced by NYSDEC in its PBS program.

The failure to describe, evaluate the impacts on, and address in a meaningful way the impacts of CBS hazardous materials is a significant deficiency with respect to this DEIS.

58) Oil and Gas Exploration

The NYSDEC oversees permitting, compliance and enforcement of all regulated oil and gas wells in New York State. Specific responsibilities include:

- development, implementation and enforcement of regulations, policies and procedures to ensure that oil, gas, gas storage, solution mining, brine disposal, stratigraphic, geothermal and waterflood wells are drilled, operated and plugged so that the environment, correlative rights and public health and safety are fully protected;
- development, implementation and enforcement of regulations, policies and procedures to ensure that wastes generated during the drilling and operation of regulated wells are handled so that the environment and public health and safety are fully protected;
- management of a full regulatory permit program for underground storage of natural gas and liquefied petroleum gas;
- establishment of well spacing requirements in new and existing fields and review requests for variances;
- investigation and resolution of citizen complaints and non-routine incidents;

- provision of technical assistance and information to the regulated community, local governments, the public, other state agencies and other units within NYSDEC; and
- performance of technical review of solution mining well proposals and coordination with other involved state and federal agencies regarding solution mining and brine disposal wells. While non-CIN contractors have applied for applicable reviews and permits, no known applications have been made by the CIN. Based on past experiences it is expected that the CIN will seek on-site natural gas sources.

59) The properties subject to the proposed action, the 765 additional acres acquired by the CIN that the Tribe has publicly and repeatedly indicated that it also would place into trust, and the 64,000 acres that it has indicated that it total that it intends to acquire and place in trust are located within the region of Marsellus shale that has seen considerable interest and activity for oil exploration and development. For example, the one parcel owned by CIN (Parcel 134.17-1-1.51) has an existing natural gas well that has been operating since January 1982. The gas well currently serves the Union Springs School District by supplying natural gas to heat the District's buildings. The prior owner of the subject property entered into a lease with Pioneer Resources to allow the company to explore and produce oil and gas. By agreement with the successor to Pioneer, Devonian Energy, the School District was granted the right to an assignment of the oil and gas lease for 120 acres. The deed by which the CIN took title specifically excepts from the property the oil and gas lease granted to Pioneer from the prior owner of the property. It remains uncertain how the trust acquisition will affect the rights of the School District to continue to utilize the existing lease rights. Based on the CIN's approach to state regulation, it does not at this time, and certainly will not after these are placed in trust, consider itself to be subject to regulatory provisions applicable to these natural gas units, such as frack water discharge control and treatment. The potential for contaminated frack water to be discharged to Cayuga Lake or its tributaries without treatment raises the specter of a serious degradation of water quality in a lake that is a potable water source, and regional natural resource and engine of tourism.

The failure to describe, evaluate the impacts on, and address in a meaningful way the impacts of the release of hazardous materials from oil and gas exploration, and other related environmental regulatory provisions, is a significant deficiency with respect to this DEIS.

60) Inactive Hazardous Waste Sites and Brownfields Sites

Articles 3, 27 (Titles 9, 11, 13, 14), 56, and 71 of the ECL and selected sections of the New York State Finance and the New York Public Health Laws, provide the state with extensive programs to remediate hazardous substances that constitute a significant threat to health, safety and the environment (the state's hazardous waste, hazardous substance and superfund programs). In addition, these laws provide means for enforcement and sanctions against parties responsible for releasing pollution as well as the funding mechanisms for the clean-up of abandoned polluted sites. The law also provides for a broad "brownfields" clean-up program whereby interested parties can clean-up otherwise neglected, but polluted sites in exchange for liability releases from the state. In two related authorities, the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act of 1990 (OPA) provide that the Commissioner of the NYSDEC is the appointed Natural Resource Trustee for the state. The Commissioner is given the appropriate authority and power to represent the state where injuries to natural resources and the damages from those injuries are assessed and funds recovered to be used to restore those resources injured from releases of hazardous substances and petroleum products at federal superfund sites, state superfund sites, or oil spill sites.

Due to a lack of information from the CIN, it is not known what, if any, programs the CIN has implemented to clean up and remediate any existing inactive hazardous waste disposal sites located within the parcels subject to the proposed action, or on the additional 765 acres that it has acquired to date. The potential existence of such disposal sites and the absence of oversight by the state of any clean up or remediation actions by the CIN places not only tribal lands within the parcels, but properties outside of the CIN lands, at risk for contamination of soils, ground and surface waters, both now and in the future.

The Phase I ESA of the Springport property completely missed that the western site boundary was formerly the location of a line of the Lehigh Valley Railroad. Railroad lines are associated with the presence of a variety of environmental issues, including creosote, pentachlorophenol and other hazardous chemicals in wooden ties; herbicides used to clear rights-of-way; asbestos from breaks; PCBs form oils; and petroleum products, among others. The failure to identify this land use at the property raises significant issues of credibility with respect to the thoroughness of the Phase I ESAs that were performed, and the analysis and identification of "recognized environmental conditions" at this and the other properties.

The failure to describe, evaluate the impacts on, and address in a meaningful way the impacts of inactive hazardous waste and brownfields sites is a significant deficiency with respect to this DEIS.

Noise

61) The BIA in its DEIS has selected two locations as representative of potential noise impacts which may arise from the proposed action. As with other aspects of this DEIS, the BIA has oversimplified its evaluation of an environmental consequence with potentially significant implications for local quality of life and community character. BIA's logic is that "These two areas, where the Nation has its properties, are the most likely to see an increase in potential noise" (page 3.5-3).

62) As noted previously herein, the BIA has failed to adequately address reasonable alternatives in this DEIS. In making the statement that "The Nation presently has no plans for further development of the (Non-Enterprise) properties subject to the Proposed Action" the DEIS ignores potential reasonable future options for the property by the CIN, and the environmental impacts of such options. These potential future options include the development and full build-out of these properties by the CIN, an option that is in no way foreclosed by the land-in-trust action. This option is reasonable in the context of this NEPA review in that:

- The CIN has indicated that it plans to re-open its gaming facility and to expand the gaming facility in size from that in the past.
- Many other tribes have extensively developed their trust lands for gaming facilities after acceptance of the BIA of their land-in-trust applications, or expanded existing facilities. The negative environmental implications of such development by the CIN are substantial since the extent and nature of the development are only limited by the size of the property. The physical dimensions of the properties are the only limitations to development since the CIN use of the property would be immune to state and local regulation under its claim of sovereignty. This full build-out scenario would have potentially significant implications for noise impacts, since these new or expanded operations would occur in the area of the CIN properties. Particularly, the 111 acre Union Springs property has the potential for build-out on the magnitude of the Foxwoods Resort Casino, with the attendant noise associated with 40,000 visitors per day, related traffic, facility operations, and support services.

The BIA in its DEIS is completely silent on these potentially significant noise implications to the environment.

63) In its evaluation of present sound levels, the BIA in its DEIS notes the use of the NYSDEC guidance document "Assessing and Mitigating Noise Impacts" (2000). The BIA appears to be selective in its use of state and local standards in this DEIS. The CIN has repeatedly announced that it is not subject to state or local jurisdiction; in fact, when these lands are accepted into trust, they will no longer be subject to state or local jurisdiction, such as the NYSDEC and its noise guidance. Under these circumstances, it is ironic that the BIA should choose to use this guidance in its evaluations.

The BIA its DEIS selected three locations for ambient noise monitoring. These locations were:

- Site 1: on NYS Route 89 between Jackson Road and Garden Street
- Site 2: on NYS Route 90 between NYS Route 326 and Old Route 326
- Site 3: on NYS Route 90 between Old Route 326 and McDonald's Point Road.

However, as with other environmental resources, the DEIS did not appear to consider the necessity to evaluate noise impacts with respect to the evaluation of cumulative impacts, wherein the BIA ignores the very reasonable and widely announced plans of the CIN to acquire up to 64,000 acres and place them in trust, 765 acres of which the CIN has already acquired. Addressing cumulative impacts associated with these plans of the CIN is reasonable and would be subject to review and anticipated to have been addressed by any other federal agency under analogous circumstances.

64) Additionally, the BIA in its DEIS ignores the over-riding justification for the purpose and need of the proposed action: that placing the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)). Therefore, it is all but certain that the CIN will develop these parcels to the full extent necessary to achieve these objectives. However, the BIA fails to acknowledge this eventuality in its discussion of noise impacts, that is, the additional noise that will be generated from further development even if only limited to the properties subject to this application, to the extent that full development is available. As noted previously herein, a full build-out scenario for the 111 acre property easily could encompass a gaming facility the size of Foxwoods in Connecticut, with its attendant significantly increased noise generated by visitor vehicle traffic, routine operations, delivery trucks, and maintenance trucks and vehicles.

65) The absence of any attention to these topics by the BIA in its DEIS represents a major deficiency in the document and in the NEPA process. As noted earlier herein, these eventualities are reasonable, are well within the experience of the BIA with respect to other land in trust cases and, actually, are to be expected to meet the objectives of the CIN as documented in its application.

Living Resources

66) As noted previously herein, the evaluation of environmental consequences of the no action alternative with respect to this DEIS, and with respect to living resources, is fatally flawed. The DEIS on page 4.6-1 indicates that "the property would continue to be used as it is now..." The DEIS does not indicate nor evaluate:

- The No Action Alternative in a sufficient manner, as the DEIS should at a minimum analyze whether the CIN's activities on the properties subject to the CIN Applications can continue to comply with

federal, state and local laws such that the CIN would nonetheless achieve the objectives of "...to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)).

- What the range of such activities or development would reasonably include on the CIN properties.
- The potential that under the No Action Alternative the CIN could develop the properties and meet its objectives.
- What the likelihood is that such development under the No Action Alternative would nevertheless enable the CIN to meet these objectives.
- What the potential environmental consequences of such development under the No Action Alternative would be on the living resources in the vicinity of the affected properties compared to the environmental consequences of build-out under the other alternatives.
- How under the No Action Alternative living resources would continue to be protected to the same degree as by state law and regulation, which would no longer apply if the proposed action is approved. Since state regulation of living resources is stricter, more specific, and more wide-ranging, the No Action Alternative would result in greater protection of living resources than under the proposed action.

67) As noted previously herein, the BIA has failed to adequately address reasonable alternatives in this DEIS. In finding that "The Nation presently has no plans for further development of the (Non-Enterprise) properties subject to the Proposed Action" the DEIS ignores potential reasonable future options for the property by the CIN, and the environmental impacts of such options. These potential future options include the development and full build-out of these properties by the CIN, an option that may very well be pursued should the land-in-trust applications be granted. The likelihood of full build-out must be evaluated as part of this NEPA review in light of the fact that:

- The CIN has indicated that it plans to re-open its gaming facility and while the CIN contends that it will restrict gaming to the size of previous operations, it has not stated how it will so restrict these operations (that is, to expand the gaming facility in size from that in the past).
- Many other tribes have extensively developed their trust lands for gaming facilities after acceptance of the BIA of their land-in-trust applications, or expanded existing facilities. The negative environmental act of such development by the CIN is substantial since the extent and nature of the development are only limited by the size of the property. The physical dimensions of the properties are the only limitations to development since the CIN use of the property would be immune to state and local regulation under its claim of sovereignty. This full build-out scenario would have potentially significant implications for impacts to living resources and ecosystems both on and off the properties, especially in sensitive Cayuga Lake, since these new or expanded operations would occur in the area of the CIN properties. Particularly, the 111 acre Union Springs property has the potential for build-out on the magnitude of the Foxwoods Resort Casino, with the attendant noise associated with 40,000 visitors per day, related traffic, facility operations, and support services, and is located only 500 feet from Cayuga Lake, which is located topographically downgradient from the property, making it particularly susceptible to impacts from development and operational activities on that property.

68) The inappropriate, narrowly defined focus of the DEIS has resulted in an evaluation of living resources that also is inappropriately limited areally. Additionally, it is evident from the discussion presented in Section 3.6 of the DEIS that the BIA has ignored one of the basic concepts of ecology, that ecosystems and environmental impacts do not recognize property boundaries. Therefore, activities on CIN-owned properties

are not limited to the impact on resources within the parcel boundaries, but the impacts may extend beyond property limits onto non-CIN lands. However, the BIA only addressed ecological resources on the CIN properties, and did not include resources on adjacent and nearby properties. The ecological resources in areas surrounding the CIN properties are not addressed in the DEIS. There is the potential for them to be impacted by the activities proposed under this proposed action, and likely will be impacted by any future full build-out development of these properties; however, this eventuality is not reviewed or evaluated in the DEIS. Lastly, the CIN has acquired 765 acres of property that it has announced it intends to apply for acceptance into trust, as well as 64,000 acres the CIN announced that it intends to acquire and have entered into trust.

The BIA in its DEIS is completely silent on these potentially significant ecological implications to the environment. For example, the DEIS is silent regarding off site rare, threatened and endangered species in the area of the properties. The following information is applicable in this instance.

69) ***Threatened and Endangered Animal Species.*** Threatened and endangered species and species of special concern are protected in New York State pursuant to Article 11 of the ECL and its implementing regulations (6 NYCRR Part 182). Article 11 also includes provisions regulating hunting, fishing, trapping, the collection and possession of wildlife species, and the control of dangerous diseases in wildlife. Known occurrences of threatened and endangered species, species of special concern, and habitats in the vicinity of the properties include such species as: Brindled Madtom (*Noturus miurus*), Lake Sturgeon (*Acipenser fulvescens*), Northern Harrier (*Circus cyaneus*), Spiny Softshell Turtle (*Trionyx spiniferus*), Pied-billed Grebe (*Podilymbus podiceps*), Upland Sandpiper (*Bartramia longicauda*), and Short-eared Owl (*Asio flammeus*). Also, there is the potential presence of habitat in the area for a federally listed endangered species of bat, the Indiana bat (*Myotis sodalis).* The NYSDEC provides oversight on these critical New York State resources, including assistance in evaluating impacts during SEQRA and NEPA reviews. The NYSDEC's federal counterpart is the USFWS. The potential loss of state jurisdictional oversight may have significant impacts on these resources, including direct impacts on species and habitats (*i.e.*, loss and segmentation), and indirect impacts on adjacent (non-CIN) parcels.

New York State has a mature program to protect threatened and endangered species, with the objective "to perpetuate and restore native animal life within New York State for the use and benefit of current and future generations, based upon sound scientific practices and in consideration of social values, so as not to foreclose these opportunities to future generations."

The key definitions in the state regulations, which have been in place since 1979, are:

- Threatened species. (6 NYCRR Part 182.2[h]) Defined as any species which meet one of the following criteria: (1) are native species likely to become an endangered species within the foreseeable future in New York; or (2) are species listed as threatened by the United States Department of the Interior in the Code of Federal Regulations (50 CFR Part 17 revised as of October 1, 1998, pages 95-177).

- Endangered species. (6 NYCRR Part 182.2[g]) Defined as any species which meet one of the following criteria: (1) are native species in imminent danger of extirpation or extinction in New York; or (2) are species listed as endangered by the United States Department of the Interior in the Code of Federal Regulations (50 CFR Part 17 revised as of October 1, 1998, pages 95-177).

- Species of special concern. (6 NYCRR Part 182.2[i])Defined as species of fish and wildlife found by the NYSDEC to be at risk of becoming either endangered or threatened in New York. Species of special concern do not qualify as either endangered or threatened.

70) It is unclear from the DEIS whether the BIA or CIN has performed a detailed habitat survey to identify the presence or absence of threatened or endangered animal species, or species of special concern, as defined by both federal and State regulations, on the parcels. While past CIN operation of the parcels may have impacted existing species, including potentially significant resources, the acceptance of the trust applications may adversely impact the jurisdiction of the NYSDEC to monitor and protect remaining species that may be present on the parcels, as well as parcels purchased in the future by the CIN as these parcels continue to be developed.

71) Additionally, absent the jurisdictional authority of the NYSDEC, the continuing development of the parcels will impact threatened and endangered species and species of special concern on adjacent properties, including direct impacts on species and habitats (*i.e.*, loss of and segmentation of habitat). The patchwork pattern of the current CIN request, and potential future land purchases, makes effective management of the sensitive habitats of these species difficult, if not impossible, even with respect to the properties adjacent to the parcels. As a practical matter, this impact is far greater than just the parcels included in the current applications.

72) ***Threatened and Endangered Plant Species.*** The Protected Native Plants Program was created in 1989 as a result of the adoption of the protected native plants regulation (6 NYCRR Part 193.3). This regulation established four lists of protected plants:

- endangered;
- threatened;
- rare; and
- exploitably vulnerable.

Consistent with statutory authority (ECL § 9-1503), the NYSDEC's implementing regulations state that "It is a violation for any person, anywhere in the state, to pick, pluck, sever, remove, damage by the application of herbicides or defoliants, or carry away, without the consent of the owner, any protected plant" (6 NYCRR Part 193.3). The regulation gives landowners additional rights to prosecute people who collect plants without permission.

Implications resulting from the potential loss of state jurisdictional authority to protect remaining resources are identical to impacts identified above for protected animal species; impacts which are unacceptable given the stated importance of these resources to the people of New York and their responsibility to preserve these resources for future generations.

73) With respect to the Seneca Falls property, it has been reported that he two ponds on-site, which both have a National Wetland Inventory (NWI) classification of PUBHx, are likely the results of past mining activities. A 1902 map from the Annual Report of the University of the State of New York[13], shows that there is a thin saline waterlime deposit over the Salina Gypsum in this area. These two ponds are probably the result of the waterlime being mined in an attempt to access the more valuable gypsum below. A second explanation for

[13] Annual Report of the University of the State of New York. 1902. Stratigraphic Map of the Region About Union Springs and Part of the City of Auburn Cayuga County.

these ponds and the other small depressions on the largest parcel is that they are sinkholes that have formed where the thin waterlime bedrock has collapsed over holes left by the dissolution of the underlying gypsum. In either case, this waterlime/gypsum combination lining the pond has created a very unique microhabitat for rare and endangered New York State fauna and flora. The DEIS's assumption that these are farm ponds devoid of rare herptofauna or endangered flora is a convenient shortcut by "experts" not familiar with local ecosystems. There is no documentation that the edges or waters of these ponds were checked for such unique species, that an analysis of their presence was performed, or that an analysis was conducted of impacts on these habitats of activities to be conducted on this property should the applications be accepted, or of the impacts of inevitable build-out scenarios on these habitats.

74) With respect to the Union Springs property, the two ponds on this property are very probably waterlime quarry holes which would create a very unique alkaline waterbody. Such a waterbody is an ideal calcareous habitat for *Potamogeton strictifolius* (narrowleaf pondweed) and *Clemmys guttata* (spotted turtle), and possibly for *Clemmys muhlenbergii* (bog turtle). The New York State Natural Heritage Program documents that *Potamogeton strictifolius* (narrowleaf pondweed) is a New York State endangered plant that is an aquatic plant of pond and lake margins, found in calcareous waters and is expected to occur in this area. It should be noted that BIA's consultant looked at the flora around the ponds in 2006 but not the flora in the ponds (page 3.6-3). The bog turtle is a New York State endangered species and the spotted turtle is a New York State species of special concern. The importance of these two ponds on the CIN's property should not be underestimated because juvenile turtles from similar ponds near this site can easily migrate to and breed in these two ponds. Again, due to the history of waterlime and gypsum quarrying in this area, it is highly unlikely that these ponds are "likely created through excavation for farming purposes." This erroneous assumption is then used to disregard the flora and fauna in the ponds. This appears to be a shortcut that allows the BIA to conduct less-than-thorough fieldwork and analysis of this issue.

The BIA in its DEIS finds that "farm ponds on Union Springs site showed evidence of turbidity from runoff." It should be noted that the two ponds are more likely to be cloudy due to high pH, not silt. Again these ponds are quarried in waterlime bedrock which would make their waters alkaline. In warmer weather a phenomenon known as the "whiting" effect causes cloudiness in alkaline (calcareous) waters such as this. This is another indication that these ponds may be very suitable for *Potamogeton strictifolius* (narrowleaf pondweed), *Clemmys muhlenbergii* (bog turtle) and/or *Clemmys guttata* (spotted turtle). Basically, one bad assumption (that these are farm ponds) leads to a second bad assumption, "farm ponds on Union Springs site showed evidence of turbidity from runoff," which leads to a faulty conclusion "and are therefore unlikely to support herptofauna that require less disturbed, more pristine wetland and open water conditions, such as spotted turtle or blue spotted salamander." These are not farm ponds, they are calcareous aquatic habitats that can support endangered species or species of special concern.

75) The Union Springs property may contain a threatened species, the Handsome Sedge, according to the New York State Natural Heritage Program. Handsome Sedge is known to occur in mesic woods with calcareous soil. This site has about 14 acres of mesic woods (DEIS, page 3.6-3) with calcareous soil.

There appear to be three typos in this single paragraph. Twice the parcel is referred to as the "Springport" property. The other possible typo is that Handsome Sedge was not noted during the "June 2006 site inspection." Was the site inspection in June or July? If it was in June, not July, perhaps this "inconspicuous sedge species" wasn't seen because the field staff was not knowledgeable in its identification, since the habitat was not identified. The New York State Natural Heritage Program letters are dated 6/29/06, so it appears that the BIA failed to coordinate the field activities of its consultant with the consultation with the NHP.

76) With respect to the Springport property, while the New York State Natural Heritage Program staff noted that this site should be checked for *Potamogeton strictifolius* (narrowleaf pondweed), it must be noted that this particular plant is very suited for calcareous waters. Such calcareous waters can probably be found in old quarry holes such as also exist on the Union Springs site.

77) Finally, with respect to this section of the DEIS, it is interesting that Section 3.6 of the DEIS provides reference to the New York State Natural Heritage Program for information about protected species on the subject properties, since the CIN has indicated that it does not recognize state and local jurisdictional issues and, if these properties are accepted into trust, the CIN will not recognize the state programs for the protection of the environment. However, there is no indication in the DEIS as to how these species, both on site and off site, will be protected by the CIN in the absence of state regulation and oversight, or what mechanisms will serve as the basis of CIN management, monitoring, control, protection and enforcement in this instance.

Cultural Resources

78) The BIA in its DEIS on page 3.7-7 describes the Seneca Falls property as "heavily disturbed by earthmoving, grading, and the construction of the former campground and existing buildings and parking lots," with the conclusion that Foundation work for the installation of improvements would have likely yielded the presence of archeological artifacts on developed portions of the sites." These statements are distressingly naïve and disappointing. It is well established in archeology that construction often progresses regardless of the presence of archeological or historic resources that may be present. Developers will ignore or hide the presence of such resources in order to maintain project schedules and preclude delays by reporting potential findings of these resources to appropriate agencies. While the site activities may destroy the original context of an artifact, and/or damage the artifact itself, its presence at a location often will add further dimension to the history of an area, and still may even represent a significant finding. Of all federal agencies, it is especially unacceptable that the BIA would use this language to dismiss the potential for cultural resources to be present. Given the claims made by the CIN to lands in the area based on its Tribal history, it is particularly surprising that the DEIS is so dismissive of the presence of potential cultural resources on these lands, especially where designated as sensitive areas by the state.

79) The same comment is made here with respect to the open, undeveloped portions of the properties. Sites with extensive past agricultural activities often are found to yield cultural resources. The BIA is obligated to address this topic more seriously and adequately, especially give the objective of the land in trust process.

Socioeconomic Resources

80) The DEIS on page 1-3 states that "The reestablishment of gaming facilities as a revenue resource is critical to the Nation's fiscal and cultural well being." This claim is not analyzed in the DEIS. The CIN continues to acquire land, and at prices that exceed market value. Additionally, the CIN has publicly and repeatedly announced that it intends to place into trust these 765 acres of land that it has recently acquired, and additional land up to about 64,000 acres that it will acquire, as well. The DEIS, in its description of the need for placing the present lands into trust, does not describe the source of the funding for the purchase of these additional 765 acres, or for the continued purchase lands up to its repeatedly announced target of 64,000 acres. The ability to make these land purchases at prices that exceed market values raises the question as to why the placing the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part

151.3(a)(3)), that is, why it is an economic necessity given the apparent financial capability to continue to acquire properties.

81) In the economic analysis of the CIN operation from properties that are subject to the proposed action, the BIA in its DEIS fails to address the following, which are costs to the local community that offset any benefits of such operations; these costs need to be considered in a benefit cost analysis of the proposed action, or an evaluation of the true costs of the proposed action to the local governments and the state:

- sales and excise taxes on the sale of cigarettes, gasoline and other items at the CIN's gas stations and LakeSide Trading businesses
- taxes or fees to the state or local governments associated with the production of natural gas from the existing well on the CIN's Union Springs property.
- fees for services supplied by the state or local governments, such as water supply, wastewater treatment, police, emergency services (EMT), fire, solid waste removal and others.

82) In a July 2006 report of the U.S General Accountability Office (GAO)[14], the GAO found that the BIA's regulations for taking land into trust "are not specific, and BIA has not provided clear guidelines for applying them." Therefore, there are wide discrepancies in decisions, and no guidance to the agency as to what constitutes a significant impact. The GAO specifically addresses the issue of the evaluation of lost tax revenue by states and localities; there are no thresholds, definitions or criteria as to what amount "might constitute an acceptable level of lost tax revenue and, therefore, a denial of an application." Further, the GAO report makes a critical comment, that "the BIA does not provide guidance on how to evaluate lost tax revenue, such as comparing lost revenue with a county's total budget or evaluating the lost revenue's impact on particular tax-based services, such as police and fire services" (page 17). In both 25 CFR 151.10 and 151.11 for On-reservation acquisitions and Off-reservation acquisitions, respectively, there is explicit language that state or local government be afforded the opportunity to provide written comment s on the "acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." However, the BIA in the DEIS appears to place little or no importance on these issues, especially the loss of regulatory jurisdiction, a validation of the evaluation in the GAO report.

83) The comment regarding tax-based services is a contentious one, in that the BIA in its DEIS, and the CIN, have given short shrift to the cost of additional police services required given the traffic volume to the area during the operation of the gaming facilities, let alone the additional police services that will be required when the CIN places the additional 765 acres it has acquired into trust, as is its announced attention, or of the 64,000 acres in total it has announced that it will acquire and place into trust. Also, emergency response services (EMT) and fire protection service needs, and their costs, will increase dramatically; this is particularly a concern with fire services, since the CIN's development projects will not be subject to inspection for conformance to codes, and there is no tribal or federal authority that will replace local and state regulations, codes and oversight.

84) The CIN has publicly and repeatedly announced that it intends to place into trust 765 acres of land that it has recently acquired, and additional land up to about 64,000 acres that it will acquire, as well. The BIA, in its DEIS, has not addressed this publicly and repeatedly announced plan of the CIN in the discussion in the DEIS of cumulative impacts. This, in itself, is a serious deficiency of the DEIS. Additionally, the GAO report criticizes the BIA's regulations and decision process for taking land into trust because the criterion for the

[14] U.S. Government Accountability Office. 2006 (July). Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications. Report No. GAO-06-781. Washington D.C.

evaluation of tax revenue "does not require deciding officials to consider the cumulative tax losses resulting from multiple parcels taken in trust over time – a practice some state and local governments would like to see instituted" (page 17). Although this report, critical of the BIA's land in trust process, was released in 2006, three years later the BIA's DEIS for the CIN application continues to propagate the same deficiencies and inadequacies in its process, guidance, and decision-making.

85) The CIN continues to acquire land, and at prices that exceed market value. Additionally, the CIN has publicly and repeatedly announced that it intends to place into trust these 765 acres of land that it has recently acquired, and additional land up to about 64,000 acres that it will acquire, as well. The DEIS, in its description of the need for placing the present lands into trust, does not describe the source of the funding for the purchase of these additional 765 acres, or for the continued purchase lands up to its repeatedly announced target of 64,000 acres. The ability to make these land purchases at prices that exceed market values raises the question as to why the placing the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)), that is, why it is an economic necessity given the apparent financial capability to continue to acquire properties.

86) Impact of the trust process on community development - The CIN land claims and land in trust process have been an ongoing process involving the regional community for over ten years. The potential for the CIN to acquire and isolate lands from the community has been a real and probable outcome over this period. The BIA has failed to address in this section of the DEIS the implications of the land claim and land-in-trust process on private and public investment in the community. The BIA has not considered as an offset to its claimed benefits that this external investment may have declined or largely ceased as the trust process has moved forward, since investors may be concerned about the lost value and other impacts of their investments. The BIA's economic analysis in general is substantially one-sided, encompassing benefits of and to the CIN, without equal or reasoned attention to the disadvantage and negative economic impacts.

Community Infrastructure

87) The BIA in its DEIS fails to adequately address municipal infrastructure issues and the effects of the proposed action on community infrastructure; the attention given to this topic is extremely deficient.

First, the BIA has not described nor addressed in any manner the legal status of community infrastructure (*e.g.*, water lines, sewer lines, electrical lines, natural gas lines, petroleum product lines) that may cross underneath, on or above these properties. Should these properties be placed in trust, there is the potential for the CIN to claim ownership and control of this infrastructure to the detriment of the public health and safety, and general public good, of the surrounding community. The BIA has and continues to be silent on this extraordinary issue affecting the surrounding community. The patchwork nature of the properties subject to this application makes it difficult to develop a solution; any solution which requires that this infrastructure be redirected would be costly in any event, more so if it is intended that this infrastructure avoid these properties.

Additionally, in the "Cumulative Impacts" discussion of Section 4.8 (Socioeconomic Impacts) of the DEIS, the BIA makes the clear statement that "Future fee-to-trust applications from the Cayuga Indian Nation are possible" (page 4.8-15). This is a clear indication that the BIA recognizes the obligation to evaluate future trust applications as a component of this DEIS, then fails to do so across the board. However, with respect to Cumulative Impacts of the proposed action on infrastructure, the BIA in its DEIS uses its same nondescript boilerplate language indicating no effects. If the CIN places additional property into trust, the patchwork nature of the CIN trust lands will be all the more complex. Given the seriousness of the implications to the

community's infrastructure should the CIN be able to claim that infrastructure crossing its property, the BIA's silence in the DEIS on this issue is unacceptable.

88) With respect to particular components of the community infrastructure, the following deficiencies are noted with respect to the DEIS:

Water Supply

- The DEIS does not indicate what the anticipated water supply needs are for the various CIN properties, especially for the gaming facilities and the maximum water demand when the facility will be back in operation.
- The DEIS states that the Seneca Falls water department withdraws 1.2 million gallons per day; the DEIS does not indicate what the water demand is for the service area as compared to the supply, and whether there is anticipated growth in demand from others in the water district.
- The DEIS indicates that the water department has a permit that allows it to withdraw 3.5 million gallons a day. However, the DEIS does not indicate whether the aquifer will support this volume of removal over an extended period, that is, whether the permitted volume has ever been withdrawn and, if so, for what continuous period of time, or whether more than 1.2 million gallons a day is actually presently available. Groundwater resources may change over time, and many permits have been issued based on other than accurate direct data or direct study of the aquifer.
- The DEIS does not indicate the condition of the well system, and whether the water supply infrastructure is capable of increased withdrawals, or is at present compromised and in need of repair or replacement.
- The BIA does not indicate the potential need to improve infrastructure if the CIN develops these properties and requires an increase in supply. As has been noted elsewhere herein, the BIA in its DEIS ignores the over-riding justification for the purpose and need of the proposed action: that placing the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)). Therefore, it is a foregone and very reasonable conclusion that the CIN will develop these parcels to the full extent necessary to achieve these objectives. However, the BIA fails to acknowledge this eventuality in its discussion of community infrastructure impacts, that is, the need for additional water supply in support of further development even if only limited to the properties subject to this application, to the extent that full development is available. As noted previously herein, a full build-out scenario for the 111 acre property easily could encompass a gaming facility the size of Foxwoods in Connecticut, with its attendant significantly increased water supply demand for the 40,000 visitors a day, as Foxwoods accommodates.
- The BIA in its DEIS does not indicate how potential upgrades to the water supply system to accommodate activities on CIN lands, or routine operation and maintenance of water supply infrastructure to these properties, will be financed, since the CIN will be under no obligation to pay taxes or fees relating to the water systems when the lands are placed in trust. Therefore, the CIN would be receiving the benefit of water supply services with no obligation to pay for them.

Wastewater

- The single largest CIN property subject to the proposed action is located in Union Springs. The DEIS does not indicate what the capacity is of the Village wastewater treatment plant, whether the plant is approaching, at, or over design or hydraulic capacity. Therefore, the implications of potential development of the Union Springs property on the wastewater infrastructure can not be evaluated.

- There is no indication of whether the need for wastewater treatment capacity is growing in the area served by the Village's wastewater treatment plant, and the ability of the treatment plant to service those needs; this information is necessary to evaluate what the impact of even minimal development on the CIN property would have on treatment capacity and the availability of that capacity.
- The DEIS does not indicate the condition of the wastewater treatment plant, and whether the water supply infrastructure is capable of increased withdrawals, or is at present compromised and in need of repair or replacement.
- The BIA does not indicate the potential need to improve infrastructure if the CIN develops these properties and requires a significant increase in wastewater treatment capacity. As has been noted elsewhere herein, the BIA in its DEIS ignores the over-riding justification for the purpose and need of the proposed action: that placing the land into trust will benefit the Cayuga Indian Nation because "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing" (25 CFR Part 151.3(a)(3)). Therefore, it is a foregone and very reasonable conclusion that the CIN will develop these parcels to the full extent necessary to achieve these objectives. However, the BIA fails to acknowledge this eventuality in its discussion of community infrastructure impacts, that is, the need for additional wastewater treatment capacity in support of further development even if only limited to the properties subject to this application, to the extent that full development is available. As noted previously herein, a full build-out scenario for the 111 acre property easily could encompass a gaming facility the size of Foxwoods in Connecticut, with its attendant significantly increased wastewater treatment capacity for the 40,000 visitors a day, as Foxwoods accommodates. Foxwoods generates between 2 million and 4 million gallons a day of wastewater.
- The BIA in its DEIS does not indicate how potential upgrades to the wastewater treatment plant and collection system to accommodate activities on CIN lands, or routine operation and maintenance of water supply infrastructure to these properties, will be financed, since the CIN will be under no obligation to pay taxes or fees relating to the water systems when the lands are placed in trust. Therefore, the CIN would be receiving the benefit of water supply services with no obligation to pay for them.

Solid waste

- Upstate New York communities of some of the most active and successful recycling programs in the country. This environmentally sustainable practice is a result of state laws requiring recycling of a long list of materials. When these properties are placed into trust, the CIN will be under no obligation to comply with state and local regulations. As a result, the CIN will not be obligated to recycle that portion of its waste as required by state law. The BIA in its DEIS has not indicated what authority will replace state regulation and local oversight so that the CIN does not dispose of these recyclable materials in regional landfills, wasting landfill capacity to the detriment of the community at large.
- This issue literally increases in size when the cumulative impacts of the CIN's announced intent to place 765 additional acres of acquired property into trust, as well as its announced intent to acquire and place up to 64,000 acres into trust. This cumulative effect, which the BIA in its DEIS failed to address and only minimally acknowledged on page 4.8-15, will translate to tons of recyclables when the CIN inevitably develops its properties. Notwithstanding claims and protestations noted in the DEIS by the BIA, the expectation that this development would occur is very reasonable given that the objective of the proposed action is to facilitate tribal self-determination, economic development, or Indian housing, the latter of which represent development projects for the properties.

Community Services

89) The BIA in its DEIS makes unsubstantiated statements that have no place in a DEIS. With respect to Community Service Effects, the BIA states that "the Nation's property would not be subject to local or county taxation, and would therefore not contribute to the funding of these services through the property taxation system. The Nation, however, would assume the full range of jurisdiction over the subject properties. Further, the Nation will continue to pay for necessary community services it uses" (page 4.10-1). These statements are unsupported – while there are Tribes that successfully do so, there is no indication how the CIN is competent or has the resources to furnish police, EMS and fire protection services. Unfortunately, local resources will need to be accessed, with no guarantee that the CIN will contribute adequately to the use. In similar circumstances relating to the Oneida Indian Nation (OIN), the OIN has unilaterally decided what adequate compensation for services is, and has changed that amount at whim. This has left emergency services unequipped to manage emergencies at the high rise hotel on the OIN's property. This example serves as a warning, since the CIN inevitably will develop its properties. As noted earlier herein, notwithstanding claims and protestations noted in the DEIS by the BIA, the expectation that this development would occur is very reasonable given that the objective of the proposed action is to facilitate tribal self-determination, economic development, or Indian housing, the latter of which represent development projects for the properties. A full build-out scenario for the 111 acre property

    This issue becomes even more serious and costly to the rural area in which these properties when potential cumulative impacts are considered, that is, when the CIN acts on its announced intent to place 765 additional acres of acquired property into trust, as well as its announced intent to acquire and place up to 64,000 acres into trust. Yet the BIA in its DEIS does not provide even a minimal description as to how the CIN will achieve its assumption of these community services, or the level of risk to nearby residents if the CIN does not have fire protection services for its properties, or how the community can abdicate its public responsibilities if the CIN can not provide EMS services to visitors to its gaming operations.

90) The BIA in its DEIS does not provide an objective analysis on the issue of increases in cases of the potential for gambling addiction to result from the granting of the applications and the reopening of the gaming facilities, let alone the expansion of the gaming facilities that will inevitably occur. The DEIS does not appropriately acknowledge this issue, or suggest contributions by the CIN to local social services. In this instance, as with others, the CIN serves to reap the benefits of community services without accepting responsibility for its role in the community and contributing to the cost of such services. In fact, in many locations in its DEIS, the BIA notes that the CIN can not be held accountable nor will it have responsibility for any taxes, fees, contributions or other state and local jurisdictional obligations when the lands are placed into trust. These costs, in this instance as in others noted herein, will be borne by local residents and taxpayers.

91) The assertions in the DEIS that the CIN "will continue to pay for necessary community services it uses" implies payments are being made at the present time. Cayuga County has indicated that taxes on the properties in the county that are included in the applications are current; tax payments must be current and remain current otherwise the applications can be denied by the BIA. However, the county indicates that the CIN is delinquent on six of the other eight parcels it owns in the county. The BIA fails to analyze this pattern of non-compliance with relevant jurisdictions in the context of the BIA's assertions that, following the taking of the properties into trust, the BIA and the CIN would regulate these properties consistent with the present state and local jurisdiction. This assertion is without substance.

Resource Use Patterns

92) The underlying rationale for how Resource Use Patterns are addressed in this DEIS is confusing. The BIA in the DEIS spends 10 pages in Section 3.11 describing the zoning regulations and designations and land use plans for the CIN properties and their respective surrounding areas. This description is followed in Section 4.11, "Resource Use Patterns Effects," by the statement that the foregoing is meaningless: "Under the Proposed Action, the Nation would gain jurisdiction over the land, and local land use and zoning requirements that currently apply to the Nation's lands would no longer apply." If this is the primary argument of the BIA with respect to Resource Use Patterns, as defined in the DEIS, then the BIA is obligated to describe and evaluate how the CIN will control development on its present lands, as well as other lands that it has acquired and may continue to acquire (cumulative impacts), and what mechanisms are or will be in place so that the CIN's activities will not negatively impact the surrounding community. However, the BIA in its DEIS is silent on this question.

However, with respect to this topic, the BIA in Section 4.11(D) of the DEIS acknowledges that "Jurisdictional impacts of each proposed action are considered in the review process required by this regulation. Therefore, cumulative jurisdictional impacts under the Nation's proposed alternative and the Enterprise Properties Alternative are not considered significant" (page 4.11-2). This statement, buried far in the DEIS and not mentioned, acknowledged or evaluated elsewhere, is very significant. With respect to the entirety of the DEIS other than this section, the BIA has been completely silent on jurisdictional implications of the proposed action, as noted in several of these comments herein. This is a significant failure on the part of the BIA and deficiency of this DEIS.

93) It was also noted that the existing uses and the existing buildings subject to the CIN's applications include no residential structures or residential uses. When the BIA grants these applications and takes these lands into trust, the BIA must note that no residential uses are allowed on such parcels. If it is likely that residential uses will be added to subject parcels, or other residential parcels will be subject to additional trust application(s), then the BIA must modify its NEPA analysis to encompass at such new uses, expanded uses, and their cumulative impacts. The BIA, by failing to address this issue in its DEIS, the BIA cannot assert that taking the land into trust will benefit the Cayuga Indian Nation for use of "...the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or *Indian housing*" (25 CFR Part 151.3(a)(3) (emphasis added) because the DEIS indicates that there will be no change in land use, that is, that no Indian Housing will be provided on these properties, even though few members of the CIN reside in the central Finger Lakes region. Likewise, based on the findings in the BIA's DEIS, local offices of the CIN will not be constructed on these properties to administrate the properties and enforce environmental and related laws, ordinances and regulations of the CIN, because, as the DEIS finds repeatedly in Section 4, "the property would continue to be used as it is now."

94) On page 3.11-9, the BIA in its DEIS noted Cayuga County's Land Use Plan and the designations for the areas where the CIN's properties are located. However, the BIA fails to analyze the impacts on the county's planned land use, and the resultant community character, from the approval of the CIN's applications, as well as from the inevitable build-out of the properties following the approval of the CIN's applications. The BIA again has used its rote finding that "Under this alternative, the property would continue to be used as it is now, and there would be no changes to onsite (sic) or area agriculture, recreation, land use plans, zoning or public policy." When the properties subject to the action are placed into trust, the "land plans, zoning and public policy" will no longer apply, as these are activities of local and state governments, the jurisdiction of which will no longer apply to these properties. Therefore, this finding by the BIA is erroneous and

misleading; the BIA has failed to perform an analysis of this issue (the impact of the proposed action on Resource Use Patterns) with respect to the CIN's applications.

95) In its description of environmental consequences, the BIA in its DEIS notes that "once the affected properties are placed into trust, the properties in the Town of Seneca Falls and the Village of Union Springs will be subject to land use regulation pursuant to the Nation's Land Use Ordinance, CN-2003-01" (page 4.11-2). The BIA implies in this statement that the CIN's ordinance is the equivalent of local and state land use plans and regulations. However, although government jurisdiction issues relating to this application are known to be contentious and of major concern to local and state governments, and their residents, the BIA has failed to make this ordinance available for review in support of its statement.

Traffic and Transportation

96) The evaluation of traffic and transportation for the proposed action has two major deficiencies common to the DEIS:

- The BIA in the DEIS fails to address the issue of whether resuming gaming operations at levels that were in operation in 2005 will impact Level of Service of intersections in the area of the gaming operations. The studies used to evaluate traffic potentially generated by such gaming activities are out of date. Further, the DEIS ignores the information and analysis provided by Seneca and Cayuga County law enforcement agencies and others regarding the potential impact of the resumption of gaming on area traffic. Additionally, the DEIS fails to analyze the all but inevitable fact that the CIN will further develop the subject. As noted in these comments, the expectation that this development would occur is very reasonable given that the objective of the proposed action is to facilitate tribal self-determination, economic development, or Indian housing, the latter of which represents development projects for the properties. The BIA ignores this reasonably likely impact, and is completely silent as to how the increased vehicular traffic upon this eventuality will impact the areas and communities surrounding these properties. In consideration of the potential build-out of the CIN's 111 care property, which would accommodate a development nearly twice the size of Foxwoods in Connecticut, which has over 40,000 visitors daily along with the associated visitor and vehicular and support traffic. The silence of the BIA on this issue is inconsistent with the BIA's obligation under NEPA.

- As of this writing, the CIN has purchased an additional 765 acres in the area of the properties included in the application. The BIA in its DEIS has failed to address:

    - the potential for these purchases to occur, even though they were ongoing as this DEIS was being prepared and issued.
    - the cumulative traffic and transportation impacts that these additional properties will have with the properties in the proposed action should an application for such properties to be placed into trust be made. The CIN has publicly indicated its intentions to apply to have properties that it acquires placed into trust.
    - The CIN has publicly announced its intentions to acquire up to 64,000 acres of property in the coming year in the area of the properties included in this application and apply for it to be placed into trust. This intention has been announced publicly numerous times. Yet the BIA has not evaluated the cumulative impacts with respect to traffic and transportation of this clearly announced plan by the CIN.

Visual Resources

97) The CIN's properties are located in the Cayuga Lake watershed, with the 111 acre property located only 500 feet from the lake. The BIA in the DEIS describes the visual resources in the area and evaluates whether the existing uses of the properties will impair visual resources. However, as it has throughout the DEIS, this section of the document does not acknowledge or evaluate the potential impacts of the further development of the properties subject to the proposed action, or of the cumulative visual impacts that additional properties that will be acquired and placed into trust will have on visual resources.

98) With respect to the development and build-out of the existing properties, and the development of the 111 acre Union Springs property, the BIA in the DEIS does not address this eventuality. The impact of a Foxwoods or Turning Stone-like development on visual resources of the region will significantly degrade the visual resources of the this entire portion of the Cayuga Lake watershed. Such a development would be visible from across the lake and a significant distance up and down its length. It would be inconsistent with the character of the region. Yet the BIA has chosen to ignore this possibility, or that of some lesser development at this property and at others, which is a not unreasonable and foreseeable outcome of the proposed action. As a result, the BIA has ignored its obligations under NEPA, and failed to perform the requisite hard look on the issue related to the proposed action.