A. INTRODUCTION

The public comment period elicited a number of written and oral comments on the Draft Environmental Impact Statement (EIS) from the State of New York, elected officials, various organizations, and individuals that were similar in nature and scope.

To facilitate the response to public comment process, these similar or repeated comments are addressed in this section of tabulated Common Responses. The Common Responses are listed below, followed by detailed responses.

Common Response 1: Trust Land Authority and NEPA Process

Common Response 2: Purpose and Need for Trust Land

Common Response 3: Constitutionality of Trust Land Process

Common Response 4: Cayuga Indian Reservation

Common Response 5: Legality of the Nation's Businesses

Common Response 6: Alternatives

Common Response 7: Real Estate Taxes and Economic Effects

Common Response 8: Sales Taxes

Common Response 9: Regulatory Jurisdiction

Common Response 10: Treaties with the Cayuga Indians of New York

Common Response 11: Land Use and Zoning

Common Response 12: Checkerboarding

Common Response 13: Use of New York State and Seneca and Cayuga County Information in Preparing the Draft EIS

Common Response 14: *City of Sherrill* Supreme Court Decision

Common Response 15: Community Services and Infrastructure

Common Response 16: Unfair Competition

Common Response 17: Future Development

Common Response 18: DEIS Completeness

Common Response 19: Special Treatment of Indians

Common Response 20: Pending Litigation

Common Response 21: Potential Environmental Impacts

B. COMMON RESPONSES

COMMON RESPONSE 1: TRUST LAND AUTHORITY AND NEPA PROCESS

A number of commenters have stated that it is unconstitutional or unfair for the Federal government to place the Cayuga Indian Nation's (the "Nation") lands into federal trust. The Secretary of the Interior's primary statutory authority for the discretionary acquisition of land in trust status is Section 5 of the Indian Reorganization Act ("IRA") of 1934, 25 U.S.C. § 465[1]. The IRA gives the Secretary of the Interior discretion to acquire land into trust for Federally-recognized Indian tribes and individual Indians. The IRA does not require the Secretary of the Interior to acquire any specific tract of land, any specific amount of land or to acquire any land at all. Authority for this statute derives from the Indian Commerce Clause of the Constitution, Art. I § 8, cl. 3. Section 5 of the IRA applies to tribes, like the Cayuga Indian Nation. Implementing regulations for Section 5 of the IRA are codified at 25 C.F.R. Part 151. The Secretary of the Interior's Land Acquisition Policy expressed in 25 C.F.R. § 151.3 states that land may be acquired in trust status "when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or when the tribe already owns an interest in the land; or when the Secretary of the Interior determines that acquisition of the land is necessary to facilitate tribal self-determination, economic development or Indian housing."

The claim that Section 465 of the IRA is unconstitutional insofar as it may constitute an unconstitutional delegation of Congressional authority to the Secretary of the Interior has been rejected, most recently in three Federal court decisions involving challenges to the Record of Decision issued by the Department of the Interior on the trust application of the Oneida Indian Nation. *State of New York v. Salazar*, 6:08-CV-644, 2009 WL 3165591 (N.D.N.Y. September 29, 2009); *Town of Verona v. Salazar*, 6:08-CV-647, 2009 WL 3165556 (N.D.N.Y. September 29, 2009); *City of Oneida v. Salazar*, 5:08-CV-0648, 2009 WL 3055274 (N.D.N.Y. September 21, 2009). These court decisions uniformly hold that agency regulations sufficiently limit the

[1] The United States Code (USC) and Code of Federal Regulations (CFR) referenced throughout this DEIS are available at http://www.gpoaccess.gov.

Secretary of the Interior's discretion and that Section 465 does not violate the non-delegation doctrine. *See, also, Michigan Gaming Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008); *Carcieri v. Norton*, 497 F.3d 15, 43 (1st Cir. 2007)(en banc) ; *rev'd on other grounds sub nom. Carcieri v. Salazar*, ___U.S.___, 129 S. Ct. 1058 (2009); *South Dakota v. United States Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999); *Shivwitz Band v. Utah*, 428 F.3d 966, 872-74 (10th Cir. 2005); *Nevada v. United States*, 221 F.Supp 2d 1241, 1250-51 (D. Nev. 2002).

Currently about 56 million acres of land are held in trust by the Federal government for various tribes and individual Indians in a number of states throughout the country, including several of the thirteen original colonies. When the Secretary of the Interior acquires land in trust status, the United States acquires legal title to the land. The Indian tribe for whom the land is acquired holds beneficial or "trust" title. The Indian tribe exercises tribal sovereignty over the land, which is restricted against voluntary or involuntary alienation (conveyance of the land or an interest in the land). Trust lands are not subject to New York State or local taxation or land use controls, but are subject to the laws and administration of the tribal government and the Federal government. The land-into-trust process begins with the submission of a Trust Land Application to the BIA; in this case the Cayuga Nation submitted a Trust Land Application to the BIA on May 25, 2005. The Proposed Action is for the placement of 125± acres[1] in trust status. The Trust Land Application does not propose a change in land use.

The BIA prepared the Draft Environmental Impact Statement ("DEIS") as part of an environmental review process for the Nation's Trust Land Application under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and the Council on Environmental Quality (CEQ) Regulations for Implementing NEPA (40 C.F.R. §§ 1500-1508), the United States Department of the Interior (USDOI) Manual 516 DM 1-7 and 10, and the BIA NEPA Handbook 59 IAM 3-H (May 5, 2005).

Because the Nation proposed to change the ownership of the land without a change in land use, the proposed action would fall within a category of actions for which the BIA would not normally be required to prepare an EIS or an Environmental Assessment (a "categorical exclusion"). 516 DM 10.5.I. However, to further the spirit of NEPA in fully informing the public and the decision-makers of the possible impacts of the proposed action and alternatives on the quality of the human environment, the BIA has prepared the DEIS. The BIA issued the DEIS for public review on May 22, 2009.

Prior to preparing the DEIS, the BIA conducted a public scoping meeting on March 1, 2006, and received comments and input from the State of New York, local, and tribal governments and the public on the issues to be addressed in the EIS. A final Scoping Report was distributed and made available to the cooperating agencies (New York State Department of Environmental Conservation, Seneca County, Cayuga County, and Cayuga Indian Nation of New York) and the public on November 6, 2006. A prepublication Draft EIS was then prepared and issued to the cooperating agencies for review and comment on February 17, 2009. A Draft EIS was prepared and made available for public review and comment on May 22, 2009. There was a mandated 45-

[1] The notice of intent published in the Federal Register on February 13, 2006 (71 FR 7568) cited the conveyance into federal trust of seven parcels comprising 125± acres of land. The records of the affected municipalities report the actual acreage of the seven parcels included in the Nation's Land Trust Application to be 129.16 acres. Since the Proposed Action now excludes the Montezuma parcel, the fee-to-trust application comprises six parcels and 129.14 acres of land.

day public comment period for the Draft EIS, which the BIA extended until July 6, 2009. During the public comment period, a public hearing was held at the New York Chiropractic College, in Seneca Falls, Seneca County, New York on June 17, 2009. A Final Environmental Impact Statement (FEIS – this document) was prepared and considers the comments received on the Draft EIS. The FEIS identifies the Preferred Alternative for the Nation's Trust Land Application.

The next step in the process is for the BIA to prepare and issue a Record of Decision (ROD) setting forth the Secretary of the Interior's final decision on the Trust Land Application. Notice of the final decision on the Nation's Trust Land Application will be published in the Federal Register no earlier than 30 days after the publication of the FEIS. The Secretary of the Interior's final decision on the Trust Land Application may or may not be to implement the Preferred Alternative. With regard to the BIA carrying out its trust responsibilities, the Secretary of the Interior is required to consider under the land-into-trust regulations the extent to which the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. See 25 C.F.R. § 151.10(g). That determination will be reflected in the Record of Decision.

The Federal government provides specific services to tribes for the management of lands held in trust. While the BIA takes the lead in the oversight of Indian trust lands, other Federal agencies are charged with overseeing compliance with specific Federal laws. These other Executive Branch agencies provide assistance to tribes for compliance with Federal laws and regulations under their jurisdiction, many of which have a tribal liaison to coordinate assistance in their area of expertise. The BIA may provide both direct assistance and funding. Under Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1975, Titles I and III, have made it possible for Tribes to take specific program shares (dollars) under Title I, Annual Funding Agreement, or to become totally self-governing under Title III, Compacting/Self-Governance. See Common Response 9, below, for further information on the Federal policy of Indian Self-determination and providing Federal assistance for tribal programs and land management.

COMMON RESPONSE 2: PURPOSE AND NEED FOR TRUST LAND

Several commenters have asserted that the purpose and need for the Proposed Action has not been sufficiently established. These commenters have expressed the opinion that the proposal to place the subject parcels into trust is simply to facilitate the avoidance of paying taxes and compliance with New York State and local regulations.

The statutory preamble to the IRA describes it as "[a]n Act to conserve and develop Indian lands and resources." 48 Stat. 984 (1934). As the United States Supreme Court has determined, "[t]he intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152-54 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). It has also been judicially determined that "an intelligible principle exists in the statutory phrase 'for the purpose of providing land for Indians' when it is viewed in the statutory and historical context of the IRA." *Michigan Gaming Opposition,* 525 F.3d at 31 (quoting 25 U.S.C. § 465). "This principle involves providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from…prior federal policy." *Id.*

The purpose and need for the Proposed Action is appropriately presented in the DEIS and is consistent with the foregoing Federal law and policy regarding Indian tribes. The purpose and need, as discussed in detail in Section 1.0 of the FEIS, addresses the Cayuga Nation's need for

cultural and social preservation, expression and identity, political self-determination, economic development and self-sufficiency by providing a tribal land base and homeland. Economic need is only one element of the Nation's overall need. In addition, the basic features of trust land status – the ability to exercise tribal sovereignty, exemption of the land from taxation, and restriction of the land against alienation – are largely uncharacteristic of land held by private individuals or corporations, and are the primary reasons that Indian tribes and individuals apply to have lands placed into trust. These features of trust status are intended to foster and protect a tribe's culture and society, political self-determination, economic growth and self-sufficiency.

The IRA gives the Secretary of the Interior the discretion to acquire land into trust for Indian tribes and individuals. The IRA does not require the Secretary of the Interior to acquire any specific tract of land, any specific amount of land or to acquire any land at all. The amount of land accepted into trust is decided by the Secretary of the Interior on a case-by-case basis.

With regard to the Nation's Trust Land Application, the BIA's DEIS has presented and evaluated several alternatives to the Proposed Action, including the No Action alternative and several other trust land alternatives that include less land than requested by the Nation in its Trust Land Application. Under the No Action alternative, and other alternatives where some lands are not conveyed into trust, the BIA would assume that property taxes would continue to be assessed on those lands (however, the Nation would have to determine whether or not to continue paying such taxes), and those lands would continue to be subject to New York State and local environmental, health and safety, and zoning laws. However, an acquisition of any amount of land less than the amount applied for should not be interpreted as to preclude future applications to take the subject lands into trust. The Secretary of the Interior has discretion under NEPA and the IRA to select an alternative that does not meet the purpose and need expressed by an applicant, including the No Action alternative. The Secretary of the Interior may decide to acquire in trust less land than the applicant requested based on the land acquisition criteria contained in 25 C.F.R. Part 151. Accordingly, the Secretary of the Interior is considering the purpose and need and the extent to which the purpose and need would be met under each alternative in addition to the impacts of each alternative on the New York State and local governments. The Secretary of the Interior's final decision on the Nation's Trust Land Application will be made after consideration of the issues entered into the administrative record on the DEIS and FEIS, as well as criteria contained in 25 C.F.R. Part 151. The Secretary of the Interior's final decision on the Trust Land Application may be to implement the Preferred Alternative. The Secretary of the Interior may, however, choose to implement another alternative, including an alternative not identified in the FEIS but within the range of those evaluated in the FEIS.

COMMON RESPONSE 3: CONSTITUTIONALITY OF TRUST LAND PROCESS

A number of commenters have questioned the Secretary of the Interior's authority to acquire lands into trust for any Indian tribe in New York since the state is one of the thirteen original colonies. Some commenters have suggested that a "New York State Reservation" be created as an alternative to conveying the Nation's lands into trust.

AUTHORITY TO ACQUIRE LANDS IN NEW YORK STATE IN TRUST

The Secretary of the Interior's primary statutory authority for the discretionary acquisition of land in trust is Section 5 of the IRA, 25 U.S.C. § 465, with implementing regulations at 25 C.F.R. Part 151. Authority for this statute derives from the Indian Commerce Clause of the Constitution, Art. I § 8, cl. 3. As stated in Common Response 1, the constitutionality of the trust

land process has been established in extensive Federal court litigation, including litigation arising out of the Record of Decision issued by the Department of the Interior on the trust land applications of the Oneida Indian Nation. The decisions in the cases involving the Oneida Indian Nation rejected the argument that New York, as one of the original thirteen colonies stands in a different position from most other States with respect to the issue of state sovereignty. *See, Town of Verona v. Salazar* at 7; *City of Oneida v. Salazar* at 9. The State of New York is not excluded from this framework by virtue of being one of the thirteen original colonies. Although the Secretary of the Interior has not to date exercised his discretionary authority under the IRA to acquire land in trust status in New York State, the United States currently holds lands in trust in several of the thirteen original colonies.

Furthermore, *Cayuga Indian Nation of New York v Cuomo*, 758 F. Supp. 107 (N.D.N.Y 1991) recognized the Federal Cayuga Indian Reservation as existing, that New York State owned no interest in the Cayuga Reservation, and that any interest it may have once held was ceded to the United States when they signed the Constitution. Therefore, New York does not have any special rights as an original colony which would give them jurisdiction over Indian Lands or otherwise create an exemption from the trust land process for lands in New York.

CREATION OF A NEW YORK STATE RESERVATION

The United States Constitution acknowledges Indian tribes to be sovereign nations and confers exclusive authority over Indian commerce on the Federal government. The Federal government's authority over Indian commerce is implemented by statutes enacted by Congress. The Federal government has not delegated any of its authority to create Indian reservations or set aside trust lands to the states, including New York State. Although a state may grant a tribe exemption from its own tax laws and regulations, states have no power to create federal Indian reservations or to place lands in federal trust. Lands within a state-designated Indian reservation or trust would not necessarily be treated the same as lands within a Federal Indian reservation or trust. Moreover, the initial and continuing designation of the land as a state reservation or trust would be at the will of the state.

DENIAL OF THE NATION'S TRUST LAND APPLICATION

Denial of the Nation's Trust Land Application (i.e., selecting the No Action Alternative) with the expectation that New York State would enact legislation or takes other action to create a state reservation or place the land in state trust status is not a reasonable expectation or alternative. The State could have taken such an action any time within the last 200 years, but has not done so.

COMMON RESPONSE 4: CAYUGA INDIAN RESERVATION

The Cayuga Indian Nation of New York is a federally recognized Indian tribe. Prior to the arrival of Europeans, the Cayuga Indian Nation commanded a major presence over a large part of the present-day central New York, extending north into Canada and south into Pennsylvania. The Nation had developed a sophisticated civilization with numerous towns and villages, centered around present-day Cayuga Lake in central New York. This well-defined Cayuga territory incorporated in excess of three million acres of land. This territory, which encompasses the land owned by the Nation subject to the Proposed Action, is part of 64,015 acres guaranteed to the Cayuga Indian Nation as reservation land under the Treaty of Canandaigua, which Congress ratified and President George Washington signed in 1794. In Article 2 of the Treaty of Canandaigua the United States "acknowledge[d] 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." 7 Stat. 45. Article 2 further provided that "the United States will never claim the same, nor disturb" the Tribes "in the free use and enjoyment" of those lands, and that "the said reservations shall remain theirs, until they choose to sell same to the people of the United States, who have the right to purchase." *Id*. In the 1794 Treaty, the [U.S.] recognized the lands designated in the [State's] Treaty of Albany of 1789, recognizing the existence of the Cayuga Reservation (i.e. the 64,000 acres.)
The present Cayuga Nation has its headquarters in North Collins, New York. The Nation consists of members who are the direct descendants of those whose land was lost to the State of New York in 1795 and 1807. The Nation intends to reestablish tribal presence in their homeland around Cayuga Lake, which holds for them cultural and religious significance.

The transfer into federal trust of the Nation's Cayuga and Seneca County properties would provide cultural resource protections and enable the Nation to govern their lands as a sovereign Indian Nation. The transfer of Cayuga Nation lands into trust under 25 USC 465 and 25 CFR 151 is an appropriate and accepted means of furthering the federal government's policy to support and protect federally recognized Indian nations. The properties subject to the Proposed Action were purchased by the Nation at fair market value from willing sellers. These lands were not taken by condemnation or given to them by the government, and the proposed fee-to-trust process is separate and distinct from any Nation land claims. The Nation's prior land claims are not the subject of this application and therefore are not required to be addressed in this EIS. Any future fee-to-trust applications within the Nation's 64,015 acres of reservation land guaranteed by the Treaty of Canandaigua are hypothetical, and analysis is not required under NEPA.

COMMON RESPONSE 5: LEGALITY OF THE NATION'S BUSINESSES

Some commenters have asserted that the tax-free sale of cigarettes and gasoline, as well as the operation of gaming machines is illegal.

The Nation's right to sell tax-free cigarettes and gasoline derives from the status of the Nation's land as a "qualified reservation" under the New York Tax Law and the State's well-established policy of forbearance from taxation of Indian sales of cigarettes and gasoline.

In regard to gaming, the Indian Gaming Regulatory Act ("IGRA") allows gaming to be conducted on "Indian lands," defined as lands within the limits of an Indian reservation, lands held by the United States in trust, and lands held by an Indian tribe or individual in restricted status. See 25 U.S.C. § 2703(4). The Cayuga reservation has not been diminished or disestablished. Moreover, in *State v. Salazar,* the court dismissed the State's IGRA claim, holding that inasmuch as the Oneida Nation's Turningstone Casino is located on Indian lands, the provisions of 25 U.S.C. § 2719(b)(1)(A) do not apply. This holding is relevant and applicable to the present application by the Cayuga Indian Nation.

COMMON RESPONSE 6: ALTERNATIVES

A number of commenters, including Seneca and Cayuga Counties, have recommended the adoption of the No Action Alternative.

Commenters proposed that the Department not act on the Nation's fee-to-trust request unless and until an agreement regarding placement of lands into trust and related issues is reached. This alternative was eliminated from further consideration because achieving a negotiated resolution is not reasonably foreseeable. In 2007, the Cayuga Nation proposed a settlement agreement that put a limit on how much property they would request to be placed into trust in exchange for other support from the Counties. Both Seneca and Cayuga Counties rejected the proposed

settlement. The Nation and the State and local governments were free to reach and submit an agreement to the Department for its consideration prior to the issuance of this FEIS, but have not done so. Moreover, the issuance of this FEIS does not prevent them from doing so prior to formal acceptance of the subject lands into trust.

The NEPA regulations, 40 C.F.R. § 1500.14; 43 C.F.R § 46.415; and the BIA NEPA Handbook, Part 6, collectively require the study and comparative presentation of the environmental effects of the Proposed Action, the No Action Alternative, and reasonable alternatives. The Proposed Action as expressed by the Nation is to convey ±125 acres of Nation-owned land to the United States government to be held in trust.

Section 2.0 of the DEIS evaluated three alternatives (The Proposed Action, No Action, and Enterprise Properties into Trust). These alternatives were developed through the scoping process in which the public and cooperating agencies participated. The BIA held public scoping hearings and reviewed the meeting transcripts, written scoping comments, and prior submissions by the New York State, local governments, and the Nation.

After consideration of the oral and written comments received on the Draft EIS, the BIA determined that the DEIS presented a sufficient range of alternatives. Therefore, this FEIS considers the same alternatives that were evaluated in the DEIS. The final decision on the Nation's Trust Land Application may or may not be to implement the Proposed Action. The Secretary of the Interior is still considering the requirements at 25 C.F.R. Part 151 and related information.

COMMON RESPONSE 7: REAL ESTATE TAXES AND ECONOMIC EFFECTS

Several commenters state that they want the Nation to pay their "fair share" of taxes. It should be noted that the Cayuga Indian Nation has at this time paid all of its duly assessed current State and local property taxes, including school and special district taxes.

When the Secretary of the Interior evaluates a land-into-trust application and decides which, if any, lands to acquire in trust, he must consider the impact of removing the land from the tax rolls pursuant to 25 C.F.R. § 151.10(e). The assessments provided in the DEIS and in this FEIS assist the Secretary in this evaluation. In 2005, the Supreme Court held, in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), that as a matter of Federal law, the Nation's reacquired lands were subject to taxation unless accepted into trust by the United States pursuant to Section 5 of the IRA.

The Treaty of Canandaigua, which established the Oneida reservation, also established the Cayuga reservation, as noted in Common Response 4. The Supreme Court's 2005 decision in *City of Sherrill v. Oneida Indian Nation of New York* did not impact the status of the Oneida Reservation, which was established by the 1794 Treaty of Canandaigua. Subsequent Federal district court decisions have supported the continued existence of the Oneida reservation. This position, therefore, is relevant and applicable to the present application by the Cayuga Indian Nation. The Proposed Action and Alternative 3: Enterprise Parcels into Trust would place the subject Cayuga Nation parcels into federal trust. 25 U.S.C § 465 requires that properties held in trust be exempt from property taxes.

The Cayuga Nation parcels subject to the fee-to-trust application comprise a total of ±125 acres of land. If these parcels are brought into trust, these parcels would no longer be subject to state or local taxation. Under the No Action Alternative, the BIA would assume that the Nation would continue to pay property taxes to the affected jurisdictions; however, should the subject parcels

not be taken into trust, the Nation would have to determine whether or not it would continue do so. The fiscal and taxpayer effects of the Nation no longer paying property taxes on the subject parcels is discussed in the DEIS and the FEIS, Section 4.8, "Socioeconomic Effects," and additional analysis and summaries are presented below.

Several commenters expressed concerns about removing thousands of acres from the local property tax rolls as a result of the Proposed Action. This concern potentially arises due to the Cayuga Indian Nation being guaranteed approximately 64,000 acres of reservation land under the Treaty of Canandaigua, signed by President George Washington in 1794. It should be noted, however, that the Cayuga Indian Nation's fee-to-trust application ("the Proposed Action") involves the transfer of only ±125 acres into federal trust. No additional fee-to-trust applications have been received to date, and consideration of any potential future federal trust land acquisitions and/or Cayuga Nation land-to-trust applications are hypothetical and cannot be assessed in this FEIS.

With regard to loss of taxes and potential undue burdens being placed on existing property taxpayers as a result of Cayuga land tax exemption, it is important to note that as a percentage of total affected tax base, the subject Cayuga Nation parcels contribute very little property tax. As shown in Table A.1, below, the Nation's parcels represent only 2.61 percent of the Town of Springport/Village of Union Springs tax base; and 0.42 percent of the Town of Seneca Falls tax revenue base. In respect to Cayuga and Seneca County taxes, the subject Cayuga tax parcels comprise substantially less than one-tenth of one percent of the total county tax revenues collected.

Table A-1
The Nation's Property Tax Payments as Percentage of Total County/Municipal Property Tax Collections

	Town of Springport (includes the Village of Union Springs)	Town of Seneca Falls[1]
County Taxes		
Total Property Taxes Collected	$29,565,821	$8,827,518
Cayuga Nation's Property Tax Bill	$16,784	$3,740
Nation's Percent of Total	***0.057%***	***0.042%***
Town/Village Taxes		
Total Property Taxes Collected	$313,173	$90,625
Cayuga Nation's Property Tax Bill	$8,173 [2, 3]	$3782
Cayuga Nation's Percent of Total	***2.61%***	***0.42%***

Notes: [1] Figures for Town of Seneca Falls provided by Seneca County in "Supplemental Seneca County Volume," Harris Beach PLLC (see Appendix J of the DEIS).

[2] Town/Village figures for the Town of Springport and Town of Seneca Falls were provided per Note 1, above. The provider stated that the Town of Springport figure does not include tax amounts for college chargeback, fire districts, water districts or sewer districts.

[3] Includes Town of Springport taxes and Village of Union Springs taxes.

Sources: http://www.orps.state.ny.us Accessed June 14, 2006. Town of Springport Fiscal Budget General Fund—Town-wide for 2006 "Estimated Revenues."
http://www.uscsd.info/departments.cfm?sublevel=8869&subpage=25&subsubpage=576. Accessed June 14, 2006.
Village of Union Springs Fiscal Budget General Fund for 2005-2006 "Estimated Revenues."
http://www.emsc.nysed.gov/mgtserv/2005_property_tax.htm. Accessed June 14, 2006.

As shown above, only a marginal amount of tax revenue would be foregone by the affected counties, towns and village should the Proposed Action proceed and the Cayuga Nation properties become exempt from local and county property taxation.

In addition to voicing concern about the effects on municipal tax revenues, several commenters expressed concern that property taxes throughout the affected area would increase to compensate for the loss of property taxes now paid by the Nation's. To assess the potential impacts on taxpayers, this analysis considers how individual households would be affected if they alone bore the entire burden of tax increases resulting from the loss of property taxes now levied on the Cayuga Nation's proposed land-to-trust properties. The households considered are owner-occupied homes in the affected county, town, and village locations. Table A.2, below, shows the amount of county, town, and village property taxes generated by the Nation's properties, and estimates the tax increases for each such homeowner in the affected jurisdictions.

Table A.2
Homeowner Tax Increases Resulting from Taking Cayuga Fee-to-Trust Lands off the Tax Rolls

	Cayuga County	Town of Springport (incl. Village of Union Springs)	Seneca County	Town of Seneca Falls
Median Household Income	$ 37,487	$43,785	$37,140	$37,245
Number of owner-occupied housing units	22,031	971	9,320	2,455
Cayuga Nation's Property Tax Bill (County, Town or Village Taxes)	$16,792	$8,173	$3,740	$378
Increase in Property Taxes per Household Under Proposed Action	$0.76	$8.42	$0.40	$0.15

Notes: U.S. Census Bureau 2000 (2007 estimates are available for counties but are not available for affected towns or village). See FEIS and DEIS Section 3.8 for data tables.

As can be seen in the above table, the tax increases experienced by individual homeowners would, in most cases, be less than one dollar per year, with Springport/Union Springs residents expected to experience a potential increase of $8.42 per year. To provide perspective and help assess the effect of increased taxes on household incomes, the table above also includes the median household incomes of the affected jurisdictions. These tax increases represent insignificant percentages of median household incomes. It should be noted that this analysis presents a worst-case scenario that overestimates the effect on taxpayers because it considers the effect on households bearing the entirety of any potential tax increases resulting from the Proposed Action, when, in actuality, any such increases would be spread more broadly among many classes of taxpayers, including commercial and non-residential properties, as well as owners of multi-family dwellings, such as apartment buildings.

SCHOOL DISTRICT EFFECTS

Several commenters have expressed concern regarding adverse impacts to school district tax revenue should the Nation no longer pay property tax. As discussed in "Section 4.8: Socioeconomic Effects" of the DEIS and the FEIS, impacts to school districts from decreases in property tax revenue as a result of the Nation no longer paying taxes would be minimal.

The Proposed Action would place nine tax lots comprising ±125 acres of Cayuga nation land into federal trust. If placed in trust, these Cayuga tax lots would no longer be subject to local property and school taxes. The amount of reduction in property tax revenues collected by the three affected school districts is shown in Table A.3, below.

The affected school districts would be expected to see decreases in property tax revenues of less than one-half of one percent, with such decreases in school district tax revenues ranging from a low of 0.15 percent to 0.54 percent, as more fully discussed below.

Looked at another way, the Proposed Action would result in minimal increases in an already significant number of properties that are not taxed for school district (and in most cases, for any municipal) purposes. The school district tax bases are comprised of taxable as well as tax-exempt land. Examples tax exempt land includes school district properties, and town, village, county, and New York State lands (e.g., parks, public works properties, public road rights-of-way, etc.). In addition, land owned by not-for-profit organizations is also given tax exemptions. These lands include, for example, religious institutions, scouting organizations, and land conservancies.

Also as shown in Table A.3, below, between 63 and 70 percent of the parcels comprising the affected school districts are exempt from paying school taxes. There are 2,797 tax exempt parcels in the Seneca Falls School District, and 837 parcels are off the tax rolls in the Union Springs School District. The Cayuga Nation fee-to-trust application includes only eight tax lots that would become tax exempt under the Proposed Action.

Table A.3
Tax Exempt Lots per School District and the Nation's Property Tax Payments as Percentage of Total School District Property Tax Collections

	Union Springs School District	Seneca Falls School District
Total Number of Tax Lots in District	1,332	3,997
Number of Tax Lots Exempt from School District Taxes (non-Cayuga Nation parcels)	837	2,797
Percentage of Tax Lots that are Exempt from School Taxes	63%	70%
Value of Existing Tax-exempt Tax Lots	$54,831,000	$209,803,000
Total Property Taxes Collected by District	$6,767,703	$9,301,887
Cayuga Nation's School Tax Bill for Subject Tax Lots	$36,222	$13,979
Cayuga Nation's Percentage of District's Total School District Property Tax Revenue	0.54%	0.15%

Source: NYS Office of Real Property Services (see: http://www.orps.state.ny.us/cfapps/MuniPro/muni_theme/county/sumextax.cfm?roll_yr=2007&swis=05; and http://www.orps.state.ny.us/cfapps/MuniPro/muni_theme/county/sumextax.cfm?roll_yr=2007&swis=45); 2005-2006 Union Springs School Tax Bill for fiscal year beginning 7/01/2005 and ending 6/30/2006; "Supplemental Seneca County Volume," letter from Harris Beach PLLC (see Appendix J of DEIS); and 2005 Town of Seneca Falls and County of Seneca Tax Bills as paid February 14, 2005.

As shown above, the Proposed Action would only place ±125 acres of land into trust, which would be exempt from property and school taxes. As such, the Proposed Action would reduce

property tax revenue by $36,222 (0.535 percent) for the Union Springs School District, and by $13,978.76 (0.15 percent) for the Seneca Falls School District.

To further assess the potential effect of removing the subject Cayuga Nation parcels from the property tax base this analysis considered the relationship between the Nation's property tax payments to the school districts and the educational expenditures directly incurred by the districts as reported to New York State Education Department. As shown in Table A.4, below, the percent of overall educational expenditures represented by the Nation's property tax contributions ranges from one-one hundredth of one percent to one-third of one percent of the district's total educational expenditure amount.

Table A.4
Cayuga Nation's Property Tax Payments as Percentage of Total School District Instructional Expenses

	Union Springs School District	Seneca Falls School District
Instructional Expenditures (including special education)	$11,141,130	$15,169,116
Cayuga Nation's School Tax Bill for Subject Tax Lots	$36,222	$13,979
Cayuga Nation's Percentage of District's Instructional Expenditures	0.33%	0.01%

Notes: Instructional Expenditures for General Education are K-12 expenditures for classroom instruction (excluding Special Education) plus a proration of building level administrative and instructional support expenditures. These expenditures include amounts for instruction of pupils with disabilities in a general education setting.

Source: The New York State School Report Card Fiscal Accountability Supplement, 2006-2007. See, for example, http://www.emsc.nysed.gov/irts/reportcard/2008/supplement/051101040000.pdf. Tax data as per notes in Table A.3, above.

Several commenters expressed concern about undue school district tax burdens being shifted to homeowners should the Cayuga Nation properties be taken off the tax rolls. Table A.5, below, presents the estimated property tax increase individual households would be expected to experience if the Cayuga Nation lands were taken off the school district tax rolls.

Table A.5
Homeowner School District Tax Increases Resulting from Taking Cayuga Fee-to-Trust Lands off the Tax Rolls

	Union Springs School District	Seneca Falls School District
Median Household Income	44,945	39,501
Number of Owner-Occupied Housing Units in District	3,335	3,869
Cayuga Nation's School Tax Bill for Subject Tax Lots	$36,222	$13,979
Increase in Property Taxes per Household Under Proposed Action	$10.86	$3.61

Source: U.S. Census Bureau 2000 (2007 estimates are available for counties but are not available for affected towns or village). Tax data as per notes in Table A.3, above.

As shown in the above table, taking the Cayuga Nation's proposed fee-to-trust lands off of the school district tax rolls would result in per-household property tax increases ranging from less than four dollars per year, to nearly $11.00 per year. It should be noted, however, that this estimation presents a worst-case scenario, and overestimates the tax increases potentially shifted to homeowners. In actuality, it is expected that the school district tax amounts shown above would be lower because any such increases would not fall entirely on owners of single-family dwellings. Such increases would also be spread among all property owners paying school district taxes, including owners of multi-family dwellings, and as owners of commercial and non-residential properties.

ECONOMIC EFFECTS ON ADJACENT PROPERTIES

Many commenters have asserted that the Proposed Action would reduce assessed values of adjoining and surrounding properties. Evaluation of surrounding property values is outside the scope of NEPA requirements and not appropriate to address in this FEIS. However, the Cayuga Indian Nation is not proposing any land use changes in conjunction with the Proposed Action. In addition to operating existing businesses, the Nation would reinstate pre-existing gaming facilities that would operate as they did prior to 2005. As such, the Nation's properties would continue to exist as they do today, therefore effecting no change in land use and consequently there is no reason to expect changes to property values of adjacent properties.

POSITIVE ECONOMIC EFFECTS OF THE PROPOSED ACTION

Further, on balance, the economic benefits directly and indirectly generated by the Proposed Action would have a positive effect on the local economy, including the following:

The Nation's LakeSide Entertainment businesses would reinstate 19 jobs to the Seneca and Cayuga County employment market. These 19 jobs were the jobs previously held by LakeSide Entertainment employees and were lost when the facilities closed temporarily. Upon the re-opening of the facilities, the Nation intends to re-establish these 19 jobs, with the intent of hiring area residents.

Including the indirect and induced economic activity that will occur off-site as a result of the Proposed Action, the total employment supported in the two counties from the LakeSide Trading operations plus the reopened LakeSide Entertainment facilities is estimated at 72 jobs, an increase over the Nation's current total effect of 24 jobs. Total employment in the broader New York State economy resulting from the Nation's operations under this Alternative is estimated at approximately 81 jobs. Each job created or supported results in the spending of wages and salaries in the local and regional economies, generating sales taxes and employment (income) taxes.

The annual operations of the LakeSide Trading and reopened LakeSide Entertainment gaming businesses are projected to have direct employee compensation in the two counties equal to about $1.3 million. Including indirect and induced activity that occurs off-site, the total employee compensation from the operation of the project are estimated at about $1.8 million in the two counties, and $3.8 million in New York State. Under this Alternative, the direct effect on the local economy, measured as output or demand, from the annual operation of the proposed project is estimated at $3.1 million, an increase of approximately $1.3 million over existing operations. Including activity that occurs off-site, the total effect from the annual operation of the proposed project on the two counties' economy is estimated at $4.2 million. The total effect on the New York State economy is estimated at $7.5 million annually.

COMMON RESPONSE 8: SALES TAXES

Commenters have asserted that the non-collection of taxes on the Nation's sale of gasoline and cigarettes has and will continue to create ongoing reductions in such tax collections and reduction in the local share of those taxes paid to our communities, placing a burden on property owners and non-Indian business owners, and resulting in an adverse economic effect on the communities in the affected counties.

As stated in Common Response 5, the Nation's right to sell tax-free cigarettes and gasoline derives from the status of the Nation's land as a "qualified reservation" under the New York Tax Law and the State's well-established policy of forbearance from taxation of Indian sales of cigarettes and gasoline.

COMMON RESPONSE 9: REGULATORY JURISDICTION

Commenters have stated that placement of lands in trust would have an adverse effect by precluding New York State and local authorities from regulating uses and activities on trust lands. Further, commenters expressed that placement of lands in trust could complicate New York State and local governance, particularly in the area of applying environmental laws uniformly and equitably over an entire geographic area. Commenters have also asserted that some New York State and local regulations are more stringent than their Federal counterparts in several important areas (environmental, health and safety, zoning).

The BIA is aware that in some cases State standards differ from their Federal and tribal counterparts. The United States holds approximately 56 million acres in trust across the country and the BIA is familiar with issues that arise from differences between state/local and tribal jurisdiction. It is not necessary or appropriate to engage in a side-by-side comparison or critique of the protectiveness of Federal/Nation laws versus New York State/local laws. The Nation proposes no change in land use as part of its Trust Land Application. Thus, there would be no direct environmental impacts that would result from a change in jurisdiction following the acquisition of land in trust – regardless of differences between Federal/Nation and New York State/local and requirements.

Moreover, the Federal government supports tribal self-determination. The Congress enacted the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 et seq., to counteract the precipitous decline in the economic, cultural, governmental, and social wellbeing of Indians. The IRA reflects a Federal policy of encouraging tribal self-government, both politically and economically. See *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Other statements of Federal support for tribal self-determination are contained, for example, in the Indian Self-Determination and Education Assistance Act of 1975. See 25 U.S.C. § 450a. One of the mechanisms under the IRA for fostering tribal self-government is the acquisition of land in trust. See 25 U.S.C. § 465. The Congress only requires trust lands to comply with Federal and tribal standards. It would undermine tribal self-government to compare and contrast tribal laws against state and local laws, and require equivalency between them as a prerequisite for placing land in trust. Instead, pursuant to the land-into-trust regulations, the Secretary of the Interior considers the jurisdictional problems and potential conflicts of land use that may arise by placing land in trust. 25 C.F.R. § 151.10(f).

The full effect of *City of Sherrill* on tribal versus New York State and local jurisdiction is a subject of dispute between the Nation and New York State and local governments. In any case, as noted above, the Nation's lands have always been subject to Federal laws. The baseline utilized for the Secretary of the Interior's consideration of potential jurisdictional problems and

land use conflicts arising from the Proposed Action is the conservative assumption that New York State and local governments currently have jurisdiction over the Nation's lands, and that by placing the land in trust status, jurisdiction would transfer to the United States and the Nation (except as otherwise provided by Federal law, e.g., 25 U.S.C. §§ 232, 233).

Irrespective of whether land is placed in trust or not, the land would continue to be regulated by Federal laws, including environmental laws. The Environmental Protection Agency (EPA) would continue to have primacy for environmental regulations and oversight. Through its policies, the Nation has indicated its commitment to standards of environmental protection, conservation, and public health and safety. Several commenters have questioned the qualifications and ability of Nation members to enforce federal regulations and statutes. It is the responsibility of the Nation to follow federal regulations, while it is the responsibility of the federal government to enforce these standards. The policing efforts and enforcement policies of federal regulatory agencies are not within the scope of this FEIS.

The combination of Federal and Nation regulatory oversight and the ongoing practice of consultation and coordination between the Nation and Federal, New York State, and local agencies could serve as a mechanism to mitigate potential effects stemming from the placement of lands in trust status. The fee-to-trust application associated with this Proposed Action would not affect government jurisdiction of any land outside the Nation properties. Area residents would continue to be subject to local, state, and federal laws, as they are now. Other comments are speculative and it is not appropriate to address them in this FEIS.

COMMON RESPONSE 10: TREATIES WITH THE CAYUGA INDIANS OF NEW YORK

Several commenters have recounted that New York State made treaties with Indian Tribes in state including the Cayuga. Commenters also express that subsequently, Indians sold lands to New York State, the lands were then re-sold to speculators and developers, and the lands have since changed hands on the open market.

The purpose of the EIS is not to reconcile the historical interpretation of the various treaties and the associated reservations and their respective lands that may exist with respect to the Cayuga or any other New York tribe. The history of treaties with the Cayuga and other New York tribes is extensive and has been the subject of much discussion and litigation. The Nation, New York State, and the Seneca and Cayuga Counties have provided extensive information including expert reports on the matter of the Cayuga which are a matter of public record.

An Act of the Congress is required to disestablish or diminish a Federal Indian reservation, and the Congress has not diminished or disestablished the Cayuga reservation.

COMMON RESPONSE 11: LAND USE AND ZONING

Under the Proposed Action, lands acquired in trust would be interspersed among non-trust lands. Several commenters expressed that local governments would have no control over the use of trust lands but would have control over the use of non-trust lands, and that this would have an adverse effect on their ability to cohesively plan and to uniformly enforce their zoning and land use regulations.

Under the land-into-trust regulations, the Secretary of the Interior must consider jurisdictional problems and potential conflicts of land use which may arise. See 25 C.F.R. § 151.10(f). [Is this taken into consideration or reflected in the EIS? Where?]The Nation is not proposing any change in land use as part of the Proposed Action, so no direct land use effects would result.

Moreover, the Nation's current land uses are generally consistent with local zoning and land use plans in the surrounding communities.

In addition, the Nation has adopted and followed a Cayuga Indian Nation Land Use Ordinance and other ordinances to protect and preserve public safety and human welfare. The Cayuga Indian Nation Land Use Ordinance mandates that, "no existing land use shall be substantially changed or altered; nor shall any building be constructed, added to or renovated; nor shall any landscape construction or site development work be performed without a Land Use Permit or Special Land Use Permit issued by the Council, as required by this Ordinance."

An alternative analyzed in the EIS, The Enterprise Properties into Trust Alternative to the Proposed Action, which was developed for analysis in the DEIS presents a more contiguous assemblage of parcels over which the Nation would control land use. Under this alternative, the Nation's properties in Seneca Falls and Union Springs would be placed into trust. The smaller parcel in Springport would remain under local land use control.

COMMON RESPONSE 12: CHECKERBOARDING

Numerous comments addressed the issue of checkerboarding and the concern that trust lands interspersed with non-trust lands could have an adverse effect on New York State and local governments and neighboring non-Indian landowners. Commenters have expressed concern over uniformity of environmental regulations, health and safety regulations, zoning ordinances and land use planning. Some commenters have also suggested that any checkerboarding that may result from the placement of land in trust under the IRA is contrary to the Supreme Court's decision in *City of Sherrill*. In addition, commenters stated that cooperative agreements between Indian tribes and local governments can serve to ease or eliminate checkerboarding issues.

Checkerboarding occurs throughout the United States, primarily as a result of the General Allotment Act of 1887, ch. 199, 24 Stat. 388, and other governmental policies that eroded the tribal land base and weakened tribal organizations. The General Allotment Act of 1887 opened for settlement tracts of tribally owned lands by dividing them into individual "allotments" for conveyance to individual tribal members and "surplus" lands for conveyance to non-Indians. The allotment policy resulted in enormous losses of tribally owned lands. Indian land holdings diminished from 138 million acres in 1887 to 48 million acres in 1934. See *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255-56 (1992); Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs). The Congress enacted the IRA to reverse the disastrous consequences of the prior Federal policies on the economic, cultural, governmental, and social well-being of Indian and to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-54 (1973); *Hagen v. Utah*, 510 U.S. 399, 425 n.5 (1994). The "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Congress recognized that Indian tribes could maintain political and economic self-sufficiency and improve the living conditions of their members only by halting the diminishment of tribal lands and by supplementing and protecting their land base. Of relevance here, IRA Section 5 provided the Secretary of the Interior discretionary authority to:

> [A]cquire . . . any interest in lands within or without existing reservations . . . for purposes of providing land for Indians; . . . title to any lands acquired pursuant to the

> Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. Today, the United States holds title to over 56 million acres in trust for Indian tribes and individuals.

With respect to property taxes, the Supreme Court in *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 265 (1992), found that checkerboarding is not a material concern because the tax assessor must make a property-by-property determination of whether or not a tax exemption or immunity applies. In addition, potentially significant issues of concern relative to checkerboarding can and in many cases have been addressed. With respect to civil and criminal jurisdiction, the Congress has given New York State jurisdiction over civil and criminal disputes, even if they involve Indians and even if they occur on tribal lands. See 25 U.S.C. §§ 232, 233. In addition, although local governments do not have the right to regulate use of trust lands, Federal laws, including Federal environmental laws, apply to those lands. See e.g., *Reich v. Sand & Gravel*, 95 F.3d 174, 181 (2nd Cir. 1996); *Smart v. State Farm Insurance Company*, 868 F.2d 929,935 (7th Cir. 1989); *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989).

In other states where land has been placed into trust, Indian tribes and local governments have entered into cooperative agreements dealing with a range of issues, such as law enforcement, fire protection, transportation, and land use. See e.g., Cross-Deputization Agreement Among the City of Bennington, Oklahoma, the BIA, and the Choctaw Nation of Oklahoma (1994); Memorandum of Understanding between Squaxin Indian Tribe and Mason County Fire District (2002); Joint Powers Agreement between the Pueblo of Acoma and the New Mexico Department of Transportation (2003); see generally *Nevada v. Hicks*, 533 U.S. 353, 393 (2001). Such voluntary agreements can reduce or eliminate impacts potentially arising from the configuration of tribal trust lands. In substance, BIA has found that these agreements are essentially the same as intergovernmental accords that have been concluded between neighboring municipalities, competing regulatory agencies, and states that border each other for purposes of resolving jurisdictional issues and ensuring the health and safety of their respective citizens.

Beginning in 2003, the Cayuga Indian Nation began to reacquire within its historic reservation from willing sellers on the open market. The current land tenure pattern within the Cayuga reservation is largely the consequence of prior purchases of Cayuga lands by New York State without federal approval as required by the Trade and Intercourse Act, 25 U.S.C. § 177, subsequent sales to non-Indians, and reacquisition of certain lands by the Cayuga Nation as the lands have become available.

While Nation lands conveyed into trust would not be subject to local land use plans, zoning, and other local regulations, the Nation has adopted and implemented the Cayuga Indian Nation Land Use Ordinance and other ordinances to protect and preserve public safety and welfare and the environment.

The potential jurisdictional problems and conflicts of land use that may arise from the intermixing of Federal, New York State, local and Nation jurisdiction in areas where Nation land would be conveyed into trust could be resolved through a path of cooperative dialogue between the Nation and New York State agencies and local governments in Seneca and Cayuga Counties. As mentioned above, the BIA has many examples throughout the United States where Indian

tribes have been able to successfully work with state agencies and local governments to resolve jurisdictional conflicts where an intermixing of land ownership occurs as a result of a trust decision.

Finally, the Supreme Court decision in *City of Sherrill v. Oneida Indian Nation of New York* indicated that the proper way for an Indian Nation to reassert sovereignty over the lands was to request the Secretary of the Interior to accept them into trust status under Section 5 of the IRA and its implementing regulations at 25 C.F.R. Part 151. The Supreme Court characterized these regulations as being "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill v. Oneida Indian Nation of New York*, 554 U.S. 197, 220-221 (2005). Before approving an acquisition, the Secretary of the Interior must consider, among other things, jurisdictional problems and potential conflicts of land use which may arise. See 25 C.F.R. § 151.10.

A lack of contiguity or compactness due to checkerboard ownership could affect a community's ability to effectively plan and regulate. Potential jurisdictional problems are addressed in the DEIS, which also addresses potential conflicts of land use that could occur as a result of conveyance of Nation lands into trust. Consideration of these issues, pursuant to 25 C.F.R. § 151.10, is reflected in the configuration of the Preferred Alternative that is identified in the Final EIS.

COMMON RESPONSE 13: USE OF NEW YORK STATE AND SENECA AND CAYUGA COUNTY INFORMATION IN PREPARING THE DRAFT EIS

Several commenters state that a complete EIS under NEPA must consider substantial and substantive comments and information previously submitted to the BIA on the Trust Land Application.

The comments on the DEIS submitted by Seneca and Cayuga Counties on multiple dates and all enclosures were reviewed and considered by the BIA in preparing the FEIS. The BIA also reviewed and considered all information submitted at the public hearing on the DEIS and comments submitted during the public comment period. Further, the BIA has reviewed and considered all previous information submitted by New York State and local governments on the Nation's Trust Land Application and the Pre-publication DEIS. Additionally, the BIA considered all comments submitted during the EIS scoping process (including the public scoping meeting held on March 1, 2006.

The BIA, through its third party contractor, solicited supplemental information from various Federal, New York State, Seneca and Cayuga County and local sources during preparation of the Pre-publication DEIS and the DEIS. Additional information was also solicited from the Nation related to its governmental, economic, social and cultural programs and activities. Information provided by the various parties is referenced throughout the document and was considered by the BIA in the analysis of potential effects. The BIA's consultation and coordination on this matter is found in Section 6 of this FEIS. Copies of consultation and coordination letters are found in Appendix C of the DEIS.

COMMON RESPONSE 14: CITY OF SHERRILL SUPREME COURT DECISION

A number of commenters have expressed various opinions and interpretations about the Supreme Court's 2005 decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). Commenters have referenced the Court's opinion in relation to presenting their personal opinions on topics such as citizen's rights, Indian sovereignty, reservation land, treaties,

checkerboarding, taxes, trust status, and Federal trust authority. Numerous commenters have suggested, based on their interpretation of the *City of Sherrill* decision that the Nation's Trust Land Application is in "violation" of the Supreme Court's decision.

City of Sherrill addressed the Oneida Nation's opposition to paying property taxes to the City of Sherrill on the grounds that the Nation's re-acquisition of fee title to discrete parcels of reservation land revived the Oneida's sovereignty over each parcel. The Supreme Court found that too much time (two centuries) had passed to allow the Nation to unilaterally reassert sovereignty over these parcels. The Supreme Court did not find that the Congress had disestablished or diminished the Oneida reservation. Referring to practical concerns associated with the Nation's unilateral reassertion of sovereign control and removal of the parcels from the City of Sherrill's tax rolls, and potential future litigation, the Supreme Court rejected the Nation's theory of the case and stated that "Section 465 [Section 5 of the IRA] provides the proper avenue for the Oneida Nation to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *City of Sherrill*, 544 U.S. at 221. The Supreme Court explained, "Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the areas governance and well being. Title 25 U.S.C. § 465 authorizes the U.S. Secretary of the Interior to acquire land in trust for Indians and provides that the land shall be exempt from New York State and local taxation." Id. At 220. Before doing so, the Secretary of the Interior must consider the criteria provided at 25 C.F.R § 151.10, including the purpose for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls, and jurisdictional problems and potential conflicts of land use which may arise. The Supreme Court found that the Department of Interiors' land-into-trust regulations "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."

Consistent with the Supreme Court's decision, the Cayuga Nation submitted a Trust Land Application to the Eastern Regional Office of the Bureau of Indian Affairs. Pursuant to Federal statutes and regulations, including 25 U.S.C. §§ 465, 2202 and 25 C.F.R. Part 151, the Cayuga Nation petitioned the Secretary of the Interior to accept the transfer of certain parcels of land into federal trust.

COMMON RESPONSE 15: COMMUNITY SERVICES AND INFRASTRUCTURE

A number of commenters have stated that the Nation's Trust properties will be a burden on the local infrastructure (roads, police, fire departments, schools, and emergency services etc.) since the properties will be exempt from sharing in the cost to maintain such infrastructure and will not pay for services that occupants of trust properties will continue to use. As stated in Sections 4.9, "Community Infrastructure Effects," and 4.10 "Community Service Effects," under the Proposed Action, the Nation's properties would continue to be used as they are now, and there will be no changes to onsite or area water supply, wastewater, energy or solid waste. Tribal nations have the ability to contract emergency services and utilities as needed, and do not receive these services for free. The Nation will continue to pay for all utilities, or negotiate agreements to provide them as necessary. Further, the Nation will continue to pay for necessary community services it uses, and the Nation will explore cooperative agreements in regard to community service providers, including emergency services, to ensure that the Nation's properties and patrons of its businesses are adequately protected. Currently, Tribal members do not live on the properties subject to the trust application. As discussed in Common Response 24, members of the Cayuga Indian Nation are not anticipated to relocate to the Project Area.

Therefore, the Proposed Action is not anticipated to generate any increased school attendance, and the use of these services is not expected. Since they generally do not use the infrastructure, there would therefore be little direct impact from use of the local infrastructure from Tribal members by placing the land into trust. Please refer to Common Response 7: Real Estate Taxes and Economic Effects for a discussion of potential revenue losses to the schools. If Tribal members do live on the subject properties, they would typically be employed off-reservation, and subject to taxes on their wages and purchases off-reservation. The Nation's business concerns on the lands subject to the trust application serve the local population and employ local residents. By supporting local residents that do pay the taxes that support the infrastructure necessary to operate the businesses, there may be an indirect tax benefit.

COMMON RESPONSE 16: UNFAIR COMPETITION

A number of commenters have stated that the Cayuga Indian Nation has an economic advantage over competing businesses by not charging or collecting state taxes. Commenters have stated that the since the Cayuga Indian Nation enterprises would not remit sales and excise taxes they would be able to offer their customers lower prices, attract more customers, and undercut their competitors. Commenters have further stated that the non-Indian businesses, which pay taxes, may be unable to compete and may be forced to decrease the size of their operations, number of employees, or shut down, which would result in additional tax losses and special assessment revenues.

The Nation currently operates two LakeSide Trading commercial enterprises, one in Seneca Falls, Seneca County, and the other in Union Springs, Cayuga County. No change in use is planned for these, or any other property, as part of this application. The DEIS cannot analyze speculation by projecting that there may be future applications. Approving the application would only exempt the ±125 acres from property taxes.

The other tax issues raised by commenters relate to the Nation's status as a sovereign Indian Nation, not whether their property is held in trust. These issues are subject to decisions make by Congress and the Federal Courts, and are not related to the Nation's fee-to-trust application. The payment or avoidance of other taxes is not part of the Nation's application. The Bureau of Indian Affairs ("BIA") does not support the nonpayment of any legally owed taxes by Indian Tribes. Approval of the application would only exempt the ±125 acres from property taxes, which is less than one percent of the Counties' property taxes, not businesses taxes. The BIA assumes that if the trust application is not approved the Nation would continue to pay property taxes to the affected jurisdictions, however, the Nation would have to determine whether or not it would continue to do so.

Commenters have also suggested that non-Indian businesses will be at a competitive disadvantage because they have to comply with all local regulations. While the Nation's properties would no longer be subject to local regulations, the Cayuga Indian Nation has adopted its own regulations which are contained in Appendix K of the DEIS. The absence of local regulations is not anticipated to give the Nation's businesses any competitive advantage over other businesses. Any differences between the Nation's and local government's land use ordinances are not considered a means to providing competitive advantage.

COMMON RESPONSE 17: FUTURE DEVELOPMENT

A number of commenters have stated that the DEIS should consider the potential environmental impacts future trust applications, the acquisition of more land, and the expansion of the Nation's business operations (i.e., gasoline sales, convenience store operations, campgrounds, and

gaming). Although the Nation has acquired additional land, this additional land is not part of the current Trust application. Should the Nation desire to place additional land into trust, additional applications would need to be submitted, and their consideration would be subject to review. At this time, the Nation has no plans to expand its businesses or place any of the new land into trust. Therefore, any consideration of these concerns would be hypothetical, and analysis is not required under NEPA.

COMMON RESPONSE 18: DEIS COMPLETENESS

A number of commenters stated that the Draft Environmental Impact Statement (DEIS) lacked the critical information needed for a thorough review of the application. They further stated that the DEIS did not require mitigation of known adverse impacts, and that it should be withdrawn from consideration. The Bureau of Indian Affairs reviewed and accepted the DEIS as complete for public review on May 8, 2009. Prior to this date, the DEIS was circulated to the Cooperating Agencies for their review. The DEIS was revised based on the comments received during this time. Therefore, the DEIS does contain sufficient information required for a thorough review of the application, and will not be withdrawn.

Furthermore, the DEIS, after a thorough analysis of the potential impacts, did not identify any significant adverse impacts that would result from the proposed action. Therefore, there are no known adverse impacts and no mitigation is required or proposed.

COMMON RESPONSE 19: SPECIAL TREATMENT OF INDIANS

A number of commenters indicated that in their opinion, descendants of original Indian tribes should be treated as citizens of the United States, that Indian Nations no longer exist, and that the federal government should dissolve the Bureau of Indian Affairs. Many of these comments have no basis in law. These policy issues are, however, outside the scope of this FEIS. The United States Constitution provides Congress the sole responsibility for regulating Indian affairs. The BIA is obligated to carry out the laws as designated by Congress regarding Indian tribes.

COMMON RESPONSE 20: PENDING LITIGATION

A number of commenters have stated that the DEIS did not address the pending litigation (such as appeals of Cayuga Indian Nation *v* Gould, 615.1CA 08-02582) and therefore should be withdrawn, and the NEPA process stayed until there is a final disposition of the pending litigation.

The Cayuga Nation is a federally recognized tribe, and has been so since Congress ratified and President George Washington signed the Treaty of Canandaigua of 1794. Lawsuits concerning cigarette taxes or land claims cannot alter the facts of their federal recognition nor their rights under the Indian Reorganization Act. Litigation over cigarette or gasoline taxes, Indian land claims or other issues involving the Cayuga Nation are unrelated to the land-to-trust application, and are outside the scope of the present NEPA analysis. Processing the land-to-trust application will not be put on hold pending the resolution of such issues, and comments on these issues will not be considered or addressed further in the present analysis.

COMMON RESPONSE 21: POTENTIAL ENVIRONMENTAL IMPACTS

A number of commenters stated that the proposed action would result in significant adverse impacts to wetlands and natural resources, including potential impacts to Cayuga Lake, since the State, counties, towns and villages would lose the jurisdiction to review, monitor, or regulate activities that have an environmental impact on the air, soil, and water; enforce the fire and

building codes on structures existing or constructed on trust lands; permit and track the handling, transporting, disposing, and cleaning-up hazardous materials; sample quality of petrochemical products at gas stations; register and inspect underground fuel storage tanks; ensure that gas discharges are cleaned up; manage and protect fish and wildlife populations; restrict and regulate development within floodplains and floodways; protect cultural, historic, archaeological, and architecturally important resources; review and permit sound, economic development of mineral resources; regulate the application of pesticides; and enforce the New York State Sanitary Code.

States have to demonstrate the adequacy of their environmental program and compliance with Federal statutes to receive primacy from the United States Environmental Protection Agency (EPA) for any specific environmental program implementing Federal environmental laws. EPA Indian Policy is that States applying to administer Federal environmental programs within Indian Country must adequately demonstrate their jurisdiction to do so. We are not aware of any such demonstration regarding the Cayuga Nation's properties. Environmental primacy still rests with the US EPA regarding the Cayuga Nation's properties.

Managing the potential for Underground Storage Tanks (UST) leaks is the only potentially significant environmental issue for managing the Cayuga Nation's properties. New York State has never been given primacy from EPA for UST. Without New York State holding UST primacy from EPA, managing any UST leaks would remain an EPA issue, regardless of the decision on the application. The Bureau of Indian Affair Eastern Regional Environmental Scientist has reviewed the UST reconciliation logs and soil boring data and found no evidence of UST leaks at either convenience store.

COMMON RESPONSE 22: TRAFFIC

A number of commenters stated that the traffic analysis was outdated, and/or did not consider the potential impacts of the gaming in operation. The EIS explains that the environmental baseline for traffic is the actual traffic on the date of the Cayuga Nation's application. In addition, the EIS projects a return to that environmental baseline traffic. The traffic analysis, including the build years and no-build condition, has been updated as part of this FEIS, and the new information and analysis is provided in Sections 3.12 and 4.12.

Existing traffic conditions in the study area were established based on traffic counts conducted in August, 2009 (during the peak summer months). The data collection program consisted of manual and Automatic Traffic Recorder (ATR) counts conducted at various locations throughout the study area. No unusual weather or traffic conditions were observed during the count period.

The traffic analysis contained in this FEIS assesses the potential traffic impacts of the Proposed Action and its alternatives on traffic and transportation in the affected areas. The existing conditions traffic analysis does not reflect the actual environmental baseline on the date of the Nation's fee-to-trust application. Actual environmental baseline traffic conditions would reflect the existence of operating gaming facilities at the Seneca Falls and Union Springs properties. The temporary closing of these gaming operations necessitated the analyses presented.

However, the analysis of the future with the Proposed Action, or the "Build Condition," does consider the effects of reopening of the Nation's LakeSide Entertainment gaming facilities located on NYS Route 89 in the Town of Seneca Falls, Seneca County, and on NYS Route 90 in the Village of Union Springs, Cayuga County.

The trip generation rates used to compute the vehicular trips generated by the reopening of the gaming operation were developed based on information presented in the article "Trip Generation

Characteristics of Small to Medium-Sized Casinos" which was presented as part of the Institute of Transportation Engineers (ITE) 2001 Annual Meeting Compendium. These rates were compared with the trip generation rates presented in the *Institute of Transportation Engineers (ITE) Trip Generation Manual 8th Edition* for Land Use Code #473, "Casino/Video Lottery Establishment." When the rates were compared side by side, the rates from the article provided for a more conservative analysis and thus were used for this analysis.

The updated traffic analysis contained in the FEIS confirms that the Proposed Action would not result in any significant adverse impacts to traffic and transportation.

COMMON RESPONSE 23: CRIMINAL JURISDICTION

A number of commenters expressed concern that the Nation's properties would become a haven for criminals, terrorists, and illegal activities. In particular, commenters question how youths would be prevented from illegally purchasing tobacco products or gambling, and how local authorities would respond to criminal activities.

While the local governments would lose some jurisdiction, this is acknowledged within the Environmental Impact Statement. This issue will be further addressed within the separate review process required under the 25 CFR 151 regulations. Within New York State, Congress provided New York State police and courts jurisdiction over both criminal and civil offenses on reservations, as is codified in 25 USC 232 (July 2, 1948 for criminal jurisdiction) & 233 (September 13, 1950 for civil jurisdiction). As a result, there are no criminal or civil offense jurisdictional issues on Indian lands within the State of New York. As restricted-fee treaty lands the lands are defined by Congress as Indian Country by Federal statute in 18 U.S.C. 1151, by being within the borders of their reservation established by the Treaty of Canandaigua of 1794, signed by President George Washington.

COMMON RESPONSE 24: RELOCATION OF CAYUGA INDIANS TO THE PROJECT AREA

A number of commenters have noted that the EIS presented the following two statements which appeared inconsistent with each other:

> *"The Nation intends to reestablish tribal presence in their homeland around Cayuga Lake, which holds for them cultural and religious significance"*
>
> *"It is not anticipated that members of the Cayuga Nation would relocate to the Project Area."*

The first statement was presented in the context of the purpose and need of the Proposed Action. The second statement was presented in the context of the overall demographic composition and employment base of Seneca and Cayuga counties. The second statement has been clarified in the FEIS to state the following:

> *"It is not anticipated that members of the Cayuga Nation would relocate to the Project Area* ***in sufficient numbers to significantly alter the demographic composition or employment base of Seneca/Cayuga County."***

While the Proposed Action is not anticipated to involve a relocation of the Nation's people to the project area, the Nation presence in the area will be established by the operation of its businesses.

COMMON RESPONSE 25: CAYUGA INDIAN NATION 2003 BUSINESS PLAN

A number of commenters have noted that the pre-publication draft of the EIS referenced a 2003 Cayuga Indian Nation Business Plan. Knowledge of this business plan was obtained from discussions between the EIS Contractor and Cayuga Indian Nation representatives. However, the physical plan was never provided to the BIA or the EIS Contractor, and was withheld from the EIS as confidential business information pursuant to Exemption 4, 383 DM 15, § 5.6; 5 U.S.C. §552(b). References to this plan were therefore removed from the draft prior to it being declared complete for public review.

COMMON RESPONSE 26: CUMULATIVE EFFECTS OF ONEIDA AND CAYUGA APPLICATIONS

A number have commenters have stated that the Oneida and Cayuga Indian Nation trust applications will result in cumulative impacts to New York State and its residents. As stated in the EIS, no cumulative impacts are anticipated for the Proposed Action under any of the analyzed alternatives. No other currently active proposals are similar to the proposal in either county. Tribal fee-to-trust applications in other New York counties, such as the Oneida application, are also not anticipated to produce statewide cumulative impacts, since any impacts from other proposals, if any, would be localized. Implementation of the Nation's proposal would return both Counties' conditions to those of the environmental baseline date of the Nation's application, which included the gaming operation. With no anticipated impacts resulting from the proposal, and no other proposals impacting the same resources, no cumulative impacts are anticipated.

COMMON RESPONSE 27: HAZARDOUS MATERIALS

A number of commenters have stated that the Proposed Action could impact soil and water resources, including Cayuga Lake, because of potential petroleum releases, or migration of other hazardous materials such as fertilizers and pesticides. The EIS included an analysis of the potential hazardous materials impacts of the Proposed Action and its alternatives. Managing the potential for UST leaks is the only potentially significant environmental issue for managing the Cayuga Nation's properties. No other potentially significant adverse impacts to the water quality of Cayuga Lake, adjacent farmland, groundwater, or soil contamination are anticipated from the Proposed Action.

Under all of the alternatives, including the No Action Alternative, the Nation's gasoline filling stations would continue to operate, and for any gasoline filling station, there is always the possibility of a release from continuing operations. For all of the alternatives, other than the possibility of a release from continuing operations at each retail gasoline station, no significant impacts associated with hazardous materials would result. Therefore, the Proposed Action is not any more likely to result in a hazardous materials impact than the No Action Alternative.

Furthermore, irrespective of whether land is placed in trust or not, the land would continue to be regulated by Federal laws, including environmental laws. The Environmental Protection Agency (EPA) would continue to have primacy for environmental regulations and oversight. As discussed above, under Common Response 21, New York State has never been given primacy from EPA for USTs. Managing the potential for UST leaks is the only potentially significant environmental issue for managing the Cayuga Nation's properties. Without New York State holding UST primacy from EPA, managing any UST leaks would remain an EPA issue, regardless of the decision on the application. The Bureau of Indian Affair Eastern Regional Environmental Scientist has reviewed the UST reconciliation logs and soil boring data and found

no evidence of UST leaks at either convenience store. Through its policies, the Nation has indicated its commitment to standards of environmental protection, conservation, and public health and safety.

COMMON RESPONSE 28: SEGREGATED COMMUNITY

Many commenters have suggested that the Nation land-into-trust application would create a segregated community or a "reservation" community where none currently exists. The Nation would, however, continue to interact with the non-Indian community through continued operation of its existing businesses, which serve Indians and non-Indians. Further, over 64,000 acres of land were guaranteed to the Nation as reservation land under the Treaty of Canandaigua of 1794. Therefore, the Proposed Action would not introduce a reservation culture to the area, but would support a tribal community that has been present for many years. The DEIS has appropriately described the purpose and need of the Proposed Action and it is not appropriate to analyze the validity of the federal land-into-trust program in this FEIS.

COMMON RESPONSE 29: POTENTIAL SOCIAL IMPACTS

Many commenters have suggested that the Proposed Action would induce a burden to a number of social services, including addiction services, welfare, and Medicaid. Commenters have also expressed concerns over adequate resolution of disputes, attracting a population with higher rates of substance abuse to the community, and increasing social problems associated with gambling (such as divorce, abuse, bankruptcy, and crime).

There is no evidence to suggest that the above mentioned social issues would result from the Proposed Action. As discussed in the DEIS, the direct relationship between casino gambling and increases in local crime rates and corresponding increases in costs of community social services, has not been definitively established. Although the Nation recognizes that further study is needed, studies to-date have not shown a direct correlation between the relationship of gambling facilities and increases in crime rates or social problems. Under the Proposed Action, the Nation would operate small-scale gaming facilities, as it did prior to 2005, and that have historically attracted people primarily from the local area. The Nation and all presiding governmental agencies encourage responsible gambling practices; the Nation would provide information to its patrons regarding counseling services in the area.

COMMON RESPONSE 30: EFFECTS ON PUBLIC ROADWAYS, RIGHT OF WAYS, AND WATERWAYS

A number of commenters have suggested that the Nation has, or potentially will hold, claims to roadways and waterways that are encompassed by or adjacent to the Nation's land. Commenters have also expressed concern regarding utility easements and other infrastructure rights-of-way. Commenters have stated that a number of important utility lines exist in the region and could be negatively affected by future Nation land acquisitions, such as high voltage electric transmission lines, intercontinental high pressure natural gas pipe lines, regional natural gas pipe line, liquid petroleum pipe line, and telecommunication cables including a fiber optic trunk cable. Commenters have expressed concern that the Nation could potentially seek to put these lands into trust.

Roadways and waterways are owned by and under the jurisdiction of the local, state, and federal government, as applicable. These thoroughfares are contained within rights-of-way under the purview of the appropriate government agency. Without the willing transfer of land from one of

these rights-of-way to the Nation, the Nation cannot obtain ownership of any roadway or waterway that may pass through or be adjacent to Nation land. No municipal, state or federal government agency has expressed any intention to sell or offer any portion of these thoroughfares to the Nation.

With the exception of the Nation's Union Springs parcel, the subject properties do not incorporate any existing easements or rights-of-way. As discussed in the DEIS, New York State Electric and Gas ("NYSEG") has several easements over the property owned by the Nation to provide electric and gas service. There are NYSEG transmission lines that cross the Union Springs parcel that are a link in the infrastructure that provides electric and gas service throughout Cayuga County. The Union Springs parcel also contains a natural gas well to which Devonian Energy has access rights. These rights were transferred to the Union Springs Central School District in 1981 and a gas well was drilled. This well has been used as a source for fuel for heating the high school and district offices. Under the Proposed Action, the Nation's Union Springs parcel would be taken into trust subject to all of the existing access rights. Therefore, the Proposed Action would not impede existing utility or infrastructure lines.

Consideration of future land acquisition, including transfers of easements and rights-of-way ownership, and land-into-trust applications are hypothetical and are not required to be analyzed under NEPA.

COMMON RESPONSE 31: WILDLIFE HARVESTING

Many commenters have expressed concern that under the Proposed Action, the Nation would be exempt from NYSDEC hunting regulations, and will not be subject to any limitations for wildlife harvesting. Commenters have asserted that unregulated wildlife harvesting on the Nation's properties would negatively affect the local sporting industry, wildlife management in the area, and wildlife populations along the eastern seaboard.

The subject properties associated with the Proposed Action comprise a small overall land area of approximately 125 acres. Much of this area is noncontiguous, making each individual parcel much smaller in most cases. Any wildlife harvesting on such small areas of land would have minimal consequences on wildlife populations. There is no evidence to suggest that the subject properties harbor significant wildlife habitats, or great quantities of wildlife, that could affect the local or regional wildlife behaviors and patterns. As discussed in the DEIS, no significant adverse impacts to wildlife habitats are anticipated to result from the Proposed Action. Furthermore, no land use changes are associated with the Proposed Action.

COMMON RESPONSE 32: RIGHTS OF NON-INDIANS ON TRIBAL LANDS

Commenters have questioned the legal status of non-Indians on tribal lands. Commenters have asserted that non-Indians would unknowingly lose their legal civil rights when on tribal lands or when passing through tribal lands on public roadways.

The sovereign status of tribal lands in trust does not grant total immunity to consequences from unlawful actions. Tribal lands remain under federal and tribal jurisdiction, and New York State is given authority to settle civil and criminal disputes (codified in 25 USC 232 (July 2, 1948 for criminal jurisdiction) & 233 (September 13, 1950 for civil jurisdiction). Citizens of the United States would be protected under federal law on tribal lands, as well as New York State law for criminal and civil issues.