STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

July 3, 2009

OVERNIGHT MAIL

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

Re: DEIS Comments – Cayuga Indian Nation of New York Trust Acquisition Project

Dear Mr. Keel:

These comments and enclosures are submitted on behalf of the State of New York regarding the Draft Environmental Impact Statement ("DEIS") issued pursuant to the National Environmental Policy Act of 1969 ("NEPA") for the Cayuga Indian Nation ("CIN") applications for Land Into Trust dated April 14, 2005 and May 25, 2005 (the "CIN Applications").

The State joins in the comments submitted on behalf of the Counties of Seneca and Cayuga on the DEIS, as well as the comment reports of O'Brien & Gere Engineers, Inc. dated July 2, 2009 and Dr. Ian Ayres and CRA International, Inc. dated July 2, 2009 attached to the Counties' comments. The State also reaffirms and incorporates by reference herein, its earlier objections to the CIN applications as outlined in the comment Memorandum of February 10, 2006, a copy of which is attached hereto.

The recent decision of the United States Supreme Court in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), has made clear the Department of Interior (DOI) under the Indian Reorganization Act (IRA) is required to make a threshold determination of whether the group applying for land in trust was an Indian tribe under federal jurisdiction in 1934. In *Carcieri*, the Supreme Court held that the phrase "recognized Indian Tribe now under Federal jurisdiction" in 25 U.S.C. § 479 unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934, rejecting the DOI's view that the phrase was ambiguous and subject to an interpretation allowing it to accept land into trust on behalf of Indian tribes that came under federal recognition sometime after 1934, and rejecting alternative arguments in support of a more expansive interpretation of the Secretary's authority. 129 S. Ct. at 1063-68. The Supreme Court concluded that the Narragansett Tribe was not under federal jurisdiction in 1934 and that the Secretary accordingly lacked the authority to take the parcels at issue into trust. *Id.*

Section 479 (Section 19 of the IRA) defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." In the State's

February 10, 2006 Memorandum, the State noted that there "are serious questions as to whether in 1934 the DOI recognized the Cayugas in New York as a tribe having a reservation in New York," citing S. Rep. No. 1836, 81st Cong. 2d Sess. (1950) at 5 (The Cayuga Indians have no reservation): John T. Reeves Report to the Commissioner of Indian Affairs, Dec. 26, 1914: Nat'l Archives, Record Group 75, file New York, 100086-14-013, at pp. 3-4 ("The Cayugas also sold their land to the state and gradually migrated westward . . . finally removing to the Indian Territory and becoming affiliated with other tribes there.")

The State also urged that the CIN was not a tribe to which the IRA applies, citing language in the Act indicating that it was intended to apply only to tribes who in 1934 were residing on a reservation. *See, e.g.,* 25 U.S.C. § 478 (providing that the IRA would not apply "to any reservation" when the adult Indians voted against it); 25 U.S.C. § 465 (authorizing the acquisition of land "within or without *existing reservations*" (emphasis added)). *See* attached Memorandum at 2-4, fn. 2. It is the State's understanding that at the time of the enactment of the IRA, the Cayugas had no reservation and for the most part the group remaining in New York was residing among the Seneca on the Cattaraugus Reservation. The above evidence raises serious questions as to whether the Cayugas were an Indian tribe under federal jurisdiction in 1934. In view of the decision in *Carcieri*, it is clear that the DOI must, as a threshold matter, make a factual determination that in 1934 the Cayuga were a "recognized Indian Tribe now under Federal jurisdiction." This question is not addressed by the DOI and requires a full development on the record.

Moreover, Section 18 of the IRA conditions application of the IRA on a vote of the affected Indians. *See*, 25.U.S.C. § 478. As noted in the State's 2006 Memorandum, the State is not aware of any evidence that following the enactment of the IRA, the Cayugas as a separate group voted to accept the IRA. Available evidence indicates that the Act was rejected by the Indians throughout New York. See Lawrence M. Hauptman, *The Iroquois and the New Deal* (1981) at 22. The vote taken at the Cattaraugus Reservation where the Cayugas resided rejected the IRA. *See*, Theodore Haas, Ten Years of Tribal Government Under I.R.A., Table A (1947). As with the question of federal jurisdiction, there are also serious questions as to whether the Cayuga voted to reject the IRA which have not been addressed by the DOI. *See*, Memorandum at 2, fn.2.

In view of the above, and for the reasons set forth in the Comments of Cayuga and Seneca Counties dated July 2, 2009, the no action alternative should be selected.

Very truly yours,

David A. Rose
Assistant Counsel to the Governor

Attachment

MEMORANDUM

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

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

Date: February 10, 2006

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

I. There Is No Valid Statutory Basis For Granting The Application

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

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

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

The Dawes Act -- and the federal policy of allotment -- have never been applied in New York. See Laurence M. Hauptman, The Iroquois and the New Deal (1981) (hereafter, "Hauptman") at 22 ("In New York, where the Dawes Act had not been applied . . ."). Indeed, the Dawes Act specifically excepted the Seneca Nation of Indians (the only tribe in New York with any significant land holdings at the time) from the Act's application. See 25 U.S.C. § 339. Consequently, Section 465 was not directed at New York. Not surprisingly, no Indian land in New York has ever been held in trust status for the Cayugas or any other Indian group.[2]

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[1] This section is the only statutory basis cited in the CIN's Application.

[2] Even if the IRA was intended to apply in New York, Section 465 is unavailable to the CIN for a number of reasons. Section 18 of the IRA conditions application of the IRA on a vote of the affected Indians. See 25 U.S.C. § 478. The State is not aware of any evidence that following enactment of the IRA, the Cayugas as a separate group voted to accept the IRA. To the contrary, the act was rejected by Indians throughout New York. See Hauptman at 9 ("[T]he IRA was overwhelmingly rejected in New York"). The State understands that at the time of enactment of the IRA, the Cayugas living in New York resided with the Senecas on the Cattaraugus Reservation; and that the vote taken at the Cattaraugus Reservation rejected the IRA. See Theodore H. Haas, Ten Years of Tribal Government Under I.R.A., Table A (1947). Section 2202, which was cited by the Oneida Indian Nation of New York ("OIN") in its application, does not assist the Cayugas for the same reasons set forth in the Memorandum, dated January 30, 2006, submitted by the State with respect to the OIN's application.

Even if Section 465 did apply, which it does not, the discretionary authority contained in that section was never intended to be used in the context presented by the Application. The land into trust and land transfer sections of the IRA were designed to provide for acquisition of "small tracts of land" to allow "landless" Indians or tribes to become economically self-sufficient. See 78 Cong. Rec. 11123 (1934) (a purpose is to "provide for the acquisition, through purchase of land for Indians now landless who are anxious and fitted to make a living on such land ... [I]f we could put them on small tracts of land ... they could make their own living"); 78 Cong. Rec. 11730 (1934) ("Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land...").

There is no legitimate basis for contending that the 130 acres owned by the CIN must be taken into trust to secure the economic self-sufficiency of that tribe. There has been no showing that the CIN cannot make productive use of land it owns without having the land taken into trust. Section 465 was never intended to serve, and cannot properly be used, as a vehicle to enable a tribe to accumulate wealth at the expense of the surrounding non-Indian population. In addition,

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The statute is also inapplicable because by its terms it is directed at tribes who in 1934 were residing on a reservation. See 25 U.S.C. § 478 (providing that the IRA would not apply "to any reservation" when the adult Indians voted against it); 25 U.S.C. § 479. Section 465 itself reflects this fact, authorizing the acquisition of land "within or without existing reservations...." (emphasis added) The statutory language makes clear that the authorization to take land into trust is keyed to the existence of a reservation in 1934; land "within or without" such an "existing" reservation could be taken into trust, but there is no authorization to take land into trust when the Indians making the application had no existing reservation in 1934.

The State also notes that Section 465 permits land to be taken into trust status for the "purpose of providing lands for Indians." Section 479 (Section 19 of the IRA) defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." There are serious questions as to whether in 1934 the DOI recognized the Cayugas in New York as a tribe having a reservation in New York. S. Rep. No. 1836, 81st Cong. 2d Sess. (1950) at 5 (The "Cayuga Indians have no reservations"); John R.T. Reeves Report to the Commissioner of Indian Affairs, Dec. 26, 1914; Nat'l Archives, Record Group 75, file New York, 100086-14-

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

B. In The Circumstances Present Here Section 465 Is An Impermissible Delegation Of Legislative Authority[3]

Particularly in light of the fundamental policy considerations that the CIN's Application raises, there are serious questions as to whether the delegation of authority contained in 25 U.S.C. § 465 is constitutional. It is fundamental that Congress may not delegate its policymaking functions to an administrative agency. Under the Constitution, Congress may only delegate authority to an administrative agency when it articulates an "intelligible principle" that limits the agency's exercise of that authority. See Whitman v. Am. Trucking Ass'ns, Inc., 531

013, at pp. 3-4 ("The Cayugas also sold their land to the State and gradually migrated westward . . . finally removing to the Indian Territory and becoming affiliated with other tribes there").

[3] Section 465 is constitutionally infirm on other grounds as well. For example, to the extent it displaces state sovereignty over the land, it violates the Tenth Amendment, and exceeds Congressional authority under the Indian Commerce Clause. See Printz v. U.S., 521 U.S. 898, 935 (1997) ("The Federal Government may [not] issue directives requiring the States to address particular problems . . . [i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty"). But see Carcieri v. Norton, 423 F.3d 45, 58 (1st Cir. 2005). In addition, taking the land into trust would effectively deprive the State of its property interests created by the 1789 Treaty between the State and the Cayugas without just compensation, in violation of the Fifth Amendment. See U.S. Const. Amend. V; see also Block v. N.D. ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 291 (1983).

U.S. 457, 472 (2001), quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). This requires Congress to state the policy behind its legislation, and set boundaries or standards to limit the agency's power. See Am. Power & Light Co. v. Secs. & Exch. Comm'n, 329 U.S. 90, 104 (1946).

Section 465 violates these precepts by giving the Secretary of the Interior ("Secretary") unbounded discretion to acquire land for Indians. "There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority except that the acquisition must be 'for Indians.' It delegates unrestricted power to acquire land. . . ." See South Dakota v. United States Dep't of Interior, 69 F.3d 878, 882 (8th Cir. 1995), vacated, 519 U.S. 919 (1996).[4] The IRA states a purpose, but a purpose is not a standard. The power to acquire land for the "purpose of providing land for the Indians" tells who will benefit from agency actions, but it provides no guidance whatsoever as to how much, from where, or for what use the Secretary may acquire land. See id. at 882-83 ("Despite the government's broad, inherent power to acquire land for public use, the nondelegation doctrine surely requires at a minimum that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition").

Neither the statute itself nor agency regulations contain limiting standards. The regulations list factors that the Secretary should consider when taking land into trust status, not boundaries to authority. More importantly, however, even if the regulations contained some acceptable standard, which they do not, administrative adopted standards cannot cure an

[4] Although the Eighth Circuit's decision declaring the land acquisition provision of the IRA to be an unconstitutional delegation of legislative authority was vacated, the Supreme Court did not issue a decision indicating the basis for its ruling.

unlawful delegation. Congress' fundamental function is to make public policy and legal standards. It may never delegate this function to an agency. See Yakus v. United States, 321 U.S. 414, 424 (1944).

The problem is highlighted in this case by this Application to the Executive Branch. The CIN seeks to have the Secretary approve trust status for land scattered among non-trust lands that are populated almost exclusively by non-Indians. To approve the Application, the Secretary necessarily would have to perform Congress' social policymaking function.[5]

The CIN's Application is, in substance, an effort to avoid having Congress perform that function. The Application follows decades of unsuccessful efforts by parties to the Cayuga land claim to resolve that claim by settlement. In the context of a settlement, which would require legislative approval, Congress would fulfill its role in making critical policy judgments about the total amount and configuration (e.g., concentration and contiguity) of land to be taken into trust for the tribe. It is entirely inappropriate to use Section 465 to circumvent that Congressional function. The Department may not use Section 465 to confer benefits on the CIN that could not be obtained either through litigation or legislative action.

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

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

As a preliminary matter, the Application should be treated under 25 C.F.R. § 151.11 (as opposed to Section 151.10) since the land which the CIN seeks to have taken into trust is not

[5] It is true that some decisions have found that Section 465 does not involve an improper delegation. See South Dakota v. United States Dep't of the Interior, 423 F.3d 790 (8th Cir. 2005); Carcieri, 423 F.3d 45; Shivits Band v. Utah, 428 F.3d 966 (10th Cir. 2005); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999). However, those cases involved trust applications for small tracts of land, many of which were rural and undeveloped. The

within an existing reservation.[6] That conclusion is clearly demonstrated by the relevant case law and required by the DOI's own regulations.

The Court in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 125 S. Ct. 1478 (2005), expressly determined that the Oneida Indian Nation ("OIN") could not "unilaterally revive its ancient sovereignty, in whole or in part, over" parcels purchased in fee by the Oneidas within the last decade that were located within the boundaries of "the area that once composed the Oneida's historic reservation." 125 S. Ct. at 1483. "The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." Id. Consequently, fee lands purchased by the OIN in recent years are not exempt from state and local law. See id. at 1483, 1493. The same reasoning explains why fee lands purchased by the CIN within an area set aside by a 1789 treaty between the State and the historic Cayugas and acknowledged in the 1794 Treaty of Canandaigua are also not exempt from local real estate taxes, and other state and local regulatory law.

As reflected in the DOI's own land into trust regulations, an "Indian reservation" is an area in which a tribe is "recognized by the United States as having governmental jurisdiction. . . ."[7] See 25 C.F.R. § 151.2(f). The definition contained in the regulations is

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tracts were either near or on reservation land or only partially located in non-Indian cities. In such cases, the Secretary's decision to place land in trust is practically ministerial and would not affect state or federal policies.

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

[7] Judge Hurd's decision in Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005) ("Madison County"), is not persuasive. The court in that case did not consider the significance of the Supreme Court's finding of no sovereignty on the issue of the reservation status of the land. Moreover, that case improperly relied on the earlier decision by the Second Circuit as to reservation disestablishment. Id. at 231. The reversal of the Second Circuit's decision deprives it of any preclusive effect. See Stone v. Williams, 970 F.2d 1043, 1054 (2d Cir. 1992) ("A judgment vacated or set aside has no preclusive effect" (citations omitted)); Harris Trust & Sav.

consistent with the cases which have repeatedly recognized that one of the distinguishing characteristics of an Indian reservation is the right of the tribe to exercise sovereignty over the land. See United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" (emphasis added)). As the Supreme Court noted in United States v. Santa Fe Pac. R.Co., "Indian nations [are] distinct political communities, having territorial boundaries within which their authority [is] exclusive...." 314 U.S. 339, 348 (1942) (inner quotations and citations omitted).

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

The Second Circuit's decision in Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), confirms that the principles set forth in the Sherrill decision apply with equal force to the CIN. In that case, the court found that these principles barred a claim asserted by CIN for damages for the allegedly unlawful loss of possession of land. The Second Circuit found that the Sherrill holding should not be narrowly interpreted but should be accorded its necessary and logical import. As the Second Circuit recognized, Sherrill "dramatically altered the legal landscape against which we consider plaintiff's claims." See Cayuga, 413 F.3d at 273. The

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Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1146 (2d Cir. 1992) ("It is well-settled in this circuit that a

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

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

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

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

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

As discussed above, removing 130 acres of land from local tax rolls so that the CIN can operate a gaming facility hardly fulfills the intended function of Section 465. The CIN has the capacity to use the land it owns in an economically productive way without having it held in trust status. There is no reason why the CIN needs to, or should, enjoy the significant economic advantages over surrounding non-Indian businesses that come with having its land exempt from state and local taxes and, potentially, state and local regulatory requirements.

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vacated order has no collateral estoppel effect"), aff'd 510 U.S. 86 (1993).

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

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

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

Nor does the NIA apply to the conveyance of land acquired by the CIN in fee through open market purchases from private property owners. Since any restriction against alienation applicable to the historic Cayugas' possessory interest that may have existed in the distant past no longer applies, the fee interest in the land acquired by the CIN is freely alienable. No case has held that former reservation land that has become freely alienable can thereafter become

subject to the NIA when re-acquired by the tribe that may have once held aboriginal title to the land. The Supreme Court expressly declined to reach that issue in Cass County v. Leech Lake Band, 524 U.S. 103, 115 n.5 (1998). Cases decided before and after Cass County have refused to find the NIA applicable in these circumstances. See, e.g., Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993); Bay Mills Indian Cmty. v. State, 244 Mich. App. 739, 746, 626 N.W.2d 169, 172, 174 (2001), cert. denied, 536 U.S. 930 (2002); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wash. 2d 862, 877, 929 P.2d 379, 387 (1996).[8]

In any event, there is no question that the CIN fee lands are subject to local real property taxes. That is the clear and unmistakable holding of Sherrill.[9] Taking the land into trust will remove the land from the tax rolls, and the impact of that transfer is therefore a pertinent consideration on the CIN's Application.

(b) The Removal Of CIN-Owned Land From Local Tax Rolls Would Have A Significant Adverse Impact On Local Communities And Ultimately On The State Of New York

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[8] With the exception of Judge Hurd's recent decision in Madison County, which the State contends was wrongly decided, see n. 8, supra, we are unaware of any case law that sustained a claim that the NIA prevented transfer of unrestricted fee land purchased by a tribe in modern times. The cases sometimes cited for that proposition do not support it. Tuscarora Indian Nation v. Federal Power Comm'n, 265 F.2d 338 (D.C. Cir. 1958), rev'd 362 U.S. 99 (1960), involved land purchased by the United States for a tribe adjacent to an existing reservation owned and occupied by the tribe with funds generated by the sale of their tribal land located elsewhere (id. at 342), and the Supreme Court overturned the court of appeals' decision that the NIA barred taking of the land by eminent domain. In Alonzo v. United States, 249 F. 2d 189, 196 (10th Cir. 1957), the land had been owned in fee by the tribe since before the U.S. acquired the territory in which the land of those Indians (the Pueblo) was located in the mid-1800's and had been made inalienable by a specific federal statute in 1924. See id. at 191, 195. The language in Tonkawa Tribe v. Richards, 75 F.3d 1039, 1045 (5th Cir. 1996), suggesting that the NIA applies to tribal land no matter how it is acquired is dictum; the decision rejected a tribal claim that the tribe had received a vested interest in property by virtue of an 1866 Texas statute and dismissed the tribe's NIA claim.

[9] We note that on the basis of Sherrill, Judge Hurd granted summary judgment dismissing the CIN's action seeking to enjoin municipalities from enforcing their zoning and land use laws to CIN-owned land. See Cayuga Indian Nation of New York v. Village of Union Springs, 390 F. Supp. 2d 203 (N.D.N.Y. 2005).

The impact of removal of the CIN properties from local tax rolls and taxing jurisdictions is addressed in the accompanying reports of Professor Ian Ayres and O'Brien & Gere. In addition, the State refers to the submissions of the Counties, and other municipalities and taxing jurisdictions to the BIA.

Under any measure, the economic impact of removal of CIN land from local tax rolls would be substantial. The amount of lost tax dollars is substantial, both in absolute and relative terms. The annual anticipated loss of county, municipal and school taxes resulting from the removal of the properties is estimated to be over $85,000. The present value of future tax losses based on current tax rates is approximately $5.6 million. This number does not take into consideration increases in the taxes on the properties due to increases in tax rates and assessed value or increases resulting from future development and improvement of the property. It is reasonable to assume that the CIN will continue to develop its properties, and that the loss of future tax revenue will be substantially greater than reflected by the current figures.

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

The loss of taxes imposes the costs of local services -- schools, road maintenance and repair, police and fire protection -- on a smaller group of property owners, increasing the unit cost for those services. Since the Cayugas are entitled to the benefit of those services -- e.g., Cayuga children attend local schools, individual Cayugas and the CIN and customers of CIN businesses use local roads, and receive police and fire protection -- the non-Indian community is

footing the bill for these services for the CIN. This effect imposes real and ongoing hardship on the non-Indian portion of the community.

4. Taking The CIN's Lands Into Trust May Result In An Unworkable Jurisdictional Patchwork (25 C.F.R. § 151.10(f))[10]

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

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

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

Sherrill, 125 S. Ct. at 1493.

At the heart of the Court's decision is the concern that allowing tribally-owned land located randomly throughout communities in central New York to be removed from state and local jurisdiction would fundamentally and irreparably injure the affected communities by disrupting the "governance of central New York in counties and towns." Id. at 1483. The Court's language reflects a recognition that communities cannot be maintained without the

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

ability to govern in a coherent and comprehensive fashion. As discussed below, land use, environmental and other laws are effective only if they apply uniformly over an extended area. Piecemeal removal of land from state and local jurisdiction threatens the regulatory scheme as a whole.

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

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

Id.

The CIN's effort to have the BIA take the parcels it owns in fee into trust is an obvious effort to circumvent the type of concerns articulated by the Court.

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

(b) The Disbursed And Non-Contiguous Character Of CIN Holdings Would Create A Host Of Jurisdictional

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(and the accompanying Ayres and O'Brien & Gere reports), address the serious difficulties that would be created if the CIN's position were to be sustained.

And Regulatory Problems If The Land Is Taken Into Trust

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

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

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

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

It is impossible to design and implement a unified and coherent zoning and land use plan when randomly located parcels within the community are not subject to local land use laws and can be developed for uses inconsistent with the overall regulatory framework. To the extent that CIN land when taken into trust status would be exempt from zoning and other land use laws, it would pose a significant obstacle to the non-Indian communities' legitimate land use planning. The effect can be particularly acute on individual landowners whose property is located adjacent

to a non-conforming tribal use. Similarly, the inability of local officials to monitor and enforce compliance with building and fire and safety code requirements poses risks not only for those who visit unregulated facilities but also for surrounding properties.

The point is clearly illustrated by one of the CIN parcels in the Village of Union Springs. CIN was operating, and the State understands, intends to operate in the future, a high stakes bingo hall on a parcel located 300 yards from the local high school. Obviously, and for very good reason, this is a use that likely would not be permitted under local zoning and land use laws.

A similar issue exists with respect to two of the parcels purchased by the CIN in the Town of Seneca Falls which are zoned for residential use. Because they were used as a gas station, commercial office space and retail sales prior to the adoption of the Seneca Falls Town Zoning Law, these uses are permitted on these parcels as pre-existing, non-conforming uses. A proposed change in use from the grandfathered uses or residential, however, requires a variance. The CIN has developed these parcels for gaming. In doing so, the CIN failed to request any variance for the new non-conforming use or for the expansion of the facility, in violation of the Town's Zoning Law. By placing these lands in trust, the United States would effectively condone the CIN's continued violation of local land use ordinances.

Similar considerations apply with particular force in the context of environmental laws. The purpose of environmental laws is to protect human health and the environment through uniform and systematic requirements designed to ensure that certain activities (such as disposal of waste, discharge of pollutants, storage of petroleum, filling of wetlands) are controlled in terms of location, design, construction, operation, maintenance and monitoring. These

environmental laws require, among other things, permits to construct and/or operate landfills, air emission sources, water discharge points and mines. They also regulate the design, installation and maintenance of underground storage tanks and the dredging and filling of wetlands. The State and its political subdivisions require all who are subject to their jurisdiction to comply with environmental laws because avoidance of such laws by some results in the detriment to all who share the same environment and natural resources.

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

In contrast, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., essentially is procedural and places no obligation on a federal agency to mitigate the environmental impacts of an action it approves or permits. See Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415 (1986) ("Moreover, unlike its Federal counterpart and

model, [NEPA] . . . , SEQRA is not merely a disclosure statute; it 'imposes far more 'action-forcing' or 'substantive' requirements on state and local decision makers than NEPA imposes on their federal counterparts.'") (citations omitted). See also 2 Gerrard, Environmental Impact Review in New York, § 8.03[1]. Further, environmental reviews are much more likely to occur under SEQRA than would under NEPA, in part because, unlike under NEPA, the possibility of a significant adverse impact alone is sufficient to trigger full SEQRA review. Id.; Chinese Staff & Workers Ass'n v. New York, 68 N.Y.2d 359, 365 (1986). In short, SEQRA clearly provides for more stringent environmental review than NEPA.

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

The State's law and regulations governing subsurface discharges of pollutants further underscore the difference between state and federal law. Contamination of groundwater occurs through discharges of wastewater from sewage treatment plants and other operations, and spills of toxic chemicals and petroleum products, which can have far-reaching impacts through migration in the underlying aquifer, affecting wells and even surface waters miles away from the initial contamination source. Before discharges of even sanitary wastewater from a water treatment facility, for instance, to a holding pond or the ground may occur, a person seeking to discharge must apply for a DEC permit even before construction is begun. The permit review

will include not only technical issues and direct impacts to the environment, but would require mitigation of any adverse effects found, including those that do not relate directly to the discharge of wastewater. In contrast, while any project undertaken on CIN lands arguably would be subject to federal law, the federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"), only addresses surface waters, not discharges to groundwater. Moreover, federal permits are not required for facility construction. With one narrow exception, CWA permitting relating to all discharges are exempt from NEPA review. See 33 U.S.C. § 1371(c)(1) (exempting permitting decisions under CWA § 402 made by EPA). Similarly, petroleum spills that contaminate land but do not flow into navigable surface waters are not subject to federal control under the CWA or the federal Oil Pollution Act, 33 U.S.C. § 2701 et seq., but are subject to State environmental laws such as the State's Navigation Law.

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

State law protects wetlands 12.4 acres in size or greater and smaller wetlands of local importance. While the CWA protects wetlands smaller than 12.4 acres, the Army Corps of Engineers, which administers CWA § 404 regarding wetland filling and dredging, nonetheless allows clearing of vegetation and converting a wetland to open water, which reduces or

eliminates the filtration and cleaning function that wetlands perform. In addition, under New York law, activities within a 100 foot buffer area surrounding a wetland are forbidden absent a permit. There is no similar restriction under federal law. Finally, under state law, a SEQRA review must be performed, and if there may be a significant adverse impact from any activity affecting the wetland, an environmental impact statement ("EIS") must be performed and adverse impacts mitigated or avoided. In contrast, under federal law, it is the unusual case that requires an EIS under NEPA because the Army Corps has issued many nationwide permits that allow considerable dredging and filling of small wetlands, and in general, only the impacts of dredging and filling on the wetland are evaluated rather than other environmental impacts stemming from an applicant's proposed activities.

Consequently, without the ability to apply regulatory law to tribal property, state and local authorities would be unable to protect the property and health of residents in the surrounding community or the surrounding environment. Contamination issues are of particular concern generally in central New York where many residents rely on ground water as a source of water for household use. The potential for such contamination in this case is acute because of the location of CIN land adjacent or in close proximity to Cayuga Lake, which provides water for many of the surrounding communities.

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

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

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

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

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

5. The BIA Is Not In A Position To Monitor The CIN Land Parcels (25 C.F.R. § 151.10(g))

Section 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 Application contains no assessment of the extent to which the BIA would be impacted by taking the CIN properties into trust, or having to administer those properties, or how federal environmental enforcement authorities would be impacted by having to serve as the sole or primary environmental law enforcement agency. There appears to be a serious question as to the capacity of federal authorities to perform the increased administrative and enforcement obligations the CIN application, as well as other pending applications of New York tribal groups, would entail. The proposed use of the property to conduct gaming activities further underscores the need for and difficulty of guaranteeing proper supervision over the land parcels.

The State notes that the Eastern Regional Office of the BIA located in Nashville is approximately 800 miles away from central New York. Although the BIA has a field office in Syracuse that office is small and does not appear to have the capacity to properly administer CIN properties, let alone those properties as well as the 444 properties the Oneida Indian Nation of New York seeks to have taken into trust. See also, Muskogee Area Director's May 23, 1994 Decision On Land-Into-Trust Application Of Miami Tribe In Oklahoma at 1-2 ("The subject property is approximately 500 miles from the Miami Agency . . . The Miami Agency has neither the resources or [sic] staff to properly administer the property. The distance alone makes it virtually impossible for Agency personnel to regularly visit the property").

6. Taking The Land Into Trust May Jeopardize The Effectiveness And Enforcement Of Existing Easements, Leases And Rights Of Way

The parcels which the CIN seeks to take into trust may be subject to existing easements, leases or rights of way held by non-Indians. Taking the land into trust will make enforcement of these rights significantly more difficult. Among other things, the ability of state and local governments or private individuals to pursue in rem or other enforcement proceedings with respect to the land subject to such rights may be considerably more difficult if the CIN obtains the right to exercise tribal sovereignty over these lands.

By way of example, the 108-acre parcel owned by CIN has an existing natural gas well that has been operating since January 1982. The gas well currently serves the Union Springs School District (the "District") by supplying natural gas to heat the District's buildings, and the District holds a right to an assignment of the oil and gas lease. The deed by which the CIN took title specifically excepts from the property that oil and gas lease. To the extent the trust acquisition impairs the rights of the District to continue to utilize the existing lease rights, it will have a significant adverse effect on the District.

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

In an apparent effort to come within one of the categorical exclusions contained in Section 1.4 of the DOI Implementing Procedures, 62 Fed. Reg. 2379 (1997), the CIN application asserts that the CIN "is not proposing any change in the current use of the property and, therefore, issuance of a Categorical Exclusion under BIA regulations will evidence total compliance with NEPA."

The position taken by CIN is disingenuous. Because of CIN's assertion that its property was exempt from state and local regulatory laws, which has now been unequivocally rejected by the Supreme Court in Sherrill, the uses of, and activities engaged in on, the lands since they were acquired by the CIN have not been subject to state or local land use or environmental review. Nor, as far as we are aware, have such uses been subject to all appropriate assessments under federal environmental laws. Moreover, there is no reason to believe that the CIN will undertake no further development in the land.

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

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

25 C.F.R. § 151.13 mandates that prior to taking land into trust the Secretary must require the elimination of liens, encumbrances and infirmities that make title to the land to be taken into trust unmarketable. We understand that BIA policy is to refuse to take land into trust until outstanding tax liens have been extinguished. There are outstanding tax liens on the CIN property resulting from the CIN's refusal to pay real estate taxes required by Sherrill. To the extent that there remain unpaid real property taxes due taxing jurisdictions in Cayuga and/or Seneca Counties, the liens relating to those tax liabilities would have to be eliminated before the land could be taken into trust.

D. The CIN's Apparent Failure To Adopt A Resolution Authorizing The Application Warrants Denial Of The Application

In order to take land into trust, the BIA requires a properly adopted resolution from the tribe authorizing the transfer of land into trust. See Office of Indian Gaming Management, Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and IGRA Section 20 Determinations, dated March 2005 ("Checklist") at 2, citing 25 C.F.R. Part 151.3. In addition, of course, in order to conduct gaming on Indian lands, it is essential that the tribe in question have adopted a resolution authorizing such gaming. See, e.g., 25 USC § 2710(b)(1)) As far as the State is aware, the CIN has not properly adopted such a resolution(s). The State and other parties should not be burdened with any further expenses in connection with the Application, and the Application should not be processed, unless and until such a resolution(s) is adopted by the CIN.

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

Section 2719(a) of IGRA permits gaming to be conducted on lands acquired by the Secretary in trust for the benefit of a tribe after October 18, 1988 only in very limited circumstances. None of the circumstances contained in 25 U.S.C. § 2719(a) apply here. The land which is the subject of the CIN's Application is not within the boundaries of an existing Cayuga reservation. See 25 U.S.C. § 2719(a)(1). That fact is made clear not only by the case law but by the definition of the term "reservation" in the DOI's land into trust regulations. As discussed above, the regulations (25 C.F.R. § 151.2(f)) define Indian reservation to mean "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." In light of Sherrill, the CIN does not have (and necessarily cannot be recognized as having) governmental jurisdiction over the land at issue. Consequently, that land is not within an Indian reservation.

Nor can the CIN come within subdivision (2) of subsection (a) of Section 2719. In order for that exception to apply the CIN must have had "no reservation as of October 17, 1988" and the land to be taken into trust must be located within the "Indian tribe's last recognized reservation within the State... within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(2). The land does not lie within any former federal reservation. The 1794 Treaty of Canandaigua did not create any Cayuga reservation. As is apparent from the text of Article II of that treaty, the lands described as "reserved" to the Cayugas were those reserved by New York in its 1789 Treaty with the Cayugas. 7 Stat. 44 ("The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property..."). Similarly, the Treaty merely "acknowledged" that the lands were "called" "reservations" in the 1789 Treaty with New York. The weight of authority discussing the effect of the Treaty of Canandaigua so recognizes. See Andrews v. New York, 79 N.Y.S.2d 479, 482 (Ct. Cl. 1948); Seneca Nation of Indians v. United States, 173 Ct. Cl. 917, 922 n.5 (1965); People ex rel. Ray v. Martin, 60 N.E.2d 541, 544 (N.Y.), aff'd 326 U.S. 496 (1946). Indeed, publications of both the federal government and Indian groups have characterized the Onondaga reservation, acknowledged in the same article of the Treaty of Canandaigua as the Cayugas' "reservation," as a state, not a federal reservation. See U.S. Department of Commerce, Federal and State Indian Reservations, An EDA Handbook at 303 (1971); Confederation of American Indians, Indian Reservations, A State and Federal Handbook at 198 (1986).

Consequently, CIN-owned fee land cannot be taken into trust for gaming unless one of the exceptions contained in Section 2719(b) applies. The only possible exception available for

the CIN is that contained in Section 2719(b)(1)(A). That exception applies, however, only if the Secretary first makes the two-part determination set forth in Section 2719(b)(1)(A) and then "only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

The DOI's guidelines indicate that the two part determination under Section 2719(b)(1)(A) is distinct from the Part 151 notification process. See Checklist at 8 ("[I]t is very important that [the consultation process under 2719(b)(1)(A)] be differentiated from the Part 151 notification process which requires the 30-day notice for determination of taxation, special assessment, services, zoning, etc..."). As far as the State is aware, the DOI has not initiated the consultation process required by Section 2719(b)(1)(A).