

CITY OF ONEIDA

LEO MATZKE
Mayor

COMMON COUNCIL
Wendy Cary
Edward Hanifin
Erwin Smith
Army Carinci
Donald Moore
Bruce Coe



109 North Main Street
PO Box 550
Oneida, New York 13421-0550
Tel.: 315-363-4800
Fax: 315-363-9558

January 30, 2006

VIA FAX : 615-564-6701
VIA OVERNIGHT MAIL

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

Re: Comments by the City of Oneida as to the Potential Impacts of the Oneida Indian Nation of New York's Acquisition of Trust Land within the City of Oneida

Dear Mr. Keel:

The City of Oneida (the "City") submits the following comments to the application by the Oneida Indian Nation of New York (the "Nation") for the fee-to-trust land acquisition of forty-six (46) parcels located within the City (the "Application").

I. General Description of the City and its Population

The City is located in central New York State, in Madison County, just south of Interstate 90, the main east-west thoroughfare across the State. Attached to this letter as **Exhibit A** is a map showing the location of the City within Madison County. The City, having a population of approximately ten thousand eight hundred fifty (10,850), is the only city in Madison County. The City consists of approximately eighteen (18) square miles, four (4) square miles of which are the urban center and fourteen (14) square miles of which are rural in nature. The City is bound on the north and east by Oneida Creek (also the boundary between Madison and Oneida Counties), on the south by the Towns of Stockbridge and Lincoln and on the west by the Town of Lenox. Attached to this letter as **Exhibit B** is a map of the City, with an inset showing the City's exact location within Madison County.

II. Description of the Nation's Current 32-Acre "Reservation"

The Nation's 32-acres, variously referenced as the Nation's "territory" or "reservation" (hereinafter referenced for purposes of ease, but without legal significance, as the "reservation") is located in the southern part of the City, east of and abutting State Route 46 (*see* lower right corner of Exhibit B, in the color map it is represented by the small red rectangle approximately one-half inch above the word "Stockbridge"; in the black/white map, it is shown as the small rectangular area in lower right corner of the map, about one-half inch above the word "Stockbridge" and surrounding the words "Territory Rd.").

III. Parcels At Issue

In its Application, the Nation has requested that the United States accept into trust seventeen thousand three hundred ten+ (17,310.43) acres of non-contiguous land scattered throughout Madison and Oneida Counties. **Exhibit A** shows all parcels in Madison and Oneida Counties for which the Nation seeks trust status. The forty-six parcels located within the City's boundaries ("City Parcels") include one thousand thirty-five+ (1,035.8) acres, which represent 7.4% of the City's total acreage. **Exhibit B** shows the location of the City Parcels throughout the City and their geographic relation to the Nation's current 32-acre reservation.

IV. The United States Supreme Court's *City of Sherrill v. Oneida Indian Nation* Decision

On March 29, 2005, the United States Supreme Court ruled that the Nation could not "unilaterally revive its ancient sovereignty" over parcels the Nation had purchased in the City of Sherrill. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S. Ct. 1478, 1483, 2005 U.S. LEXIS 2927, at *12 (2005), *petition for reh'g denied*, 125 S. Ct. 2290, 2005 U.S. LEXIS 4317 (2005) ("*City of Sherrill*"). The Supreme Court based its decision in large part on the disruptive consequences that such a unilateral reestablishment of present and future Indian sovereign control would have. *City of Sherrill*, 125 S. Ct. at 1493, 2005 U.S. LEXIS 2927 at *43. Of particular concern to the Supreme Court was the disruption of and serious burden to the State and local governments resulting from the exercise of tribal sovereignty and governmental jurisdiction over a checkerboard pattern of non-contiguous parcels located amid areas developed and governed by local municipalities. *Id.*

The Supreme Court pointed to the trust application process authorized by 25 U.S.C. §465 and its implementing regulations in 25 C.F.R. Part 151 as the "mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being". *Id.*, 125 S. Ct. at 1493, 2005 U.S. LEXIS 2927 at *45. With this instruction to the Nation, the Supreme Court certainly could not have intended that the trust application process and decision be an automatic approval. Rather, the process must be as the Supreme Court described, "sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory". *Id.*, 125 U.S. at 1494, 2005 U.S. LEXIS 2927 at *45.

A sensitive and reasoned consideration of the Part 151 factors as directed by the Supreme Court under the facts and circumstances of the Nation's efforts to exercise sovereignty and governmental jurisdiction over the non-contiguous parcels scattered throughout the City compel the rejection of the Nation's Application as it relates to the City Parcels.

V. The 2nd Circuit's Reversal of the Cayuga Nation Land Claim Judgment

The United States Court of Appeals for the 2nd Circuit based its reversal of the Northern District of New York's Judgment in favor of the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma on the Supreme Court's *City of Sherrill* decision. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 267, 2005 U.S. App. LEXIS 12764 at *4 (2nd Cir. , 2005)[*"Cayuga Land Claim"*]. While the *Cayuga Land Claim* did not involve the reassertion of sovereignty over recently acquired lands as had been the issue in *City of Sherrill*, it was a possessory claim seeking immediate possession of land and the ejection of current owners. Because the 2nd Circuit concluded that the nature of the claim and the remedies sought were inherently disruptive, the 2nd Circuit reversed the Judgment entered by the District Court and entered judgment for defendants. The 2nd Circuit's decision in the *Cayuga Land Claim*, like *City of Sherrill*, requires the BIA to consider and prevent the inherent disruption that would result with the Nation's exercise of governmental jurisdiction over parcels that have been governed for over two hundred years by the State of New York and its local governments.

VI. Current Status of the Nation's Lands

The current status of the Nation's fee lands and 32-acre reservation is unclear. The Nation claims, and acts as if, the lands are Indian reservations lands, immune from State and local taxation and regulation. The City considers the fee lands to be Nation-owned, but subject to all City, local and State taxation and regulations. The City has historically considered the 32-acre reservation as Indian "territory" and, absent emergency situations, has refrained from exerting governmental jurisdiction over that area of land.

All of the fee parcels are held by the Nation in fee simple. The Nation has claimed that the fee parcels are held in "restricted status". The Department of Interior has expressed its opinion that the lands at issue in the Nation's Application for fee-to-trust acquisition by the United States do not have the legal status of being "restricted against alienation". Attached as **Exhibit C** is a copy of the Department of Interior's June 10, 2005 letter to Oneida Nation Representative Halbritter, so stating and directing, in its attached internal memorandum, that the involved Realty Officer file revised transmittal documents for the deeds striking the notation regarding restricted status. Furthermore, none of the deeds from the sellers into the Nation contained any restriction against alienation. Thus, the fee parcels at issue in the Nation's Application are held by the Nation in unrestricted fee status.

Nor are the Nation's fee lands "reservation lands" over which the Nation is recognized by the United States as having governmental jurisdiction. While there has not yet been a final judicial determination whether the Nation's historic State treaty reservation was disestablished or diminished, there is no evidence to support the Nation's contention that the Nation's fee lands constitute reservation lands.

Even the current status of the Nation's 32-acre reservation and of the land claimed in the Nation's pending land claim action is still being contested in *Oneida Indian Nation of New York State v. Counties of Oneida and Madison*, 74-CV-187, [*Oneida Land Claim*]. In fact, the boundaries of that historic treaty reservation remain in dispute in not only the *Oneida Land Claim*, but also in *Stockbridge-Munsee Community v. State of New York*, 86-CV-1140, N.D.N.Y. [*Stockbridge-Munsee Land Claim*], and in the Nation's various declaratory judgment actions venued in the Northern District of New York seeking permanent injunctions prohibiting foreclosure actions by Madison and Oneida Counties and by the City of Oneida.

There is no escaping the fact that there are competing claims to the Nation's historic treaty reservation lands, which include all of the lands at issue in the Nation's Application. The Oneida Nation of Wisconsin, the Canadian Band of Oneidas (sometimes referred to as the Thames Band of Oneidas), the Brothertown Indian Nation and the Stockbridge-Munsee have all made claim to the lands at issue in the Nation's Application. In fact, the Oneida Nation of Wisconsin appeared at the BIA's NEPA EIS scoping hearings and publicly stated its opposition to the Nation's trust application. Moreover, the Oneida Nation of Wisconsin has also filed a trust application for a 2.26 acre parcel in the Town of Lenox which is located within Madison County north and west of the City. *See Exhibit A.*

These facts regarding the contested status of the Nation's fee lands and current 32-acre reservation require that the Nation's Application be evaluated as "off-reservation" parcels under 25 C.F.R. §151.11, rather than as "on-reservation" parcels under 25 C.F.R. §151.10.

VII. Statutory Authority for Trust Acquisition:

25 U.S.C. §151.3 provides that:

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust where such acquisition is **authorized by an act of Congress.**

(emphasis added)

Here, there exists no federal statute authorizing the Department of Interior to acquire any land in trust for the Nation. Currently, the Nation has no land in trust for its benefit. There is no federal statute authorizing any trust acquisition on behalf of the Nation. The Nation submitted its Application claiming the 1934 Indian Reorganization Act, 25 U.S.C. §465, as the Congressional act authorizing the trust acquisition. 25 U.S.C. §465, however, provides only general authority

for the Secretary of Interior to take land into trust for Indians and Indian tribes. 25 U.S.C. §465 is not, itself, the Congressional authorization required for a specific acquisition by a tribe. See Survey of Interior Board of Indian Appeals Case Law on Land Acquisition, § I “Authority To Acquire Land In Trust For Indians”, Priscilla A. Wilfahrt, Bureau of Indian Affairs Realty Training, April 2004; see also, e.g., *Campo Band of Mission Indians v. United States*, 2000 U.S. Dist. LEXIS 7269, at *8-11 (D.D.C. May 24, 2000); *Confederated Salish and Kootenai Tribes v. Norton*, 35 I.B.I.A. 226 (November 9, 2000).

Absent the required Congressional acquisition authority, the Nation’s Application must be denied.

VIII. City’s Comments Addressing the 25 CFR §151.10 factors (“on-reservation”)

The City has argued above that the Nation’s Application should be considered under 25 C.F.R. §151.11 as on “off reservation” acquisition. However, should the BIA consider the Application as an “on-reservation” acquisition, the City makes the following comments as to the acquisition’s potential impacts on (1) regulatory jurisdiction and (2) real property taxes. Further, the City provides additional comments regarding other §151.10 factors.

RE: POTENTIAL IMPACT ON REGULATORY JURISDICTIONS

As the United States Supreme Court reasoned in *City of Sherrill*, a checkerboard of alternating State and Tribal jurisdiction in the City would seriously burden the administration of local government. Specifically, accepting the City Parcels into trust (and thereby creating the jurisdictional checkerboard which the Supreme Court sought to avoid) would cause severe jurisdictional problems and potential conflicts of land use by negatively affecting the City’s provision of law enforcement and fire protection services, water and sewer services, comprehensive community development and planning services and enforcement of land use and zoning laws and regulations.

Law Enforcement and Police Protection

The City Police Department is obligated under New York State law to provide law enforcement services to all properties located within the City limits. The Nation has created and maintains its own police force, which enforces Nation laws on Nation lands, both on and off the current 32-acre reservation, without any oversight or involvement by the BIA. There is currently no deputization agreement or police cooperation agreement between the City and the Nation. Nor is there any indication, based on past negotiations, that such agreements will ever be reached. The Nation, without explanation other than “that was then, this is now”, has repeatedly abandoned efforts to reach agreement regarding cooperative law enforcement. After the *City of Sherrill* decision and the Northern District of New York’s subsequent holding that, under the *City of Sherrill*, Indian tribes can not unilaterally assert governmental jurisdiction over parcels they have acquired, (see, *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp. 2d 203, 206, 2005 U.S. Dist. LEXIS 22536 at *8 (N.D.N.Y. 2005), it is clear that the

Nation has no jurisdictional authority to exercise police powers over parcels acquired beyond the 32-acre reservation, including the City Parcels at issue in the Nation's Application.

If the City Parcels become trust lands that are immune from State and local laws and regulations, the absence of a cooperative police agreement will force the City Police Department to address numerous police jurisdiction problems and face increased dangers. These jurisdiction problems and concerns include, among others:

- the lack of City law enforcement jurisdiction on the City Parcels;
- the lack of City law enforcement jurisdiction over any suspect who flees police pursuit onto a City Parcel;
- City law enforcement protection for non-Natives who enter, visit or work on a City Parcel;
- City law enforcement of City Ordinances in checkerboard jurisdictional situations;
- disputes with the Nation Police at conflict sites.

The jurisdictional problems relating to law enforcement services are very real. There is no likelihood that a law enforcement agreement will be achieved between the City and the Nation. The BIA cannot ignore the law enforcement problems that currently exist and will be exacerbated if the City Parcels are taken into trust. No Application for City Parcels should be accepted absent a law enforcement agreement between the City and the Nation.

Fire Protection and Emergency Services

The City has a paid, professional Fire Department and a paid, professional Ambulance Service. The Nation has neither a Fire Department nor an ambulance service. Despite previous negotiations between the City and the Nation, there are currently no fire protection service agreements for the provision of fire and emergency or fire investigative services by the City to the Nation and its lands. The lack of an agreement for fire protection services results in obvious dangers to Nation lands and non-Nation neighboring lands, dangers which will be exacerbated with the trust acquisition of additional lands scattered in a checkerboard fashion throughout the City. Failure to have and comply with a fire investigation agreement severely undermines the jurisdictional responsibilities of the City's fire and emergency service departments and significantly increases health and safety risks for all residents and businesses in the area.

Furthermore, if the City Parcels are placed into trust, the fire and emergency departments will lose their ability to enforce compliance with City, County and State safety and fire codes on those City Parcels. Fire and safety codes have developed historically in response to terrible tragedies that demand our collective attention following the loss of life. The promulgation of

safety and fire codes has reduced the risks associated with fires and firefighting. Non-compliance with such fire and safety codes will result in heightened risk of injury and death.

Clear and unambiguous lines of authority and decision-making is absolutely essential at a fire scene, especially in the case of large scale incidents where multiple agencies respond. Delays resulting from the lack of authorization to enter onto and respond to fire on Nation lands will increase the dangers presented and the damages and injuries incurred.

Fire protection and fire fighting risks are also heightened when development (commercial and residential) proceeds free from the regulatory framework in the community at large. Currently, the City's Fire Department has no ability to fight a fire at the upper floors of the high rise hotel erected on Nation land. Hydrant services or other water supplies for fire fighting have not been evaluated in terms of capacity and needs. Unfettered development may result in economic growth for the Nation, but it results in increased risks to fire fighters and neighbors of the Nation lands.

No Nation Application for City Parcels should be accepted absent an enforceable City-Nation fire protection agreement covering fire protection, fire investigation and emergency services.

Land Use/Zoning Concerns

The City has recently adopted a Comprehensive Plan which provides the basis for all future planning and development within the City. Long-term planning for a community that is riddled with "out-parcels" (e.g., the City Parcels if taken into trust) would be difficult at best and completely ineffective in a worst case scenario. Included within the City's Comprehensive Plan are various land-use and zoning ordinances, all of which were created to guide future growth and development in accordance with the Comprehensive Plan.

The City adopted Subdivision Regulations to protect the character and the social and economic stability of all parts of the City and to encourage the orderly and beneficial development of the community through appropriate growth management techniques. The purposes of the Subdivision Regulations cannot be accomplished when individual and/or groups of parcels are exempt from these regulations, as would be the case if the City Parcels are accepted into trust.

The City's Signage Ordinance aims to decrease the amount of signage in the City, to increase the aesthetics of the commercial areas and to affect positively traffic safety. Such purposes will be undone by unregulated placement of signs at Nation enterprises.

The City's Zoning Ordinance exists to encourage and consider land use and development throughout the City in accord with the provisions of the Comprehensive Plan in order to preserve the character and quality of life presently enjoyed in the City. Exempting part of a municipality from the entire jurisdictional purview of zoning and land use law would, in effect, divide the community into different groups of landowners, with one group receiving no regulatory

protection from the non-conforming uses and development actions of the other group. The fact that the greater part of the land for which trust status is sought is presently undeveloped and open to new, and potentially unregulated development, creates great concern for the City. The interests of those owning, living, or using land adjacent to, nearby, downstream, or downwind of any and all future development on parcels placed in trust will be unprotected. This untenable situation will occur if the City Parcels are taken into trust.

The City also has a Site Plan Review Ordinance that operates in conjunction with the City's Zoning Ordinance to ensure orderly growth and development. All applications for new construction (with the exception of single and two-family homes) are reviewed by the City Planner, City Engineer, Code Enforcement Officer, Water Superintendent, Fire Marshall, and Planning Commission to ensure that the proposed development will meet all the criteria established by the City. If proposals for new development on City Parcels are not reviewed, as would be the case if the Nation's Application is granted, there will be no enforcement mechanism to ensure the Nation's compliance with laws and regulations governing health, safety, and aesthetic issues, let alone any chance of preserving and/or enhancing the character of the neighborhood/surrounding area in which a development project takes place.

The City's Comprehensive Plan will be rendered useless if the Nation's Application is approved and the City's planning-related regulations and ordinances are unenforceable.

Water Service

The City provides water to all City properties. The City's water supply comes from a City-owned reservoir and dam located in Oneida County. There are twenty-plus (20+) miles of twenty-inch transmission water mains running through various easements from the dam in Oneida County to the City. The City's provision of water to parcels owned by the Nation and its members is billed the same as any other City water customer. However, unlike the City's other customers, non-payment of the water bills by the Nation and/or its members cannot be recovered through real property tax bills. The City's only options for non-payment of water services by the Nation or its members are to turn off the water service or to classify as uncollectible any bills on individual accounts on certain Nation properties. The City, reluctant to turn off the water supply to the Nation and its members, presently has bills outstanding for over five years for water and sewer service on the 32-acre reservation.

Significant problems will arise if the City Parcels are taken into trust. Examples of such problems include the following:

- *The City of Oneida Water Department's existing water transmission main crosses many of the City Application Parcels* – The City's water main is located on a 50 foot right-of-way within the City. Existing New York State law requires prior notification of proposed excavation near a water main. The placement of City Parcels into trust would exempt this property from State notice requirements and increase the risk of damage to the City's water main. Such a concern is based on previous experiences, not on mere speculation as to what might happen. In the

past, the Nation has failed to notify the City of Nation actions that would restrict City access to the water main for maintenance and that would subject the water main to possible damage. On one occasion, the Nation threatened to excavate and cut off a water main located in the highway right-of-way on West Road, the main road to and traversing the existing reservation. On a separate occasion, the Nation excavated and planned the placement of fencing on the water main right-of-way. In addition, there are lands now owned by the Nation, outside City limits, on which the City has easements for the water transmission main. Such easements must be protected in order to protect the City's water supply.

- *Unregulated construction and alteration of buildings in the City without conformance to New York State building code requirements exposes the City's water system to the hazards of cross-connection* – Cross-connection controls prevent backflow into the water system in case of low pressure conditions. The Nation must select and enforce building standards, equipment requirements and cross-connection control strategies that meet the minimum requirements for cross-connection to avoid risks of contamination of the water supply. Without a consolidation of holdings and a single service connection, preservation of the City's current water service standards to these facilities would be impossible.
- *The City is presently at its water supply limits* – The Nation has already exerted pressure on the City to obtain additional water for the Nation's Casino and related resort facilities. Any unregulated construction of new facilities and the alteration of buildings at the Casino without local review will result in excessive demands upon the City's current water supply which, in turn, will result in significant pressure decreases.
- *The acceptance of the other parcels outside the City in Oneida County will also significantly impact the City's water system* – Because the City's water supply is located in and travels through Oneida County and because the City's water system is not a water authority, the City, as the owner of the system, is assessed and taxed as would be any other property owner in Oneida County. This fact makes the City one of the largest tax payers in the Oneida County Towns of Annesville (dam and water main), Vienna (water main) and Verona (water main). The loss of real property taxes for the Madison County parcels at issue in the Nation's Application will result in increased property taxes upon City properties, which will result in increased water rates for City water customers. Such an increase in water rates will create an attractive environment for other tax-exempt water suppliers to target the City's current customer base for cheaper water service and further erode the City's tax base.
- *Permitting Issues* – The Nation has consistently refused to apply for "permits" for new water services on the 32-acre reservation. It is the permit application process that triggers the City's review and consideration of the potential impact of the request. Non-permitted water hook-ups impact the City's water services as

described above. This situation will only be exacerbated if the City Parcels are taken into trust.

- *Hydrant Taxes will increase for City resident* – The cost of maintaining and servicing hydrants is assessed against benefiting properties located within six hundred feet of a hydrant and is listed on real property tax bills. The City presently maintains hydrants located on the reservation, but the Nation does not compensate the City for such. Many of the City Parcels are within six hundred feet of hydrants and would receive fire protection from the hydrants. Because the City would not be able to assess the hydrant tax against the City Parcels if they were accepted into trust, the burden for providing and maintaining the hydrants would be borne solely by the taxpayers and not shared by the Nation whose members would, nonetheless, be receiving the benefit of the hydrant services.

Sewer Services

The City provides sewer services to all properties located within the City. Pursuant to a service agreement between the City and the Nation, the City provides sewer services to the Nation's 32-acre reservation and the Village of the White Pines which is located in the City limits adjacent to the 32-acre reservation. In addition to handling sewage flows from various Nation properties located throughout the City, the City also provides operation and maintenance services for the Nation's sewage lines and mains. The Nation customers pay the same rate as all City non-significant industrial sewer customers.

The City currently has sewer line easements on property owned by the Nation and on property included in the City Parcels. To ensure the health and safety of all residents and to enhance future City development plans, all sewer easements must be fully protected. If the City Parcels are taken into trust and the City's sewer easements and access rights are not protected, it will expose the City's sewer system to inconsistent and arbitrary determinations by the Nation regarding the City's ability to connect to and/or maintain the existing sewer infrastructure. The health and safety issues associated with an unregulated sewer system are obvious.

RE: POTENTIAL IMPACT ON REAL PROPERTY TAXES

The current assessed value on the Nation's City Parcels is \$20,861,611.00, or 5.4% of the total taxable City assessment of \$388,953,657.00. To date, the City has lost \$6,530,414.77 of revenue (including interest and penalties) due to the Nation's non-payment of taxes assessed against the City Parcels. The current 2006 taxes due on Nation-owned parcels within the City amount to \$356,546.00 and constitute 13% of the total tax levy.

RE: ADDITIONAL §151.10 FACTORS TO BE CONSIDERED BY SECRETARY

25 C.F.R. §151.10 also provides that the Secretary of Interior will consider the following criteria in evaluating requests for acquisition of land in trust status when the land is located within or contiguous to an Indian Reservation and the acquisition is not mandated.

§151.10(a): statutory authority for the acquisitions and any limitation in the statutory authority

The lack of the specific Congressional statutory authority for the proposed trust application by the Nation is addressed *supra* in §VII, beginning on page four, and precludes acceptance of the Nation's Application.

§151.10(b): Tribe's need for additional land

The Nation has made no showing that it needs an additional 17,310.43 acres located in a checkerboard pattern throughout the City and throughout Madison and Oneida Counties. In fact, the Nation states only that the 17,310.43 acres is "needed to preserve the Nation's sovereignty and lands, which have been threatened with foreclosures and transfers to local governments, and is necessary to facilitate the Nation's self-determination, its economic development and its ability to provide housing, jobs, education and health care for its members". Such need descriptions are broad brush strokes, conclusory and insufficient. The Nation is obligated to state its need for each of the parcels, rather than as a package without specification.

The Nation's Application was filed on April 5, 2005, immediately after the Supreme Court's *City of Sherrill* decision, but prior to the Nation's receipt of the June 10, 2005 BIA letter, the 2nd Circuit's June 28, 2005 dismissal of the *Cayuga Land Claim* and the Northern District's October 5, 2005 vacatur of its permanent injunction preventing the Village of Union Springs from enforcing land use regulations in the Village. After these events, the Nation's statement of need has been eviscerated. To wit, the Nation does not have sovereignty over the lands to protect, the Nation is subject to the payment of taxes on its real property and foreclosure for non-payment of such taxes (although the taxing entities' right to a foreclosure sale is currently the subject of litigation by the Nation), and the Nation's parcels are subject to local land use regulation.

As to the claim that the Nation needs the land for purposes of self-determination, economic development and the provision of housing, jobs, education and health care, the Nation already owns the parcels in fee. This Application is a mere transfer of title application; it is not a request that the United States use a federal appropriation to purchase additional lands for the stated purposes. The Nation can pursue its self-determination, economic development and the provision of housing, jobs, education and health in the same taxed and regulated environment as all other individuals and enterprises. The Nation will not be rendered insolvent if it is taxed and regulated.

§151.10(c): purpose for which land will be used

The Nation fails to identify the purposes for which the City Parcels will be used. The Nation makes reference to its most recent annual report and a local university's report for information regarding its use of the lands and the alleged positive effects of those uses on the Nation and its neighbors. Such materials are marketing and public relation materials, subject to exaggeration and hyperbole, and should be considered as such. The Nation's Application letter also states that there is no anticipated change in the use of any land subject to the Application. However, the Nation has not satisfied its burden under §151.10(c). The purpose (current and/or intended) for each parcel must be identified. Otherwise, the local governments are prejudiced in their efforts to comment. The Nation's failure to provide more than a general description of the purpose and use of all parcels compels rejection of the Application.

§151.10(d): not applicable because it applies to acquisitions for individual Indians not Tribes.

§151.10(e): for land that is currently in unrestricted fee status (as here): impact on the City resulting from removal of the City Parcels from taxes rolls

The potential impact on the City resulting from removal of the City Parcels from the tax rolls has been discussed above on page 10 in the section entitled "RE: POTENTIAL IMPACT ON REAL PROPERTY TAXES".

§151.10(f): jurisdictional problems and potential conflicts of land use

The City has addressed this factor in §VIII, *supra*, in the section entitled "RE: POTENTIAL IMPACT ON REGULATORY JURISDICTIONS."

§151.10(g): whether the BIA is equipped to discharge the additional responsibilities resulting from the trust acquisition of the City Parcels

The Nation's Application states:

"The United States has administered this land for years, and, more to the point, the Nation now turns back all federal assistance funds."

In response to a FOIA request for documents supporting that statement, the BIA stated that it did not locate any documents supporting or refuting that statement. The BIA found no documents pertaining to the Nation's statement regarding the United States' administration of the lands subject to the Nation's Application because the Nation's statement has no basis in reality.

No Nation lands are held in trust by the United States. No Nation lands are held in restricted status. No Nation lands are federal reservation lands. The United States has never had a role in administering the Nation's lands. Since colonial times, the parcels have been administered by the existing governmental entity, first by the colony and subsequently by the State and its local governmental units. *See City of Sherrill, supra.* The fact that the Nation, as a federally recognized tribe, has qualified for and received federal benefits does not equate with the land being "administered" by the United States. The Nation is disingenuous to make such a statement. The Nation's return of federal assistance funds was reported to be a gesture of good will toward impoverished and/or less well-off Indian Nations and Tribes. The Nation, should it be required to open its financial records, would be proven to be an extremely wealthy entity that requires no special assistance in its economic development efforts and no special benefits to become economically independent. Those records would also show that the Nation should not receive protection from taxation and regulation based on its disadvantaged state of existence: in the words of the Nation as expressed to the City, "that was then, this is now".

The question to be addressed in evaluating §151.10(g) is whether the BIA is capable of handling the responsibilities it would incur should the Secretary of Interior accept the lands into trust. The BIA's Eastern Regional Office is located nearly a thousand miles from the City Parcels that the Nation seeks to have acquired in trust. The City of Oneida respectfully submits that the BIA is not equipped to handle the burdens of administering to an additional 17,310.43 acres of land so distant from its offices. The BIA's inability to administer trust property in New York State, where there are no other trust lands and no BIA staff, and the BIA's inability to handle the additional responsibilities resulting from such a trust acquisition should weigh heavily against and, in fact, should preclude the trust acquisition requested by the Nation.

§151.10(h): extent to which Tribe provided information to Secretary so she can comply with NEPA

The Nation failed to submit information to the BIA to enable the Secretary of Interior to comply with NEPA. The Nation made a single statement that "with respect to the environmental effect of trust acquisition, ...there is no anticipated change in the use of any land that is subject of this request". The BIA purports to have assumed the lead agency role in the preparation of the EIS and has retained a third party contractor to prepare the EIS. No environmental studies have been prepared by any State or local government on the lands owned in fee by the Nation. The City seriously questions whether the BIA, which currently has a trust relationship with the Nation pursuant to the Nation's status as a federally recognized tribe, is able to perform this lead agency role in the objective and sensitive manner envisioned by the Supreme Court in its *City of Sherrill* decision. Certainly the manner in which the BIA representatives and Malcolm Pirnie representatives conducted the public EIS scoping hearings in Oneida and Madison Counties on January 11th and 12th undermines confidence in the objectivity or validity of such hearings or determinations emanating therefrom.

IX. §151.11 (“off-reservation”) [when land is located outside of and non-contiguous to a Tribe’s reservation and the acquisition is not mandated]

Because the Nation’s 32-acre parcel is not listed as either a Federal reservation or a State reservation, this trust Application should be examined under §151.4 and 151.11.

25 C.F.R. §151.4 provides as follows:

Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a **tribe** may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

(emphasis added)

The analysis under §151.11 involves the criteria listed in §151.10 (a)-(c) and (e)-(h). As far as those factors are concerned, the City’s comments would be the same as set forth under its §151.10 analysis, with the caveat that, there is a heavier scrutiny of an “off-reservation” application under §151.11 than that conducted under §151.10 where a presumption in favor of the acquisition seems to operate. Section 151.11 sets forth three additional requirements that the Secretary must consider in evaluating an “off-reservation” trust acquisition application.

§151.11(b): location of the land relative to State boundaries and the land’s distance from the boundaries of the Tribe’s reservation require the following consideration: as the distance between the Tribe’s reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the Tribe’s justification of anticipated benefits from the acquisition and the Secretary shall give greater weight to §151.11 (d) concerns

As set forth above, the Nation’s justification for having the 17,310.43 acres of scattered, non-contiguous parcels, including the City Parcels, most of which are not contiguous to the Nation’s current 32-acre reservation, placed into trust with the United States falls far short of what is required by the BIA. That deficiency is even more significant under this §151.11 analysis. Under the greater scrutiny required under §151.11, the Nation’s general statement of need is woefully inadequate. Specifically, pursuant to *City of Sherrill*, the Nation has no sovereignty over the parcels to preserve. There is no threat to the Nation losing the lands it has acquired if it pays the taxes assessed against the parcels and abides by State and local government regulation. Requiring the Nation to pay taxes, to collect and remit sales and use taxes and to abide by State and local regulations will not sound the death knell for the Nation’s enterprises and will not interfere with the Nation’s ability to provide housing, jobs, education or health care to its members. As long as the Nation is permitted to operate its gaming facility and resort facilities, the economics of the Nation will be well-preserved and all benefits provided to the Nation’s members will remain in place. The Tribe’s stated justification of anticipated benefits

from the acquisition does not rise to the level of even suggesting, let alone supporting, approval of the Application.

§151.11(c): if land is acquired for “business purposes”, the Tribe must provide a plan specifying anticipated economic benefits associated with the proposed use.

The Nation did not submit business plans for the City Parcels, presumably because the Nation submitted its Application for consideration under §151.10. The Nation's failure to provide the BIA with the required business plan material is the result of the Nation's failure to provide specific statements of need and purpose for consideration under the §151.10 analysis. The Nation's failure to identify any specific purposes or uses eliminated the need to prepare and make public the Nation's business purposes and plans. Many of the City Parcels are located within strip malls and sit idle, with no present use, other than storage. There can be no doubt that the Nation has plans for all of its land acquisitions. Its reluctance to reveal plans can not be tolerated and protected merely by the Nation's submission of its Application under §151.10. The Nation's Application should be evaluated under §151.11. The Nation should be required to reveal the purposes for which the City Parcels will be used and should be required to submit business plans for all City Parcels whose current or intended use is business-related. As a result of the deficiencies, the Nation's Application should be denied.

§151.11(d): contact with the State and local governments pursuant to §151.10(e) [the impact on the State and political subdivision resulting from the removal of the land from the tax rolls] and §151.10(f) [the jurisdictional problems and land use regulation conflicts which may arise] must be completed as follows: after receipt of the Tribe's written request to have lands taken into trust, the Secretary of Interior must notify the State and local governments having regulatory jurisdiction over the land that each will have 30 days to comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

The City has commented above on the negative tax impacts that the acquisition of the scattered, non-contiguous City Parcels would have on City regulatory jurisdiction. The impacts articulated above must be given even greater weight under §151.11 pursuant to the directive of §151.11(b)

X: Additional Comments

In addition to all of the §§151.10 and 151.11 factors commented upon by the City, the City is compelled to comment on the Title Examination requirements set forth in 25 C.F.R. §151.13. If the Secretary of Interior were to decide that she will approve the Nation's request, she must require the Nation to furnish title evidence meeting the standards for the preparation of title evidence applying to land acquisitions by United States that are issued by United States Department of Justice. Further, after title is examined and satisfies the title evidence required by the Department of Justice, the Secretary must notify the Nation of any **liens, encumbrances or infirmities** on the parcels prior to taking final approval action on the Application. Ultimately, the Secretary must require elimination of the liens, encumbrances and infirmities prior to such approval of the Application if the liens, encumbrances or infirmities make title in the land unmarketable.

The BIA made abundantly clear in its June 10, 2005 letter to Nation Representative Halbritter (attached as Exhibit C) and in other published comments that the Nation's parcels cannot be accepted, even if otherwise subject to approval, until all liens are removed. The Nation faces tax liens on City Parcels that must be satisfied prior to the Secretary's final action on the request. Furthermore, there are rights-of-way and easements, both private and public, that encumber many of the City Parcels. All of those rights-of-way must be respected and protected. The failure to eliminate tax liens and other encumbrances and the failure to protect easements and rights-of-way on the City Parcels preclude the Secretary from taking final action to approve the Nation's Application.

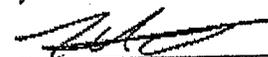
Mr. Franklin Keel
January 30, 2006
Page 17

Conclusion

The City of Oneida appreciates your consideration of its written comments to the Nation's Application. If you have any questions or require further information, please contact the undersigned at the address or telephone listed above.

Respectfully submitted,

City of Oneida, New York
by:



Leo Matzke
Mayor

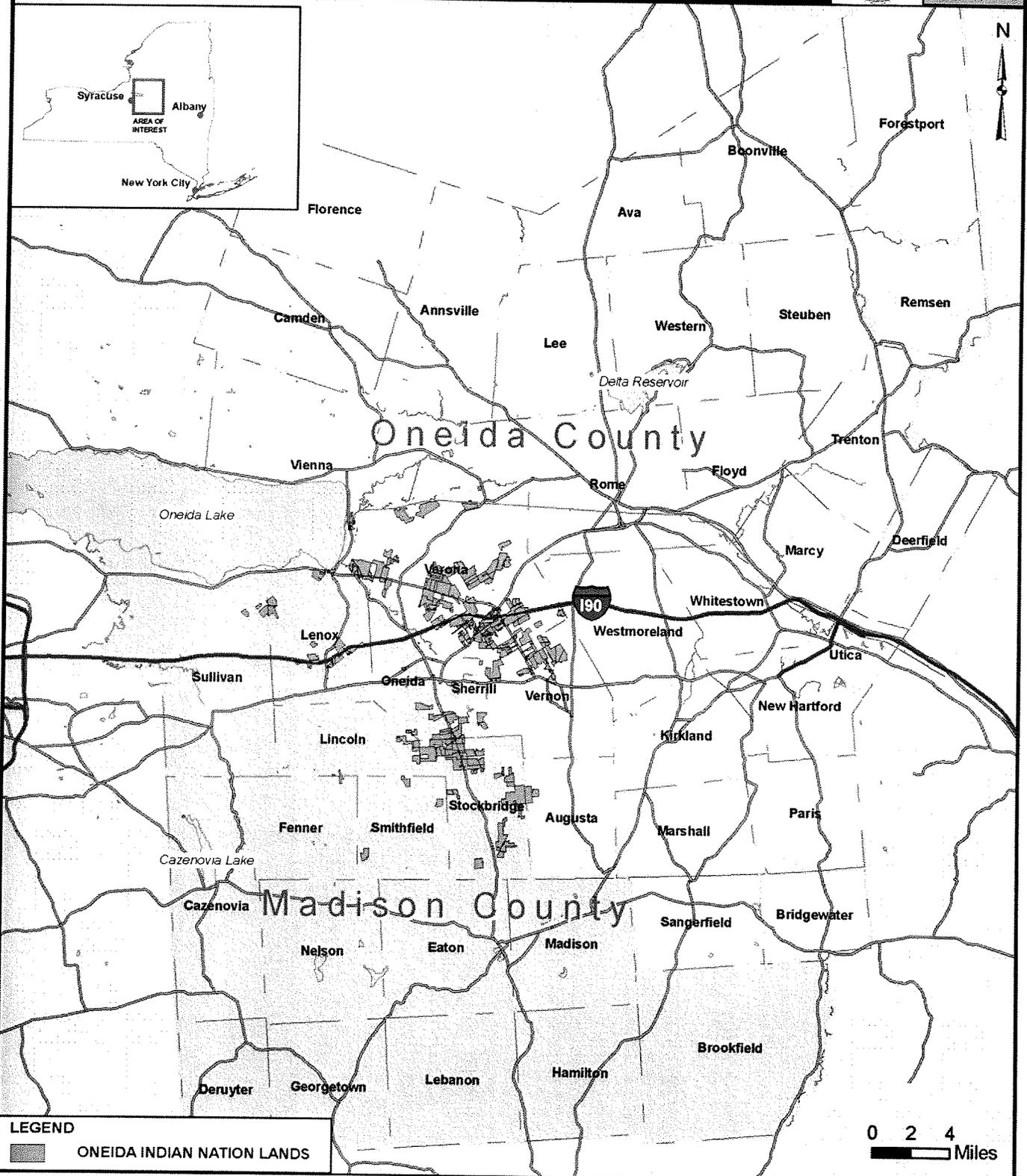
EXHIBIT

“A”

Bureau of Indian Affairs
Scoping Meeting for NEPA Environmental Impact Statement (EIS)
for Trust Land Application by Oneida Indian Nation of New York



4



**LOCATION MAP OF ONEIDA INDIAN NATION LANDS
ONEIDA AND MADISON COUNTIES, NEW YORK**

**MALCOLM
PIRNIE**

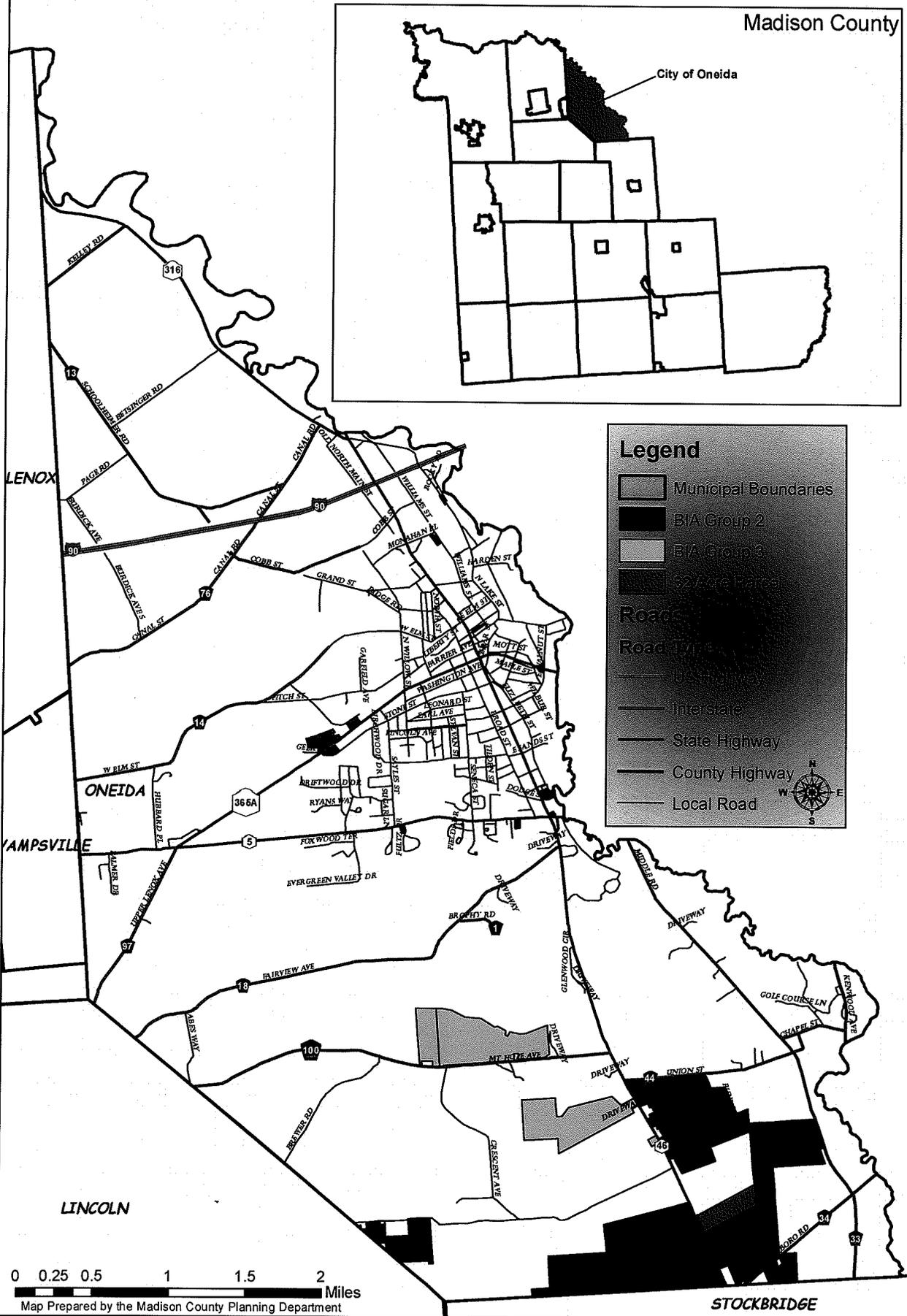
INDEPENDENT ENVIRONMENTAL
ENGINEERS, SCIENTISTS
AND CONSULTANTS

EXHIBIT
“B”

Oneida Indian Nation of New York Owned Properties in the City of Oneida

Madison County

City of Oneida



EXHIBIT

“C”



THE ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON, D.C. 20240

JUN 10 2005

Honorable Ray Halbritter
Nation Representative
Oneida Indian Nation
Box 1
Vernon, New York 13476

Dear Mr. Halbritter:

I am writing with respect to Michael R. Smith's letter dated June 7, 2005 to Michael D. Olsen. In his letter, Mr. Smith addresses issues raised by Rocco J. Diveronica in his June 1, 2005 letter to Representative John McHugh concerning the Bureau of Indian Affairs ("BIA") recordation of 331 deeds submitted by the Oneida Indian Nation ("OIN"). In addressing Mr. Diveronica's objections to the recordation of the OIN deeds, Mr. Smith purports to represent that it is the position of the BIA that lands identified in the deeds submitted by the OIN for recordation in accordance with 25 C.F.R. § 150 are "restricted against alienation pursuant to 25 U.S.C. § 177." This is to advise you that Mr. Smith misstates the position of the BIA on this issue, and further, to inform you of the Department of Interior's ("DOI") position with respect to certain issues related to status of OIN lands.

While we would agree with Mr. Smith's statement that the Supreme Court's *City of Sherrill* decision did not disturb the Court's 1985 decision in the Nation's land claim litigation that Section 177 provides the Nation a right of action to damages for trespass based on its original grant of rights in the lands at issue, we do not agree with his assertion that the Court's ruling in *Sherrill* recognizes the continuation of restriction on alienation protections over recently re-acquired lands. Indeed, the Court in *City of Sherrill* stated:

In this action, OIN seeks declaratory and injunctive relief recognizing its present and future sovereignty immunity from local taxation on parcels of land the Tribe purchased in the local market, properties that had been subject to state and local taxation for generations. n. 7. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

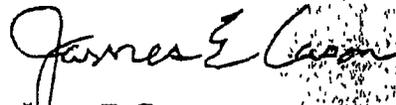
Thus, it is our opinion that Court in *City of Sherrill* unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real property taxes. In the event these taxes are not paid, we believe such lands are subject to foreclosure. Further, please be advised that the BIA is in the process of taking appropriate action to clarify that its recent recordation of OIN deeds does not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177. (See Enclosure)

With regard to the related issue of OIN's pending fee-to-trust applications, the Nation should be aware that it is Departmental policy not to accept into trust lands that are encumbered by tax liens. Accordingly, we urge the Nation to resolve any outstanding tax liens that may now encumber any of the lands for which you are seeking the United States to accept in trust.

Also in regard to your fee-into-trust application, we would also urge the Nation to prioritize the parcels the Tribe desires the United States to take into trust in order of the parcel's significance to the Nation. Prioritization of the parcels at issue in the pending application will greatly assist and inform the Department in deciding how to proceed in exercising the Secretary's discretion. We are especially interested in the Nation's views as to why particular parcels need to be held in trust. In addition, as a part of our evaluation process, we plan to consult with affected state and local jurisdictions to obtain their views on this subject as well.

If you have any questions or need additional information, please feel free to contact me at 202-208-6291.

Sincerely,



James E. Cason
Associate Deputy Secretary

Enclosure: Oneida Indian Nation Deed Transmittal Clarification

cc: Honorable George Pataki, Governor State of New York
Honorable Sherwood Boehlert, Representative of New York State
Honorable John McHugh, Representative of New York State
Rocco J. Diveronica, Chairman, Madison County Board of Supervisors
Joseph A. Griffo, Oneida County Executive
David R. Townsend, Member of Assembly, State of New York



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

MEMORANDUM

TO: Randall Trickey, Realty Officer, Eastern Region, Bureau of Indian Affairs

FROM: Michael D. Olsen, Acting Principal Deputy Assistant Secretary - Indian Affairs *M. Olsen*

DATE: June 10, 2005

RE: Oneida Indian Nation of New York Deed Transmittal Clarification

On April 7, 2005, you sent to the Land Titles and Records Office (LTRO) in Anadarko, Oklahoma 331 deeds totaling 17,193 acres in Madison and Oneida Counties, New York. The transmittal document attached to the deeds indicated that the deeds were to be recorded "in favor of the Oneida Nation of New York in restricted status pursuant to 25 U.S.C. 177."

The deeds were to be recorded with the LTRO pursuant to 25 C.F.R. Part 150, which describes the authority, policy, and procedures for recording and maintaining title documents. The ministerial act of recording deeds such as those pertaining to the Oneida Nation land at issue simply provides the Bureau of Indian Affairs with information used for recordkeeping purposes. In this case, the recordation of the Oneida Nation deeds does not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177. Accordingly, the use of the term "restricted status" in the transmittal document is confusing and inappropriate.

In order to alleviate the confusion generated by the April 7, 2005 transmittal document, please file with the Anadarko LTRO by noon, Monday June 13, 2005 a revised transmittal document. Please strike from the Remarks paragraph "in favor of the Oneida Nation of New York in restricted status pursuant to 25 U.S.C. 177" and replace it with "for the Oneida Nation of New York pursuant to 25 C.F.R. Part 150."

Should you have any questions, please do not hesitate to contact me at (202) 208-7163. Thank you for your immediate attention to this matter.