

REPORT

**Comments on the
Oneida Indian Nation's
Land In Trust Application
(Group 1 Parcels)
Oneida County, New York**

**State of New York Executive Chamber
Albany, New York**

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O'BRIEN & GERE

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ENGINEERS, INC.

Contents

Introduction.....	1
Group 1 Parcels.....	3
Impacts on Regulatory Jurisdiction	6
Impacts on Real Property Taxes	38
Impacts on Special Assessments	39
Other Considerations.....	41
Cumulative Impacts.....	47

List of Appendices

Appendix A	Figures	
	➤ Figure 1	Groups 1, 2 & 3 Parcels
	➤ Figure 2	Historic Treaty Boundaries
	➤ Figure 3	Group 1 Parcels
	➤ Figure 4	Buffer Zones
	➤ Figure 5	NYS Freshwater Wetlands
	➤ Figure 6	2003 Aerial Photograph
	➤ Figure 7	Hydric Soils
	➤ Figure 8	Natural Heritage Program
	➤ Figure 9	Streams
	➤ Figure 10	Water & Sewer Districts & Utilities
	➤ Figure 11	Flood Zones
	➤ Figure 12	National/State Register Sites
	➤ Figure 13	Archaeological Sensitivity
	➤ Figure 14	Solid Waste Facilities
	➤ Figure 15	Regulated Facilities
	➤ Figure 16	Petroleum Bulk Storage Facilities
	➤ Figure 17	Gas Stations
	➤ Figure 18	Oil and Gas Well Permits
	➤ Figure 19	Chemical Bulk Storage Facilities
	➤ Figure 20	Zoning

	✓	Figure 21	Schools & Hospitals
	✓	Figure 22	New York State Parks
	✓	Figure 23	Landmarks
	✓	Figure 24	School Districts
	✓	Figure 25	Agricultural Districts (pre-2005)
	✓	Figure 26	Prime Farmland
	✓	Figure 27	Agricultural Districts (current)
	✓	Figure 28	Environmental Justice
Appendix B		Tabular Summary of Group 1 Parcels	
Appendix C		Parcel Descriptions	
Appendix D		Rare Plant Inventory	
Appendix E		Tabular Summary of Group 1 Property Taxes & Special Assessments	
Appendix F		Correspondence from Verona Fire District	

INTRODUCTION

Within the last two decades, the Oneida Indian Nation of New York (OIN) has acquired fee title to approximately 17,370 acres of real property scattered over thirteen towns, three villages and two cities within the Counties of Madison and Oneida, New York. Consisting of hundreds of different and predominantly non-contiguous parcels, this newly-acquired property is separate from the 32 acres that was the subject of *United States v. Boylan*, 265 F. 165 (2nd Cir. 1920), error dismissed, 257 U.S. 614 (1921) (the 32 Acres). While this newly-acquired property is located within the area that was once occupied by the Oneida people before the nineteenth century, it is not property over which the present OIN can assert sovereignty. Rather, this property is within the sovereign jurisdiction of the State of New York.

The OIN seeks to obtain the right to exercise sovereignty over these newly acquired lands by transferring their fee title to the federal government, which would hold them in trust for the benefit of the OIN. The OIN has applied to the Bureau of Indian Affairs (BIA) for such transfer under 25 U.S.C. § 465 and 25 C.F.R. Part 151. A request was made for such transfer by letter dated April 4, 2005 from the OIN Representative, Ray Halbritter, to the Director of the Eastern Regional Office, BIA, United States Department of the Interior (DOI).

In correspondence dated September 20, 2005 from the Director of the Eastern Regional Office, BIA to the Honorable George Pataki, Governor of the State of New York, the BIA indicated that the newly acquired lands had been divided into three groups: Group 1, Group 2 and Group 3 (see Figure 1 in Appendix A). The BIA requested comments as to each parcel grouping by a specific date. The BIA's September 20th correspondence did not provide information regarding whether or not the parcel groupings are arbitrary or represent a prioritization offered by the OIN. Group 2 and 3 parcels are scattered throughout Oneida and Madison Counties. Based on the latest extensions provided by the BIA, comments relating to the parcels in Groups 1, 2 and 3 will be received by the BIA if postmarked by the following dates:

- Group 1 – January 30, 2006
- Group 2 – January 30, 2006
- Group 3 – March 1, 2006

The implications of placing land in trust, potentially in perpetuity, are complex and require review among many federal, State, regional and local cross-cutting jurisdictions. The assertion that within the trust process the BIA, "as a federally mandated 'trustee' of Nation land assets is responsible to manage those assets in the *best interest of the tribe* [emphasis added]" (see draft scoping outline prepared by Malcolm Pirnie dated October 6, 2005; page 1), presupposes a bias toward the OIN versus the interests of and potential impacts to New York State, its political subdivisions, residents and citizens. Historically, this procedure has been used by the BIA with considerable restraint. Thus, the BIA has not taken additional land in trust from tribal groups that "have the ability to manage their own affairs" and who "have been highly successful through their own efforts" (Memorandum from Commissioner, DOI BIA to All Directors and Superintendents, dated April 21, 1959). BIA policy has also steered away from placing land into trust when it was evident that the trust status would place an Indian tribe in a position where the trust status is being used as a "tax dodge" by a "big operator" (Memorandum from Commissioner, DOI BIA to All Area Directors dated August 3, 1960). BIA policy is

certainly relevant given the recent OIN-touted business successes (see OIN 2004 Annual Report; <http://oneidanews.net/annualreport2004/pdfs/oin2004annualreport.pdf>), and the significant implications that would arise by placing such a large amount of land into trust.

A transfer of this kind would be unprecedented and would result in significant adverse impacts to the State of New York, its political subdivisions, citizens and residents. These impacts will be far-reaching and long-term. Illustrative of the specific issues of concern identified by the BIA, *impacts from the removal of the land from the tax rolls* (25 C.F.R. § 151.10(e)) and *jurisdictional problems and potential conflicts of land use that may arise* (25 C.F.R. § 151.10(f)), the resulting patchwork of cross-cutting jurisdictions and potential lack of regulatory coordination and supervision created by the “land in trust” would place an undue hardship on State and local government’s ability to protect and preserve the safety and welfare of its citizenry and the environment in which they work and reside. A sampling of these issues and hardships are summarized in this report.

In its April 4, 2005 application to the BIA, the OIN advises [“that there is no anticipated change in the use of any of the land that is the subject of this request.”] However, the OIN also provides statements (including those made by OIN employees and other representatives at the BIA hearings on January 11-12, 2006) that appear to contradict that bold assertion by indicating that the need for placing lands in trust is, in part, “to secure an adequate territorial land base for the Nation, to facilitate the Nation’s self-determination and *economic development* [emphasis added] and to provide housing for Nation members and their families.” In addition, the OIN’s most recent annual report highlights OIN efforts to promote economic self-sufficiency through diverse economic activity. Given that the OIN views lands in trust as “sovereign land”, and depending upon the BIA’s decision regarding the trust application and regardless of present land uses, the State may have a limited opportunity to view potential impacts based on reasonably foreseeable future development (*i.e.*, consistent with past OIN development practices).

Based on the OIN’s past development practices and current objectives, it is reasonably foreseeable that such lands acquired by the OIN, whether or not placed into trust, will continue to be utilized by the OIN to advance its economic development and diversification agenda. Furthermore, it is recognized that placing such lands in trust represents to the OIN a more appealing economic, financial and marketing alternative to achieving its goals, than by complying with regulatory and financial processes required by State and local laws and regulations. However, the OIN applications fail to demonstrate that fee to trust is necessary to achieve OIN goals.

Consequently, comments regarding the application provided herein take into account current land use, as well as reasonably foreseeable future land uses and associated short-term, long-term and cumulative impacts. The parcels included in the current OIN application represent a “snap-shot” of the OIN’s land holdings at a specific time. It is reasonable to assume that the OIN’s land acquisition efforts will continue and that whatever the outcome of the current application, efforts to place lands into trust will continue resulting in additional direct impacts, as well as greater cumulative impacts. Thus, the BIA must consider the potential cumulative implications in its review of this and future applications. When contrasting the current OIN application to parcels disputed in on-going land claims (see Figure 2 [Treaty Boundaries] in Appendix A), including those of other tribal governments, or purported tribes (*i.e.*, the Oneida Tribe of Indians of Wisconsin, the Cayuga Indian Nation of New York, the Saint Regis Mohawk

Tribal Council, the Stockbridge-Munsee Community, Mohican Band of Indians, the Seneca-Cayuga Tribe of Oklahoma, Mohawk Council of Akwesasne, Mohawk Nation Council of Chiefs, etc.), it is clear that the potential impacts described herein (including cumulative) are multiplied dramatically.

O'Brien & Gere was retained by the State of New York to assist in the preparation of these comments relating to the OIN's application. Consistent with the BIA's guidance provided in its September 20, 2005 correspondence, O'Brien & Gere has prepared these comments on behalf of the State to address the specific criteria for evaluating such requests as contained in 25 C.F.R. 151.10, notwithstanding the legal question of whether these criteria, which define "[o]n-reservation acquisitions" apply, or similar criteria in 25 C.F.R. 151.11 for "[o]ff-reservation acquisitions" instead apply.

Substantive comments contained herein focus on parcels identified by the BIA as Group 1 parcels, which include and largely consist of, the Turning Stone Resort and Casino and other OIN-developed properties in the County of Oneida, NY (Towns of Vernon and Verona). As referenced herein, additional materials are appended to the report to support conclusions and/or provide additional information. In accordance with the BIA's submittal schedule, additional stand-alone reports have or will be provided to the BIA that focus on Groups 2 and 3. All reports include an evaluation of certain potential cumulative impacts associated with placing land into trust.

GROUP 1 PARCELS

Group 1 of the OIN's application is comprised of 99 parcels (3,428± acres) of land located within the jurisdictional boundaries of Oneida County. 80 parcels (2,196± acres) are located in the Town of Verona, with 19 parcels (1,232± acres) situated within the Town of Vernon. Until the early 1990's, these lands were predominantly characterized by agricultural and rural development consistent with existing land uses in the surrounding area. Since taking fee title to these lands, and within a relatively short period of time, a majority of these Group 1 parcels have been developed in conjunction with the OIN's Turning Stone Resort & Casino.

The municipalities within which the Group 1 parcels are located are comprised of people who live and work in long established communities. These people are the local electorate who chose representatives to guide community planning processes, provide services, and protect its citizens, finite resources and the environment. These communities are comprised of churches, synagogues, and mosques; schools; parks; community groups; hamlets; neighborhoods; and businesses. Once a significant agricultural community, the area has seen its farmland diminish, replaced by industry, businesses, services, housing, and ultimately the OIN's gaming facilities. Agriculture, however, remains an important institution throughout the area and still dominates the community character.

Many of the area's citizens are also employed in nearby Rome, Utica and Syracuse illustrating the interwoven nature of communities. The complexity of infrastructure is reflected in municipal reliance on the many existing special districts that provide basic services such as fire and police, utilities (water, sewer, lighting), libraries and public schools. The local highways interconnect these communities, neighborhoods and municipalities.

Governance of the area established more than 200 years ago includes town, village and city boards, a county Board of Supervisors, planning boards, zoning boards of appeal, and school boards, as well as the many departments who provide specific services to the local citizenry. The settled expectations of citizens in the area are that governance will be by open government, including notice of decisions that will affect their lives, public hearings and access to government officials, the ability to get information (through the Freedom of Information Act; FOIA), and the availability of judicial review of government decisions. These settled expectations would be disrupted by taking lands into trust.

In addition to not providing for the contiguity of OIN lands, acceptance of this application would create patches of tribal trust lands within the fabric of multiple communities impacting their character and ability to govern. Appendix B represents a tabular summary of the Group 1 parcels including tax map number, street address, acreage, zoning designation and current land use. Summary descriptions of each Group 1 parcel (including photographs) are provided in Appendix C. The locations of Group 1 parcels are illustrated on a map included as Figure 3 in Appendix A.

In the OIN letter to the BIA of April 4, 2005, the statement is made that "All uses have been in place for many years." This statement is incorrect and blatantly misleading. The OIN has been in an active and public development mode at these properties continuously over the last 10 years. Development on Group 1 parcels during that period has included, but not been limited to:

- Turning Stone Casino
- Event Center at Turning Stone
- The Tower at Turning Stone – a 19-story, "\$308 million" hotel, with 287 rooms
- The Inn at Turning Stone – 62-room inn
- The Lodge at Turning Stone – a "98 suite luxury boutique hotel"
- A 2,400 car parking garage
- 14 restaurants and a food court
- Three 18-hole golf courses
- The Shenandoah Clubhouse – 27,000 square feet
- Cogeneration facility (at Turning Stone Resort and Casino)

The Turning Stone's own web site references construction for the "dramatic structure" of its 19 story, 287 room hotel - The Tower at Turning Stone - began only recently in 2003 (and was completed in 2005), a clear indication of the growth and expansion that has been occurring in recent years. As a result, the further claim by the OIN in its letter of April 4, 2005, that "With respect to the environmental effect of land acquisition, please be advised that there is *no anticipated change in the use of any of the land* [emphasis added] that is the subject of this request," cannot be accepted as credible on its face. While casino operations may not change, based on past activities it is expected that the additional development of the properties consistent with that use will continue unabated. Assuming past practices were to continue, OIN will resist State and local regulation and monitoring for the protection of the environment and the health and safety of the public by local communities and the State of New York. Change in use on the remaining and significant non-casino lands is likely and must also be reviewed.

The OIN has touted what it views as the positive economic impact associated with development of gaming and other operations on the Group 1 parcels. Although not in trust with the federal government, these lands have been developed by the OIN inconsistent with local land use and regulation, without review by local jurisdictions, without applicable permits from federal and State agencies, and without payment of property and other taxes that maintain the public infrastructure that supports such development.

In addition, OIN-touted successes on the Group 1 parcels have been obtained at the expense of non-OIN businesses, which are required to conduct environmental reviews, obtain permits and pay taxes on lands located within the same community and sometimes contiguous to OIN-owned parcels. In a competitive market, the ability for a non-OIN business to be marketable and sustainable on this “unlevel playing field” is significantly and adversely impacted.

In addition to the “unlevel playing field”, regulatory jurisdiction is a critical issue. It must be asked “who is minding the store” when it comes to regulatory reviews and potential impacts on the environment and public health. The OIN application fails to identify appropriate OIN programs that would operate in place of State and local programs to protect the environment and public health. While it may not be known what level of environmental detriment (short- and long-term) occurred as a result of OIN-sponsored Group 1 parcel development (anecdotal information exists and is referenced herein), it is for that very reason that government at all levels has established reviews and regulatory procedures to understand the implications of such projects before they are initiated. Federal, State and local governments also have procedures that allow jurisdictional authorities to monitor sensitive activities and operations so that public health and the environment continue to be protected.

Consequently, the discussion of impacts associated with Group 1 cover a variety of economic and jurisdictional issues highlighting the following general themes:

- Inability for non-OIN businesses to compete on an equitable basis with OIN businesses due to “unlevel playing field”.
- No formal and conventional mechanism to obtain financial support for maintenance and operation of public infrastructure (*i.e.*, taxes and special assessments).
- Disproportional use of finite resources (*i.e.*, water) by OIN operations impacting local economic development efforts to attract a diversity of sustainable non-OIN owned and operated businesses.
- Inability for local governments to review OIN-proposed development to ascertain compatibility with local zoning and building code requirements and master plans (including compatibility with surrounding land uses).
- No review of potential adverse environmental and socio-economic impacts associated with OIN-development including short- and long-term, construction and operation phase, and cumulative impacts.
- No acquisition of permits for regulated activities resulting in loss of resources (*i.e.*, wetlands) and adverse impacts to the environment.
- No review of development or monitoring of operations to document compliance with design and operating standards (*i.e.*, buildings, storm water management facilities, driveways on State and local roads, etc.).

In consideration of the OIN application (existing and future), it is imperative that the BIA balance the benefits stated by the OIN with the diverse adverse implications to the State, counties, and municipalities, as well as to the environment. As the OIN continues its efforts to diversify its development portfolio, it must continue to be asked – at what and whose expense. The remaining sections of this report provide information on the economic and jurisdictional implications of the OIN's application, as well as other considerations pertinent to the review process.

IMPACTS ON REGULATORY JURISDICTION

Summary. This section of the report presents comments requested by the BIA relevant to 25 C.F.R. § 151.10(f) (*jurisdictional problems and potential conflicts of land use that may arise*). The proposed placement of Group 1 parcels in federal trust raises many significant issues relating to the jurisdiction of the State of New York, the County of Oneida and the Townships of Vernon and Verona with regard to environmental planning, compliance, monitoring, reporting and management. To date, in the development of the Turning Stone Resort and Casino, the OIN has largely ignored applicable environmental laws, regulations, standards, guidance and policies, the objective of which are the protection of public health and of the environment. With regard to the Turning Stone Resort and Casino, golf courses, service stations and other existing OIN land use activities, these environmental laws, regulations, standards, guidance and policies would have applied to their past planning and development, and also to their ongoing operation. In the past, the OIN has considered these Group 1 parcels not to be subject to the jurisdiction of the State of New York or its political subdivisions; there has been no indication that this position will change in the future. Therefore, the development has grown, and continues to grow, without the regulatory oversight, verification and controls critical to the protection of the environment and of the public health and safety.

Table 1 represents a summary of State and local jurisdictional authority impacted by activities on OIN parcels. This list is representative of the types of jurisdictions, but is not meant to be all-inclusive. The list is provided to illustrate the established governance and potential disruption of settled expectations and services, which governance (and the related regulatory jurisdiction) provides to the affected communities. Any loss of these jurisdictions could result in a significant on- and off-site threat to the environment and public health and safety. Such loss will hinder State and local government protection of residents, employees and visitors alike from impacts to the environment, public health and safety.

Additional information regarding some of these programs, supported periodically by case study, is provided in ensuing subsections and in the appendices included herein.

Table 1 State and local jurisdictions.

<i>Jurisdiction</i>	<i>Implication</i>
State	
Article 15 of the Environmental Conservation Law (ECL) (Protection of Waters) (6 NYCRR Part 608)	Inability to track and regulate activities in protected waters of the State. Additional impacts to riparian rights.
Article 24 of the ECL (Protection of Wetlands) (6 NYCRR Parts 563-664)	Inability to track, regulate and restrict (as necessary) encroachments on State freshwater wetlands. Impacts include wetland habitats and functions.
Section 401 of the Clean Water Act (Water Quality Certification)	Loss of ability to review activities within federally-regulated waterbodies to ensure there is no contravention of State water quality standards.
Article 8 of the ECL (State Environmental Quality Review Act) (6 NYCRR Part 617)	Loss of ability to review potential significant adverse environmental and socio-economic impacts from activities developed on OIN-owned lands. Implications are far-reaching including on- and off-site impacts, short- and long-term impacts, and cumulative impacts.
Article 19 of the ECL (Permit to Construct an Air Emission Source) (6 NYCRR Part 201)	Inability to review and approve air emission, mitigation measures and potential off-site impacts (including worker and community impacts typically reviewed under the USEPA's Risk Management and OSHA's Process Safety Management programs).
Article 27, Title 9 of the ECL (Hazardous Waste Management Regulations) (6 NYCRR Parts 361, 370-374 and 376)	Loss of ability to review, permit and track the handling, transportation, disposal and manifesting of hazardous waste.
Articles 17, 37 and 40 of the ECL (Hazardous Substance and Petroleum Bulk Storage Requirements) (6 NYCRR Parts 595-599, 610, and 612-614) (Environmental Priorities and Procedures in Petroleum Clean-up and Removal) (6 NYCRR Part 611)	Loss of ability to review, approve and inventory hazardous substance (chemical) and petroleum bulk storage tanks (above and underground). Loss of jurisdiction impacts the ability to ensure compliance with federal and State tank and secondary containment design standards, as well as spill clean-up standards.
Article 27 of the ECL, Titles 13 and 14 (Inactive Hazardous Waste Disposal Site Remedial Program) (6 NYCRR Part 375)	Inability to review and approve remedial programs associated with the investigation and clean-up of brownfields and inactive hazardous waste disposal sites that could be sources of significant threats to public health or the environment.
Article 27 of the ECL (Solid Waste Disposal Facilities) (6 NYCRR Part 360)	Inability to regulate the design, permitting, construction, operation and closure of solid waste management facilities.
Article 27, Titles 3 & 7 of the ECL (Waste Transporter Permits) (6 NYCRR Part 364)	Inability to regulate the transportation of solid waste on public roads and to point of disposal.
Article 17 of the ECL (State Pollutant Discharge Elimination System) (6 NYCRR Part 750)	Inability to review, approve and monitor point source discharges to waters of the State (including process and storm water discharges, and runoff from Concentrated Animal Feeding Operations).
Article 15, Title 15 of the ECL (Water Supply Permits) (6 NYCRR Part 601)	Inability to review, approve and monitor public water supplies including quantity and quality, consumptive use, and public health issues.
Article 17 of the ECL (Approval of Plans for a Wastewater Disposal	Inability to review, approve and monitor waste water disposal/treatment facilities (including

Comments on the Oneida Indian Nation's Land In Trust Application – Group 1 Parcels

<i>Jurisdiction</i>	<i>Implication</i>
System)	wastewater treatment facilities and septic systems).
Section 225 of NYS Public Health Law (New York State Sanitary Code) (10 NYCRR)	The New York State Sanitary Code covers a wide variety of public and environmental health related topics including: communicable diseases; drinking water supplies; swimming pools, bathing beaches and recreational spray grounds; temporary residences, mass gatherings, childrens' camps and agricultural fairgrounds; life and health nuisances; barber shops and beauty parlors; qualifications of public health personnel; maternal and child healthcare; transportation and handling of dead bodies; food service establishments; migrant farm worker housing; radiation; mobile home parks; public functions; laboratories; environmental and sexually transmitted diseases; AIDS; vital records.
Section 52 of the NYS Highway Law (Highway Work Permits)	Inability to regulate, review and approve work within State public highway rights-of-way (including utility and road work, driveway cuts, etc.). Potential maintenance and protection of traffic issues.
Articles 16 and 36 of the ECL (Floodplain Development Permits, Flood Control) (6 NYCRR Parts 500 <i>et seq.</i>)	Inability for the State and local floodplain administrators to restrict and regulate development within floodplains and floodways including review of flood-proofing and compensatory storage issues.
Sections 3.09 and 14.09 of the NYS Parks, Recreation and Historic Preservation Law (State Preservation Laws) (9 NYCRR Part 428)	Inability to protect cultural, historic, archaeological, and architecturally significant resources; including potential viewshed impacts from OIN activities on resources in the vicinity.
Article 25-AA of the New York State Agriculture and Markets Law (Agricultural Districts and Prime Farmland) (1 NYCRR Part 371)	Loss of oversight related to the review of potential impacts of non-farm development activities on the continued viability of agricultural operations in New York State.
Article 23 of the ECL (Mined Land Reclamation Permit) (6 NYCRR Part 421)	Loss of ability to review and permit the environmentally sound, economic development of New York's mineral resources and the return of affected land to productive use for current and future generations.
Article 33 of the ECL (Pesticide Registration, Certification, Storage and Application) (6 NYCRR Parts 325 – 327)	Inability to regulate the application of pesticides and enforcement of State pesticide laws.
Article 11 of the ECL (Fish and Wildlife Law) (6 NYCRR Chapter 1)	Inability to manage and protect fish and wildlife populations (including monitoring of chronic wasting disease among resident deer population), and their habitats, or to license hunters, anglers, and trappers.
Section 9-1303 of the ECL (Forest Insects and Other Tree Diseases)	Inability for the State to exercise broad authority in regard to forest insects and other tree diseases to: (1) enter into cooperative agreements with other State and federal agencies for the purposes of controlling forest insects (<i>i.e.</i> , wood wasps) and other tree diseases; (2) conduct investigations; (3) by order, enter upon any lands to determine if the property is infested with forest insects or forest

Comments on the Oneida Indian Nation's Land In Trust Application – Group 1 Parcels

<i>Jurisdiction</i>	<i>Implication</i>
	tree diseases; (4) to establish quarantine districts to prohibit the movement of materials which may be harboring forest insects; (5) treat infected forest areas; and (6) establish barrier or protective zones for the purpose of preventing the spread of forest insects and disease pests, and in so doing, have the authority to enter on private lands to treat and destroy infected vegetation.
Article 12 of the New York State Navigation Law	Inability to ensure that petroleum discharges are cleaned up.
New York State Finance Law	Inability to levy special assessment fees and regulatory program fees on regulated facilities in New York State. Fees are used to fund remedial efforts and other environmental program needs.
Article 16 of the Agriculture and Markets Law (Weights and Measures)	Loss of ability for a State certified agency to monitor the accuracy of any weighing and or measuring device (<i>i.e.</i> , gas stations). Equipment is inspected and calibrated to the New York State standards in Albany, NY.
Local (County, City, Town, Village)	
Right-To-Build Approvals	Loss of ability to review and approve zoning-related issues, site plans, area and use variances, special permits, subdivisions, NYS General Municipal Law § 239 reviews, building permits, demolition permits (including asbestos removal and reporting under 12 NYCRR Part 56), consistency with building codes, etc. Has far-reaching implications on economic development (<i>i.e.</i> , "level regulatory playing field"), local master planning, land use compatibility, and cumulative impacts.
Section 136 of the NYS Highway Law (Highway Work Permits)	Inability to regulate, review and approve work within local public highway rights-of-way (including utility and road work, driveway cuts, etc.). Potential maintenance and protection of traffic issues.
New York State Sanitary Code (Wells and Septic Systems)	Loss of ability to review and approve public and private wells and septic systems.
Industrial Wastewater Discharge Permits	Oversight of pretreatment, conveyance and discharge of wastewaters to publicly owned treatment works.
Governance Issues	Impacts on State and local ability to provide open government services such as: public participation, open meetings, public access to information, judicial review, etc.
Public Health Laws	Inability to inspect facilities to ensure compliance with local and State public health and safety laws (<i>i.e.</i> , hotel and restaurant inspections, storage and preparation of food, smoking ban pursuant to Clean Indoor Air Act, communicable disease reporting, water quality, campgrounds, subdivisions, swimming pools).

Source: O'Brien & Gere Engineers, Inc.

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

Compounding the uncertainty as to the State's ability to enforce such laws where lands have been taken into trust status, it is also unclear whether the OIN has implemented surrogate regulations or, if it has, whether such regulations or practices are as comprehensive as State and local requirements. The OIN's website (<http://www.oneidation.net/>) does not identify environmental codes, although other codes are listed. In addition, under the claim of sovereignty, it is unclear whether federal regulations have been adhered to by the OIN or enforced by the jurisdictional federal agencies, although it is clear in many instances that federal statutes require such compliance and allow enforcement. Furthermore, the decision to place such a substantial amount of land into trust must take into consideration the BIA's ability (units and resources) to oversee these lands as a replacement to State and local public health and safety and environmental oversight.

To fully comprehend the areal extent of potential impacts, it is important to understand that environmental impacts do not recognize property boundaries. Activities on OIN-owned properties do not just have the potential to impact resources within the parcel boundaries, but may migrate beyond property limits onto non-OIN lands. This also holds true for non-OIN activities, although such activities are required to undergo environmental reviews and obtain permits so that impacts are eliminated or reduced to protect public health and the environment. Figure 4 in Appendix A illustrates a one-mile buffer around the Group 1 parcels. The area within the buffer represents approximately 18,300± acres of land. Based on our regulatory and land use experience, construction and operational activities may impact properties within a one-mile radius, more or less, depending on the type and magnitude of operations and resource impacted. Impacts may be related to a variety of environmental and socio-economic issues including land-related (soils, flora/fauna, habitats, utilities, traffic), water-related (wetlands, streams, ground water), air-related (dust, exhaust, emissions), and cultural-related (viewshed, land-use compatibility, historic-archaeological-architectural resources) and a variety of other issues. To support the comments provided herein, the State, working with the local jurisdictions, has compiled Geographic Information System (GIS) data to illustrate the overlap and potential conflicts of Group 1 parcels with resources and regulatory programs pertinent to the area. Group 1 GIS data presented in Appendix A consist of:

- Figure 1 Groups 1, 2 & 3 Parcels
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- Figure 10 Water & Sewer Districts & Utilities
- Figure 11 Flood Zones
- Figure 12 National/State Register Sites
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- Figure 15 Regulated Facilities
- Figure 16 Petroleum Bulk Storage Facilities
- Figure 17 Gas Stations
- Figure 18 Oil and Gas Well Permits
- Figure 19 Chemical Bulk Storage Facilities
- Figure 20 Zoning
- Figure 21 Schools & Hospitals
- Figure 22 New York State Parks
- Figure 23 Landmarks
- Figure 24 School Districts
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- Figure 28 Environmental Justice

Wetlands. Wetlands perform numerous functions, which provide benefits to the environment and the citizens of the State. Wetland functions and benefits that are important in New York State include: flood protection and abatement, erosion and sedimentation control, water quality maintenance, recharging of ground water supplies, maintaining surface flows, fish and wildlife habitats, nutrient production and cycling, recreation, open space, educational and scientific research, and biological diversity.

New York State Freshwater Wetlands are under the regulatory jurisdiction of the New York State Department of Environmental Conservation (NYSDEC), while federal wetlands are under the purview of the United States Army Corps of Engineers (ACOE). Information regarding each jurisdiction is provided below.

- New York State Freshwater Wetlands. Freshwater wetlands are protected in New York State pursuant to Article 24 of the ECL, which has been in effect since 1975: "It is declared to be the public policy of the State to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the State" (§ 24-0103 of the ECL).

Activities which may impact freshwater wetlands are subject to a State permitting process: "All persons proposing to conduct, on wetlands or adjacent areas, activities that have not been specifically exempted...must obtain either a permit or a letter of permission" (6 NYCRR Part 663.4). These regulations require that freshwater wetlands greater than 12.4 acres in size and wetlands of any size that are deemed to be of significant local importance be mapped. Under these regulations, the NYSDEC also regulates the 100-foot area adjacent to wetlands as a buffer zone. The buffer zone may be extended beyond the 100-foot adjacent area by formal order of the NYSDEC commissioner where deemed appropriate to protect the wetland area.

The NYSDEC classifies each wetland shown on its wetlands maps according to the classification system set forth in 6 NYCRR Part 664. Four separate classes are established that rank wetlands according to their ability to perform wetland functions and provide wetland benefits. Class I wetlands have the highest rank, descending through Class II, III and IV.

The areal extent of NYSDEC Freshwater Wetlands on and in the vicinity of the Group 1 parcels is illustrated on Figure 5 of Appendix A. Many of the overlapping wetland-Group 1 parcel boundaries delineate areas where previous OIN gaming and golf course related development activities have encroached and permanently filled State jurisdictional wetlands. The placement of Group 1 parcels into trust will permanently remove remaining State wetlands on these parcels from the jurisdictional protection of the NYSDEC and eliminate independent oversight to ensure that wetlands on these properties and their associated functions are not further impaired, or lost completely.

As shown on Figure 5 of Appendix A, additional State-jurisdictional wetlands are present on lands located immediately adjacent to the Group 1 parcels. Placement of the Group 1 parcels into federal trust, will hinder the State's ability to control potential direct and indirect impacts to these remaining off-site wetlands (and the non-OIN landowners who have complied with the State's regulatory requirements) from continued OIN development and operational activities. Existing and future OIN development and operational activities have the potential to impact these adjacent areas due to:

- altered hydrology;
- degraded fish and wildlife habitat;
- uncontrolled contaminants in runoff, such as fertilizers, herbicides and pesticides used at the OIN's gaming facilities and golf courses and related activities;
- petroleum contaminants and heavy metals in runoff from paved surfaces, such as parking lots, driveways and roadways; and
- dispersion of litter from the reported 4 million annual visitors to the OIN's Turning Stone facilities.

Development of the Group 1 parcels was performed without the required consultation with the NYSDEC, or the opportunity for public participation or the incorporation of measures to protect the wetland or buffer areas. Consequently, significant acreage of New York State regulated wetlands were destroyed or impaired. Despite the United States Supreme Court decision in *City of Sherrill v. The Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), the OIN continues to consider the properties constituting the Turning Stone Resort and Casino not to be subject to the jurisdiction of the NYSDEC and the protection of the State. Past or future development of Group 1 parcels, in addition to the already developed Turning Stone Resort and Casino and golf course areas, may occur without consideration of the regulatory requirements to protect the State's wetland resources.

If the Group 1 parcels are accepted into trust, remaining wetlands will be further impacted, without the oversight and protection afforded by New York State law and regulation. Unmonitored, uncontrolled and unmitigated, chemical fertilizers, herbicides and pesticides used on the golf courses and in OIN landscaping maintenance activities will find their way into runoff and alter and/or inhibit the natural process that otherwise contribute to the quality of a wetland; they impact the sensitive balance that provides the unique nature and quality of a wetland. Excavation, draining, clearing and regrading of the land associated with development of the infrastructure (water, sewage, drainage), structures, and golf courses impact the flow of surface waters and the hydrologic dynamics that support the wetlands.

To the extent that surfaces have been paved or otherwise altered from their former greenfield farmlands by the construction of the structures and paved parking areas associated with gaming facilities and other OIN development of the Group 1 parcels, wetland hydrology may also have been modified, if not impaired. Impermeable surfaces, including structures and paved areas, increase the amount and velocity of overland runoff flow, which can overwhelm a wetland's ability to temporarily retain storm water runoff and provide filtration. The lack of this natural retention and filtration of runoff increases the potential for contaminants reaching the ground or surface waters. In addition, the loss of wetland acreage and increased velocity of surface water flow is likely to increase the scouring of stream banks, lead to increased downstream sedimentation, and the flooding of upstream or downstream properties, both within the Group 1 parcels and those areas outside of the OIN properties.

Additionally, the quality of the ground waters and surface waters has been and will continue to be negatively impacted by flow over roads, parking lots, and other developed areas. The impact of this deterioration in the water quality that is reaching the remaining wetlands has not been subject to oversight by the NYSDEC on behalf of the people of New York. Additionally, the impacts noted here will only increase as the Group 1 parcels continue to be developed further.

Many species of fish and wildlife depend on wetlands for critical parts of their life cycle. By providing breeding, nesting, and feeding grounds and cover, wetlands are recognized as one of the most valuable habitats for wildlife. Young fish find food and shelter in the protective vegetation. Many species of endangered, threatened, or special concern fish and wildlife depend on wetlands. In addition, wetlands are habitat for thousands of species of the plants of New York. One half of New York's protected native plants, many of which are endangered or threatened, are wetlands species.

Finally, wetlands do not recognize property boundaries. There are wetlands that are continuous and hydrologically interconnected onto and off the Group 1 parcels. Effective wetland protection can not end at a property boundary. Since the properties for which trust status is being sought are scattered throughout the region, the impact on the non-tribal landowners of these non-regulated parcels may be far greater than the parcels' acreage would suggest. Since the tribe's claim extends to potentially over 300,000 acres, the effect of

unregulated development on the OIN's parcels can have widespread impacts off site including damage to wetland complexes, destruction and degradation of fish and wildlife habitats, increased flooding, and impairment of ground and surface water quality. Any loss of jurisdiction resulting from an acceptance of this application places at risk the integrity of wetland ecosystems throughout the region.

Case Study – Figure 6 in Appendix A represents an aerial photograph taken in 2003, which depicts the lands surrounding the Turning Stone Resort and Casino. Significant cleared (bare soil) areas are evident in the photograph as a result of the construction of the OIN's 18-hole Atunyote golf course. Comparing the aerial photograph with Figure 5, which illustrates the State's jurisdictional wetland boundaries, documents areas of wetland and wetland buffer, and shows encroachments for which no NYSDEC permits were acquired by the OIN, and for which no oversight, assessment, control or supervised mitigation were conducted. Federal wetlands were also likely filled as part of these activities. Anecdotal information reported to the NYSDEC during this timeframe included visual observations of significant siltation of a tributary of Sconondoa Creek, which flows from the OIN properties.

- Federal Wetlands. Section 404 of the Clean Water Act of 1977 requires a permit from the ACOE before dredge or fill materials can be discharged into waters of the United States, which includes wetlands. The ACOE is required to issue permits in accordance with guidelines developed by the USEPA [404 (b)(1) Guidelines]. The involvement of the USEPA is for the protection of municipal water supplies, shellfish and fishery areas, wildlife, and recreational areas. In addition, the ACOE is required to give "full consideration" to comments by the U.S. Fish and Wildlife Service (USFWS) and the U.S. National Marine Fisheries Service when reviewing permit applications.

The ACOE also has some wetlands authority under Section 10 of the Rivers and Harbors Act of 1899. Any activity in navigable waters below the ordinary high water mark of rivers and lakes (or mean high water in tidal areas) requires a permit from the ACOE. These activities include filling, dredging, structures, underwater cables, and similar activities. Navigable waters are defined in 33 C.F.R. 329.4 as those "subject to ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce".

The ACOE and USEPA jointly define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" [33 C.F.R. 328.3(b) and 40 C.F.R. 230.3(t)]. Human actions in ACOE and USEPA defined wetlands are subject to regulatory scrutiny.

The current method for identifying and delineating federally regulated wetlands are set forth in the United States Department of the Army Technical Report Y-87-1, Corps of Engineers Wetland Delineation Manual, January

1987 (ACOE 1987). According to the ACOE (1987), wetlands are characterized based on a triad approach consisting of the study of hydrology, soil, and vegetation. The three parameters are evaluated for wetland indicators such as hydric soils, periodic flooding or soil saturation, and presence of hydrophytic (water tolerant) vegetation. Evidence for a minimum of one wetland indicator for each of the parameters must be found to make a positive wetland determination. A site is classified as a federal wetland if: the prevalent vegetation is hydrophytic; and the soils present have been classified as hydric or possess reducing soil characteristics; and the area is either permanently or periodically at mean water depths less than 6.6 feet, or the soil is saturated to the surface at some time during the growing season. The USFWS, in response to the increasing national recognition of the value of wetland resources, initiated an ongoing national inventory of wetlands in 1979 using the U.S. wetland taxonomic scheme, Classification of Wetlands and Deepwater Habitats of the United States (USFWS 1979). The National Wetlands Inventory (NWI) was developed to provide comparable information on the status and extent of U.S. wetland resources. NWI maps provide an indication of the potential presence of federally regulated wetlands.

NWI maps published by the USFWS are not available in GIS format for the Group 1 parcels. However, locations of hydric soils (source: United States Department of Agriculture), a prime indicator of wetlands, are illustrated on Figure 7 in Appendix A. Hydric soils, and soils with hydric inclusions, are present throughout and adjacent to the Group 1 parcels. These characteristics indicate that under federal criteria for wetlands, large portions of the Group 1 parcels are likely ACOE jurisdictional wetlands. Therefore, plans for the development of these properties should have been subject to the jurisdiction and approval of the ACOE; restrictions may have been placed on development of large portions of these properties by the ACOE if appropriate notification of these wetlands and a permit application had been filed prior to construction; and mitigation would have been required, the nature of which would have depended on the type of wetland and the wetland values. Mitigation options may include wetland protection, on-site wetland enhancement, on site creation of new wetlands, enhancement of off-site wetlands, and/or creation of new wetlands off-site. The mitigation options required by the ACOE are highly dependent on the values of the specific wetlands, and their uniqueness nationally and regionally. Mitigation may extend from a 2:1 ratio (for example, acres created v. acres lost) to as high as a 5:1 ratio.

In New York State, the NYSDEC works closely with the ACOE to protect wetlands resources. A single Joint Application for Permit, submitted to the NYSDEC, fulfills the application requirements of both the NYSDEC and the ACOE for activities impacting wetlands. The joint application process relies on materials submitted by applicants typically including a completed wetland delineation and report, a project description with plans or engineering drawings showing the location and extent of work which may disturb or impact the wetlands, and in some instances a wetland mitigation plan which details activities to be completed to mitigate for losses of wetland habitat.

The OIN application represents a substantial amount of land, and a BIA decision on the application will represent a significant precedent (*i.e.*, national policy) that may be relied upon when weighing future, similar applications.

It is worth noting that during past OIN development of Group 1 parcels, the required proactive notification and consultation with the ACOE (during project planning) did not occur, and the process to obtain appropriate permits and approvals was not conducted. Therefore, jurisdictional federal wetlands were destroyed without notification to or approval by any agency before the fact. In addition, remaining jurisdictional federal wetlands on the Group 1 parcels remain directly at risk, since the OIN does not recognize the jurisdictional processes dealing with regulated federal wetlands. Regardless of the position of the OIN with respect to regulated federal wetlands on the Group 1 parcels and as was the case for State jurisdictional wetlands, regulated federal wetlands on adjacent properties are also at risk from the impacts of continued development and operational activities of the Group 1 parcels. Identical to the impacts on State wetlands, these impacts to off-site federal wetlands include, but are not limited to, uncontrolled contaminants in runoff courses; petroleum contaminants and heavy metals in runoff from paved surfaces, and dispersion of litter.

Clean Air. Air resources and quality are protected in New York State pursuant to Article 19 of the ECL and its implementing regulations (6 NYCRR 200 *et seq.*). NYSDEC has maintained a strong air pollution control program since at least the early 1980s. In fact, the State had established a program to control toxic air pollutants before the federal program initiated by Congress' passage of the "Clean Air Act Amendments of 1990." The goal of the State's clean air program is to "maintain a reasonable degree of purity of the air resources of the State, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the State, the propagation and protection of flora and fauna, and the protection of physical property and other resources, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution."

A State Implementation Plan (SIP) is the federally approved and enforceable plan by which each state identifies how it will attain and/or maintain the health-related primary and welfare-related secondary National Ambient Air Quality Standards (NAAQS) described in Section 109 of the Clean Air Act (CAA) and 40 C.F.R. 50.4 through 50.12. SIP documents contain a wide variety of information, including air quality goals, measurements of air quality, emission inventories, modeling demonstrations, control strategies, evidence of public participation, and more. The SIP serves as the plan by which the monitoring and control of air emissions throughout the State are coordinated, since emissions in an area of the State may be incremental, but their impacts may be additive and synergistic.

Thus, the framework for the improvement and maintenance of clean air in New York State consists of the federal Clean Air Act and its implementing regulations, the federally enforceable State SIP, and the State's own clean air laws and regulations, which are more protective than those of the federal program.

Examples of State regulatory provisions routinely anticipated to apply to the developed Group 1 parcels, and to the continuing development activities include:

- air emission sources, which require facility owners and/or operators of air contamination sources to obtain a permit or registration certificate from the NYSDEC for the operation of such sources;
- installation, maintenance and operation of emission control equipment; and
- documentation of emission operations.

Specific State air emissions regulations in 6 NYCRR that may apply to such facilities include:

- Part 201 Permits and Certificates
- Part 202 Emissions Verification
- Part 208 Landfill Gas Collection and Control Systems for Certain Municipal Solid Waste Landfills
- Part 211 General Prohibitions
- Part 215 Open Fires
- Part 217 Motor Vehicle Emissions
- Part 218 Emission Standards for Motor Vehicles and Motor Vehicle Engines
- Part 225 Fuel Composition and Use
- Part 227 Stationary Combustion Installations
- Part 229 Petroleum and Volatile Organic Liquid Storage and Transfer
- Part 230 Gasoline Dispensing Sites and Transport Vehicles
- Part 231 New Source Review in Non-Attainment Areas and Ozone Transport Areas
- Part 234 Graphic Arts
- Part 238 Acid Deposition SO₂ Budget Trading Program

Under the Clean Air Act, activities on trust lands are subject to federal jurisdiction. Therefore, the acceptance of this application may exempt the Group 1 parcels from the State's air emission regulatory programs. Existing regulated facilities (including facilities with air permits/registrations) are illustrated on Figure 15 in Appendix A. A "black hole" of no facilities is evident on the Group 1 parcels, not because of the absence of facilities that emit air contaminants, but refusal by OIN to comply with State requirements. As a practical matter, this is a highly significant environmental and public health issue. Air emissions are not limited to property boundaries. Therefore, the impacts of air emissions are not restricted to the boundaries of the properties on which the emissions sources are located, but rather, have impacts to the properties around them. Downwind receptors (residences, schools, hospitals, and similar sensitive land uses) are subject to the environmental and health impacts of the operations of any sources and sensitive receptors are present in proximity to OIN properties and operations. Therefore, clean air regulations and policy acknowledge and incorporate the important concept that impacts may extend far beyond the boundaries of a property.

There are several important aspects to the potential loss of jurisdiction by the State of New York:

- New air emission sources. The OIN will continue to develop the Group 1 parcels consistent with the OIN's prior development practices under the contention that its activities on these properties are not subject to State jurisdiction. Acceptance of this trust application may place such development beyond the environmental and public health jurisdictions of the State of New York. As a result, considerations for the protection of the environment and of the public health from the construction of new air emission sources through State jurisdiction may not be applied to such projects. New sources of air pollution in New York State must undergo permitting review to ensure there will be no adverse air quality impacts, and that appropriate air pollution controls are installed. Existing facilities located upon OIN parcels did not undergo this type of review, and future activities will potentially avoid this review resulting in air quality impacts to New York State.

Case Study – One example is the OIN's cogeneration facility at the Turning Stone Resort and Casino that was constructed without compliance with federal or State regulations. The OIN has since applied for a federal Title V air permit for a major source of air emissions from the USEPA; typically, such permits would be requested from the NYSDEC under delegation from the USEPA. As of this date, this permit application is awaiting a response from the OIN to the USEPA for finalization. However, in the interim, the facility has been operating without a permit, and without monitoring or regulation by any agency – federal or State. Additionally, the permit, if issued, will not address any State clean air act policies based on the OIN's contention that its properties are tribal lands exempt from State jurisdiction.

Based upon discussions with the USEPA, it is the State's understanding that the OIN is operating an air contamination source(s) consisting of the following equipment:

- one Natural Gas Boiler (33.5 MMBtu/hr)
- one Natural Gas/Number 2 Fuel Oil Boiler (33.5 MMBtu/hr)
- six Emergency Diesel Generators (from 2 to 15 MMBtu/hr)
- one 5.3 MW Combined Cycle Combustion Turbine
- two Natural Gas Boilers (20.4 MMBtu/hr each)
- one Emergency Diesel Generator.

The facility currently has a potential to emit (PTE) of 150 tons per year of nitrogen oxides (NOx). Because its PTE is greater than 100 tons per year, the Turning Stone Resort and Casino is considered a major facility and is subject to major source permitting requirements. These requirements were never fulfilled prior to the commencement of construction and operation of the facility.

- Existing emission sources. A loss of State jurisdiction to monitor and control air pollution from existing air emissions sources would be to the detriment of the environment and the public health. The OIN would not be obligated or

accountable for the operations of equipment on its properties, making clean air policy as applied by the NYSDEC to this region of the State difficult to implement. The context of interaction and impacts of emissions from the Group 1 parcels with other sources in the region, and the reverse, is a clean air protection policy that would be outside the jurisdiction of the State to implement.

- Mobile source program. The State's mobile source program is based on the California program rather than the less stringent federal program. If the application for placing Group 1 parcels into trust was approved, provisions of that regulation would be nullified and the State would lose the ability to enforce the more stringent regulations relating to vehicle emission limits and vehicle inspections among other provisions. As part of its mobile source emission reduction strategies, New York State has promulgated and enforced regulations stating that "no person shall sell or supply gasoline to a retailer or wholesale purchaser-consumer, having a Reid vapor pressure greater than 9.0 pounds per square inch as sampled and tested by methods acceptable to the Commissioner of the NYSDEC, during the period May 1st through September 15th of each year" (6 NYCRR § 225-3.3).
- Loss of contiguity. The patchwork pattern of the OIN request makes effective management of clean air by the State particularly difficult, if not impossible. As a practical matter, this lack of contiguity effectively hinders the State's jurisdiction for the protection of clean air in a significantly larger area than just the Group 1 parcels since new air emission sources and the operations of existing sources may be conducted without the oversight normally performed pursuant to State regulations.
- Sensitive receptors. The Group 1 parcels are proximal to, and effectively surround the Vernon-Verona-Sherrill Central School District campus (see Figure 21 in Appendix A). Any loss of jurisdiction by the State with respect to clean air places the State in a position of being unable to protect and maintain the clean air and protect the health of the student population at the school campus.

Threatened and Endangered Animal Species. Threatened and endangered species and species of special concern are protected in New York State pursuant to Article 11 of the ECL and its implementing regulations (6 NYCRR Part 182). Article 11 also includes provisions regulating hunting, fishing, trapping, the collection and possession of wildlife species, and the control of dangerous diseases in wildlife. Based on data obtained from New York State's Natural Heritage Program, known occurrences of threatened and endangered species, species of special concern, and habitats are illustrated on Figure 8 (Natural Heritage Program) in Appendix A. Known occurrences include such species as: Brindled Madtom (*Noturus miurus*), Lake Sturgeon (*Acipenser fulvescens*), Northern Harrier (*Circus cyaneus*), Spiny Softshell Turtle (*Trionyx spiniferus*), Pied-billed Grebe (*Podilymbus podiceps*), Upland Sandpiper (*Bartramia longicauda*), and Short-eared Owl (*Asio flammeus*). The NYSDEC provides oversight on these critical New York State resources, including assistance in evaluating impacts during State Environmental Quality Review Act (SEQRA) and National Environmental Policy Act (NEPA) reviews. The NYSDEC's federal counterpart is the USFWS. Any loss of State jurisdictional oversight will have significant impacts on these resources, including direct impacts on species and

habitats (*i.e.*, loss of and segmentation), and indirect impacts on adjacent (non-OIN) parcels.

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

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

- Threatened species. Defined as any species which meet one of the following criteria: (1) are native species likely to become an endangered species within the foreseeable future in New York; or (2) are species listed as threatened by the United States Department of the Interior (6 NYCRR § 182.1(a)(1), revised as of October 1, 1998, pages 95-177).
- Endangered species. Defined as any species which meet one of the following criteria: (1) are native species in imminent danger of extirpation or extinction in New York; or (2) are species listed as endangered by the United States Department of the Interior (6 NYCRR §182.1(a)(1), revised as of October 1, 1998, pages 95-177).
- Species of special concern. Defined as species of fish and wildlife found by the NYSDEC to be at risk of becoming either endangered or threatened in New York. Species of special concern do not qualify as either endangered or threatened.

As previously stated, a majority of the Group 1 parcels were undeveloped greenfields or farm lands prior to their development by the OIN. It is not known whether the OIN performed a habitat survey to ensure that threatened or endangered animal species, or species of special concern, as defined by both federal and State regulations, were present or absent on the properties. While the past OIN development of the Group 1 parcels has impacted existing species, including potentially significant resources, the acceptance of the trust application may adversely impact the jurisdiction of the NYSDEC to monitor and protect remaining species that may be present on the Group 1 parcels as these properties continue to be developed.

Additionally, absent the jurisdictional authority of the NYSDEC, the continuing development of the Group 1 parcels will impact threatened and endangered species and species of special concern on adjacent properties, including direct impacts on species and habitats (*i.e.*, loss of and segmentation of habitat). The patchwork pattern of the OIN request makes effective management of the sensitive habitats of these species difficult, if not impossible, even with respect to the properties adjacent to the Group 1 parcels. As a practical matter, this impact is far greater than just the Group 1 parcels.

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

- endangered
- threatened
- rare
- exploitably vulnerable

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

The list of rare, threatened, or endangered (RTE) plant species (as contained on federal, State or Natural Heritage Program lists) that are or may be present in Oneida County and potentially on (or formerly on) the Group 1 parcels is provided in Appendix D. Implications resulting from the loss of State jurisdictional authority to protect remaining resources are identical to impacts identified above for protected animal species; impacts which are unacceptable given the stated importance of these resources to the people of New York and their responsibility to preserve these resources for future generations.

Comprehensive Wildlife Protection and Conservation. In addition to protection of threatened and endangered species, and species of special concern, the NYSDEC also maintains jurisdictional authority under Article 11 of the ECL to regulate hunting, fishing, trapping, collection and possession of wildlife; as well as the control of dangerous diseases in wildlife. The latter issue has been of particular importance in recent months to the greater Oneida County area. The first confirmed occurrence of Chronic Wasting Disease (CWD) in New York State's deer population was identified in Oneida County. CWD is a transmittable disease that affects the brain and central nervous system of certain deer and elk. In April 2005, in its continuing efforts to protect New York State's deer population and prevent further spread of the disease, the NYSDEC issued emergency regulations regarding the handling, transport and management of deer in the State. The NYSDEC, New York State Department of Agriculture and Markets (NYSDAM), and New York State Department of Health (NYSDOH), together with the United States Department of Agriculture's Animal and Plant Health Inspection Service, are cooperating to develop a comprehensive statewide response to the threat of CWD. Any loss of jurisdiction over OIN-owned lands will significantly hinder the NYSDEC's and other cooperating agencies' ability to control the spread of this disease.

Forest Management. The NYSDEC is also responsible for the protection of the forest resources of the State. With invasive forest insects spreading, the NYSDEC's needs to act quickly to minimize damage to forests. New York State has over 18 million acres of forest land that support a wide array of plants and animals. In addition, the forest produce industry is robust in the State and would be negatively impacted if forest insects went unchecked.

Under Section 9-1303 of the ECL, the NYSDEC has broad authority in regard to forest insects and other tree diseases to: (1) enter into cooperative agreements with other State and federal agencies for the purposes of controlling forest insects (*e.g.*, wood wasps) and other tree diseases; (2) conduct investigations; (3) by order, enter upon any lands to determine if the property is infested with forest insects or forest tree diseases; (4) to establish quarantine districts to prohibit the movement of materials which may be harboring forest insects; (5) treat infected forest areas; and (6) establish barrier or protective zones for the purpose of preventing the spread of forest insects and disease pests, and in so doing, have the authority to enter on private lands to treat and destroy infected vegetation.

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

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

Any loss of State jurisdictional oversight of these programs on the Group 1 parcels will have implications ranging from direct impacts on OIN-owned lands (*i.e.*, future OIN economic diversification efforts similar to the Turning Stone Resort and Casino, Car Care, SavOn Gas Stations, Salmon Acres, Village of the White Plains, Marian Manor

Marina, Snug Harbor Marina, golf courses, etc.), as well as indirect impacts on non-OIN lands due to lack of oversight and review and the resultant environmental harm.

- Protection of Waters. As illustrated on Figure 9 in Appendix A, Group 1 parcels are located within the Oneida Lake drainage basin. Drainage within this system is conveyed through a complex network of interconnected rivers, streams and ponds, as well as ground water flow that is interconnected hydrologically with surface waters. These water resources are necessary for drinking and bathing; agricultural, commercial and industrial uses; and fish and wildlife habitat. In addition, these waterways provide opportunities for recreation; education and research; and aesthetic appreciation.

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

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

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

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

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

Certain waters of the State are protected on the basis of their classification. Streams and small water bodies located in the course of a stream that are designated as C(T) or higher (*i.e.*, C(TS), B, or A) are collectively referred to as "protected streams," and are subject to the stream protection provisions of the Protection of Waters regulations (6 NYCRR Part 608). Protected streams overlapping the Group 1 parcels are illustrated on Figure 9 in Appendix A.

No person, local public corporation or interstate authority may excavate from or place fill, either directly or indirectly, in any of the protected waters of the State or in wetlands that are adjacent (typically 50-feet horizontally from the mean high water line) to and contiguous at any point to any of the navigable waters of the State, and that are inundated at mean high water level or tide, without a permit issued by the NYSDEC.

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

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

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

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

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

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

The NYSDEC also issues permits associated with water districts in the Towns of Vernon and Verona (see Figure 10 in Appendix A), as well as to the regional water purveyors – the City of Oneida and the Mohawk Valley Water Authority. Approval of private wells remains the purview of the local and or state health departments.

- State Pollutant Discharge Elimination System. Article 17 of the ECL entitled "Water Pollution Control" was enacted to protect and maintain surface and ground water resources. Article 17 authorized creation of the State Pollutant Discharge Elimination System (SPDES) program to maintain New York's waters with reasonable standards of purity. The SPDES program is designed to eliminate the pollution of New York waters and to maintain the highest quality of water possible, consistent with:
 - public health;
 - public enjoyment of the resource;
 - protection and propagation of fish and wildlife; and
 - industrial development in the State.

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

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

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

Under the storm water SPDES program, permittees are required to prepare, implement and maintain Storm Water Pollution Prevention Plans (SWPPPs) that describe activities, mitigation (including an erosion and sedimentation control plan), and storm water management features aimed at controlling storm water quality and flows. Developing a SWPPP that complies with the requirements of the State's SPDES program does not relieve developers and contractors from the obligation of complying with storm water management requirements of the local government having jurisdiction over the project. Additional reviews by the local government may be necessary during the local right-to-build processes (*i.e.*, site plan review, subdivision review, etc.).

- Concentrated Animal Feeding Operation (CAFO). New York State is authorized to administer the National Pollutant Discharge Elimination System (NPDES) permit program. Under the State Pollutant Discharge Elimination System (SPDES) permit program, the NYSDEC has issued a General Permit for "Concentrated Animal Feeding Operations (CAFOs). Large and small CAFOs operating in New York State can obtain coverage under the SPDES General Permit (GP-04-02) to document that manure management practices are sound and minimize impacts on the environment. The OIN operates a significant black angus herd in Madison County. The herd consists of 520 head of angus which is, by the OIN's estimate, the second largest black angus herd in the northeastern United States (Indian Country Today, March 29, 2005); such an operation meets the definition of a CAFO. Other OIN agricultural activities also exist on Group 1 parcels. Based on the OIN's objective to continue on its path to self-sufficiency, it is plausible that agricultural activities on Group 1 parcels may be expanded. CAFO permittees are required to meet USDA Natural Resources Conservation Service standards regarding runoff from livestock housing and feed storage areas, process wastewater, manure management including application to cropland, and erosion control on cropland. The local Soil and Water Conservation Districts offer assistance to farms to meet CAFO permit requirements. The importance of such permits and reviews and potential impact of CAFOs on the environment and surrounding land uses was evident in the recent discharge of millions of gallons of liquid manure into the Black River from a Lowville, NY farm. While the OIN has been offered assistance from the local Soil and Water Conservation District, to date this assistance has not been accepted.
- Approval of Plans for a Wastewater Disposal Systems and Public Water Supply Improvements. Pursuant to Article 17 of the ECL, as well as the State's sanitary code, the NYSDEC and NYSDOH working with county health departments have regulatory responsibility to review and approve wastewater disposal systems (*i.e.*, conveyance and treatment facilities including septic systems) and public water supply improvements. While many existing OIN Group 1 parcel operations currently rely on public infrastructure (see Sections on Real Property Taxes and Special Assessments), future plans may entail the development of OIN-operated potable water and wastewater treatment systems. Furthermore, it is reasonable to assume that development of parcels where such public infrastructure is unavailable, will require the OIN to implement on-site measures (*i.e.*, wells and septic systems). Many of the OIN Group 1 parcels are used for the OIN's gaming operations that, based on OIN estimates attract 4 million visitors per year. Under such a scenario, and certainly since 9/11, it is imperative that local, state and federal governments have the ability to review and approve such

systems (design, capacity, reliability, and security issues) to ensure protection of public health, as well the environment.

- Realty Subdivisions. Under a Memorandum of Understanding with the NYSDEC, the NYSDOH has statewide responsibility for approval of all realty subdivisions, including the review and approval of plans for individual sewage treatment systems. NYSDEC retains responsibility only for the review and approval of plans for public or community sewerage. With the OIN's development of the Village of the White Pines and its stated objective of providing additional housing for its people, the proposed placement of the Group 1 parcels into trust highlights the need for continued local and State oversight of such projects.
- Wellhead Protection. The Wellhead Protection Program was created by the 1986 Amendments to the Safe Drinking Water Act. The NYSDEC developed New York's Wellhead Protection Program, which was approved by the USEPA in 1990. In 1998, administration of the Wellhead Protection Program was transferred from the NYSDEC to the NYSDOH and integrated into the NYSDOH's Source Water Assessment Program. The goal of the Wellhead Protection Program is to protect the ground water sources, aquifers, and wellhead areas that supply public drinking water systems from contamination. New York's approach to wellhead protection recognizes and includes the existing federal, State and county programs that protect ground water and complements these programs through a combination of activities and efforts using existing public and private agencies and organizations at all levels. The ability for State and local governments to protect ground water and public and private well supplies would be significantly hindered if access to OIN-related activities was eliminated.
- Floodplain Development Permits. The NYSDEC (Bureau of Flood Protection) has statutory authority under Articles 16 and 36 of the ECL and its implementing regulations (6 NYCRR Part 500 *et seq.*) to regulate flood control issues in New York State. Local floodplain development coordinators work with the NYSDEC and Federal Emergency Management Administration (FEMA) to restrict and regulate development within floodplains and floodways (see Figure 11 in Appendix A) including review of flood-proofing and compensatory storage issues. Development that includes diverting streams, increasing impervious surfaces, or developing in floodplains has the potential to raise flood elevations that would impact both OIN and non-OIN properties. The inability for local and State planners to review development applications has severe ramifications relating to health, environmental and liability including:
 - loss of life from flooding, dam breaks and erosion;
 - economic loss to new and existing development; and
 - inability to exercise appropriate planning and decisions.

It is not known if the development of Group 1 parcels by the OIN was reviewed and evaluated to ensure that adequate flood protection measures were incorporated into the design and construction of facilities including the Turning Stone Resort and Casino. Acceptance of the application to place the Group 1 parcels in trust would mean that future development of Group 1 parcels would

not be subject to any review and evaluation by local or state governments to ensure that flood control measures are included where appropriate to protect public health and property.

Cultural Resources. The protection of historic and archaeological properties collectively known as cultural resources is mandated by the National Historic Preservation Act (NHPA) (16 U.S.C. 470) and the New York State Historic Preservation Act (SHPA) (Article 14 of the New York State Parks, Recreation and Historic Preservation Law). Oversight and guidance to State and federal agencies in implementing the applicable statutes in New York State is provided by the Office of Parks Recreation and Historic Preservation (OPRHP) which is also the designated State Historic Preservation Officer under NHPA. Both statutes require agencies to identify, evaluate and avoid or mitigate impacts to buildings, structures, objects or sites that are listed in or eligible for listing in the State and/or National Registers of Historic Places (see Figure 12 in Appendix A). Projects involving state or federal agencies are required to comply with SHPA and NHPA respectively and generally incorporate consideration of cultural resources as a component of SEQRA or NEPA compliance during project planning, review and approval. As illustrated on Figure 13 in Appendix A, there are several areas of overlap between the OIN Group 1 parcels and areas identified by OPRHP as being archaeologically sensitive. It is the policy of New York State that sponsors of activities, which are funded, permitted or approved by any State agency, perform appropriate cultural resource investigations within such sensitive areas. Any significant loss of jurisdiction over these areas under SEQRA and SHPA, including the ability to provide oversight, would have a significant detrimental impact on the people of the State of New York.

Solid Waste Management, Transport and Disposal. The management and land disposal of wastes is regulated by the State of New York pursuant to 6 NYCRR Part 360. These regulations have been in effect since 1973, with substantive changes occurring in 1988 and subsequent years. Solid waste management facilities, including municipal solid waste landfills, industrial and commercial waste landfills, construction and demolition (C&D) debris landfills, transfer stations, waste-to-energy facilities, C&D processing facilities, regulated medical waste facilities, composting facilities, land application facilities, and recyclables handling and recovery facilities, must be designed, located, constructed, operated and monitored in compliance with Part 360. The objective of the State's jurisdiction in these matters is to protect the environment and the public health from the exposure to, and the impacts of, improper waste management.

The highway transport of regulated waste requires a permit pursuant to 6 NYCRR Part 364. Regulated waste includes, but is not limited to, hazardous waste, waste tires, used oil, medical waste and residential septage. A Part 364 transporter has certain responsibilities associated with the permit, which includes: sufficient tracking of certain wastes, namely hazardous waste; ensuring that the waste is delivered to an authorized facility; maintaining proper records on the amount of waste transported; and containing waste to prevent leaking, blowing and other discharges.

Case Study (C&D Debris) – Part 360 permitted facilities located in the region are illustrated on Figure 14 of Appendix A. The lack of facilities on OIN Group 1 parcels is not indicative of the absence of regulated facilities, but the “black hole” that depicts the lack of information (and ability to obtain information), as well as the ability to monitor OIN activities. Specifically, the OIN is known to have

demolished structures on its properties (see Syracuse Post Standard dated January 13, 2002), and to have disposed of the debris on its property without regard to appropriate disposal practices to reduce potential impacts to the environment and to public health, as embodied in the State regulatory program in 6 NYCRR Part 360. In these instances, a permit application for a solid waste landfill, or a C&D debris landfill (whichever may have been appropriate), was not requested from the NYSDEC. A Part 360 permit contains certain design, construction, operational, and closure requirements. Protective liner designs and monitoring requirements ensure that the environment and health and safety of the community are protected to the greatest extent practicable. Improper solid waste disposal may cause significant negative consequences off-site, as in the case of ground water contamination.

It is not known whether, in the process of development of the Group I parcels, it was the practice of the OIN to use the same procedure, that is, to demolish and bury structures without appropriate care for the environment and the protection of public health. It is clear that the OIN has and could apply such practices on the Group I parcels in the future – the disposal of wastes without measures to protect the environment. Any removal or significant loss of State jurisdiction from these properties would place the environment and public health at risk from waste disposal practices the OIN has not hesitated to use in the past.

Case Study (Madison County Flow Control) – Under Local Law No. 3 of 2004, all waste generated in Madison County (including waste generated on OIN trust application lands) is to stay in Madison County for management at the county's landfill and/or transfer stations. Based on information provided by Madison County, it is believed that the OIN currently contracts with private garbage haulers to dispose of its waste, and that wastes are, with at least one exception, disposed of at an appropriate County facility.

The one known exception involved a dispute between the County, the OIN and one of the OIN's contracted private waste haulers – Riccelli Trucking, Inc. Madison County commenced a lawsuit in New York State Supreme Court against Riccelli Trucking alleging seventy violations of the flow control law. The bulk of these violations were said to relate to waste removal from OIN lands and subsequent hauling of these wastes to a landfill located outside of Madison County, the commingling of recyclables and solid waste materials, and the unpermitted operation of a solid waste business in the County. The lawsuit was ultimately settled in August 2002.

During the Riccelli dispute, the OIN took the position that it is entitled to control the disposal of its waste free from regulation, believing it was therefore not subject to the flow control law. Madison County took the position that once waste is put out for disposal by the owner, the owner of the waste abandons any interest in it at that point, and the hauler who picks it up is subject to local waste regulation. The flow control law targets waste haulers, not waste generators, which allows the County to enforce the local law against the private haulers, regardless of whose waste they may be disposing.

However, it is important to note that, should the OIN become a private waste hauler and start hauling its own waste (on public, non-OIN roads) and to its own

landfill, the County's ability to effectively enforce the flow control law would be in jeopardy. Madison County has expended significant effort in ensuring the safe disposal of solid waste within its borders (see also Local Law No. 3 of 2004). In addition, the County has incurred significant debt and invested millions of dollars in the development, operation, and maintenance of the County's integrated waste management system, spending approximately \$3,000,000 annually on the system. Waste management is a matter that is vitally important to the citizens of Madison County and will remain the focus of public concern. It is essential that the County be able to continue to regulate the flow of all solid waste within its borders, as well as to assure the necessary, predictable revenue stream provided by its local laws.

Hazardous Waste Management, Transport and Disposal. Under the statutory authority of Article 27, Title 9 of the ECL, the NYSDEC regulates the management, transport and disposal of hazardous wastes in New York State. New York State has a strong commitment to protect its citizens and the environment from potentially devastating exposure to hazardous wastes. Working cooperatively with the USEPA, the NYSDEC's Resource Conservation and Recovery Act (RCRA) Subtitle C program establishes the regulatory framework for managing the generation, transportation, treatment, storage and disposal of hazardous waste. The program covers the following topics with relevance to the OIN trust application:

- Authorization. The NYSDEC received initial USEPA authorization to implement and enforce the federal RCRA-C program on May 29, 1986.
- Manifest. New York State enforces a manifest program to track hazardous waste from the time it leaves the generator facility to the place of ultimate disposal ("cradle-to-grave") to ensure that wastes are transported from the generator to a regulated disposal facility without being tampered with or illegally disposed.
- Fees. Through the Hazardous Waste Special Assessment Fees and Regulatory Fees a portion of the public debt service associated with the 1986 Environmental Quality Bond Act is repaid, as well as the funding of other environmental programs, including clean-up of hazardous waste sites.
- Reduction. The NYSDEC has statutory requirements for hazardous waste reduction efforts.
- Permits. Through Part 373 permits (6 NYCRR Part 373), the NYSDEC ensures the environmentally-protective standards in design, operation and performance of hazardous waste treatment, storage and disposal facilities (TSDFs).
- Financial Assurance. All permitted TSDFs have financial assurance mechanisms to ensure that owners/operators have the funding to provide closure and post-closure activities necessary to protect human health and the environment upon ceasing operation.

- Corrective Action. The NYSDEC provides oversight on the implementation of corrective actions required to remediate existing impacts to the environment (*i.e.*, soil, surface and ground water contamination).
- Inspections. The NYSDEC performs inspections to monitor compliance with RCRA-C regulations. Through routine inspections of hazardous waste generators, transporters and treatment, storage and disposal facilities, inspectors uncover serious offenses – violations that, left undetected, could result in extreme, adverse consequences to human health and the environment.

Figure 15 in Appendix A illustrates the locations of regulated facilities in the area inclusive of the Group 1 parcels. Regulated facilities include Part 373 and RCRA facilities (*i.e.*, TSDFs, Small Quantity Generators [SQG] of hazardous wastes, and Large Quantity Generators [LQG] of hazardous wastes). Not included are Conditionally Exempt SQGs. Again, the “black hole” represented by the lack of locations within the Group 1 parcels is indicative of the lack of information and compliance from OIN sources, and the potential impacts on public health and the environment that placement of lands into trust status represent.

It is not known whether hazardous waste is being safely managed or was disposed at these locations; there is potential for ground water contamination, whereby such contamination could be transported to off-site properties, exposing other landowners to potential health risk by several exposure pathways. In addition, this practice by the OIN at other properties can impair the ground water resource through the deterioration in ground water quality, with the potential for the loss of this important resource in a region where many private landowners subsist on residential potable ground water sources. Also, if surface waters are affected, it could impact aquatic resources and habitat. In addition to ground water concerns, there are other issues that can arise from the unregulated disposal of waste, such as odor, noise, blowing waste, and vermin.

Petroleum Bulk Storage. The State of New York is authorized to regulate petroleum bulk storage facilities. Pursuant to Article 10 of the ECL, the State adopted Petroleum Bulk Storage (PBS) regulations in 1985 that established requirements aimed at preventing petroleum spills from contaminating the lands and waters of the State (6 NYCRR Parts 612-614). Those regulations include requirements for: registration of facilities (tanks and connecting piping) having a combined storage capacity of more than 1,100 gallons; storage and handling, including requirements relating to inventory monitoring, periodic testing and inspection of equipment; tank closures; reporting of spills; and construction, design and installation requirements for new or substantially modified facilities. It is known that the OIN has developed a number of facilities that are likely subject to the PBS regulations. Gasoline station tanks and facilities with fuel tanks typically exceed the threshold storage capacities that would make those facilities subject to the design, construction, and registration requirements of the PBS regulations. As illustrated on Figure 16 in Appendix A, it is unknown how many facilities within the Group 1 parcels are subject to the State's PBS regulations. A comparison of known (registered) PBS facilities (Figure 16) with known gas stations in the area (Figure 17 in Appendix A) again illustrates the regulatory “black hole” that persists due to the OIN's lack of compliance with State PBS tank registration procedures. The inability to identify, track, regulate and monitor these facilities may ultimately lead to impacts on OIN and

non-OIN lands due to unreported and uncontained spills or leaks, improper designs, and/or inadequate best management practices.

Facilities that store 400,000 gallons or more of petroleum (commonly known as major oil storage facilities or "MOSFs") pose a heightened risk of damaging spills, due to their capacity and throughput. Pursuant to Section 174 of the State's Navigation Law, a facility operator must obtain a license from the State to operate such facilities. MOSFs also are subject to the PBS storage and handling requirements, and construction, design, and installation requirements for new or substantially modified facilities. Although presently there are no known MOSFs subject to the State's licensing authority within the Group 1 parcels, future development for that purpose cannot be precluded.

Petroleum spills pose a significant threat to the lands, natural resources, and waters (including ground water) of the State. There are approximately 16,000 spills reported annually in the State. It has been estimated that a single quart of gasoline can render 100,000 gallons of water unfit for drinking water purposes. Accordingly, Navigation Law Article 12 prohibits the discharge of petroleum, requires persons responsible for a discharge to notify the NYSDEC within two hours, and imposes strict liability on the discharger. Pursuant to Article 12, the NYSDEC has exclusive responsibility to clean up discharges of petroleum, either through State-standby contractors or by the responsible party under careful NYSDEC oversight. Consistent with that responsibility, Article 12 expressly grants the NYSDEC authority to enter property to investigate suspected or actual spills and to clean up petroleum contamination. Absent notice of a spill, the NYSDEC will be unable to ensure that the petroleum is contained and cleaned up to meet standards.

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

- development, implementation and enforcement of regulations, policies and procedures to ensure that oil, gas, gas storage, solution mining, brine disposal, stratigraphic, geothermal and waterflood wells are drilled, operated and plugged so that the environment, correlative rights and public health and safety are fully protected;
- development, implementation and enforcement of regulations, policies and procedures to ensure that wastes generated during the drilling and operation of regulated wells are handled so that the environment and public health and safety are fully protected;
- management of a full regulatory permit program for underground storage of natural gas and liquefied petroleum gas;
- establishment of well spacing requirements in new and existing fields and review requests for variances;
- investigation and resolution of citizen complaints and non-routine incidents;
- provision of technical assistance and information to the regulated community, local governments, the public, other State agencies and other units within NYSDEC; and
- performance of technical review of solution mining well proposals and coordination with other involved State and federal agencies regarding solution mining and brine disposal wells.

Existing, permitted oil and gas wells are identified on Figure 18 of Appendix A. The OIN has previously investigated the potential to locate underground natural gas reserves on OIN-owned properties. While non-OIN contractors have applied for applicable reviews and permits, no such applications have been made by the OIN. Based on past experiences, it is expected that the OIN will continue to seek on-site natural gas sources.

Chemical Bulk Storage. Articles 37 and 40 of the ECL prohibit releases of hazardous substances and authorizes the State to regulate the storage and handling of hazardous substances. Pursuant to that authority, the State adopted chemical bulk storage (CBS) regulations in 1994 designed to prevent releases in the first instance (6 NYCRR Parts 595-599). Those regulations establish reporting requirements for releases of hazardous substances; over 1,000 substances are currently listed in the regulations as hazardous substances. The CBS regulations also include requirements for: registration of tanks (aboveground tanks with a capacity of 185-gallons or more, and any underground tank); storage and handling, including requirements relating to inventory monitoring, periodic testing and inspection of equipment; tank closures; and construction, design and installation requirements for new or substantially modified facilities. Facilities that may have storage tanks subject to the CBS regulations are, for example, water and wastewater treatment plants and those with swimming pools that may store chlorine, as well as manufacturing facilities that may store various solvents. As illustrated on Figure 19 in Appendix A, the number of CBS facilities within the Group 1 parcels that may be subject to the CBS regulations is unknown due to the aforementioned "black hole" effect (see Petroleum Bulk Storage). Similar to the PBS discussion, any lack of CBS oversight would result in the potential for similar impacts to public health and the environment.

Petroleum and Hazardous Material Emergency Spill Response. The NYSDEC maintains a Spill Response Program with trained response personnel assigned to regional offices throughout New York State. The program operates a Spill Hotline for receiving notification of incidents. The program staff promptly respond to known and suspected releases, and ensure that containment, clean-up and disposal are completed to minimize environmental damage. Regional spill response staff are available to respond to releases of petroleum and other hazardous materials 7 days-a-week, 24 hours-a-day. Any loss of jurisdiction in the area of emergency spill response will impair the ability of the State of New York, and of the local municipalities, to protect the environment and of the public health in accordance with the requirements of the Environmental Conservation Law, the Navigation Law, and associated regulations.

After receiving notification of actual or suspected releases, NYSDEC spill responders evaluate the situation to determine what actions are required to protect public health and the environment, and to identify the spiller, or responsible party. When NYSDEC spill responders arrive at the site of an incident, they have the authority to:

- enter property to investigate actual and suspected releases;
- give responsible parties direction on actions to be taken and the type of environmental clean-up contractors they will need;
- answer questions concerning notification requirements;
- provide information on technical questions;
- advise responsible parties when clean-up goals are being properly met;
- in cooperation with the NYSDOH, can arrange for the evacuation of structures where contaminated vapors from spills present a threat to the health of the occupants; and

- arrange for containment and clean-up by a State-funded contractor when the responsible party is unknown, unable, unwilling or doing inadequate clean up, or if local public safety agencies need emergency assistance.

Clean-ups, particularly those in which spills have contaminated ground water, take time. Extensive drilling and laboratory sampling may be required, and remediating the ground water may take several years. Responsible party requirements will vary with type of release, site characteristics, disposal requirements, and clean-up goals for soil and water.

The State's Navigation Law and the Environmental Conservation Law and associated regulations require at least the following actions at a site:

- removal of all free product from the surface and underground;
- remediation of the affected surface environment;
- treatment of drinking water or provision of alternative water supplies during ground water remediation;
- remediation of contaminated soil;
- treatment of contaminated ground water;
- rescue and rehabilitation of affected wildlife; and
- restoration/replacement of affected natural resources.

Article 12 of the Navigation Law establishes the New York State Environmental Protection and Spill Compensation Fund (Fund) as a non-lapsing, revolving fund administered by the Office of the State Comptroller. The Comptroller:

- disburses Fund money for administrative, clean-up and removal expenses incurred by NYSDEC;
- arranges for settlement of damage claims from releases; and
- collects reimbursement and penalties from dischargers, and establishes the license fees.

The New York State Attorney General's Office also supports the program through legal actions to obtain reimbursement from responsible parties. Other public agencies may respond if a release creates immediate hazards to life and health. The first trained personnel to arrive at a release site are usually from local emergency service agencies such as the police or fire department. Local agencies will lead the response to protect the public from fires, explosions, or toxic gases, and sometimes to divert traffic or evacuate residents. Other State and federal agencies, such as the NYSDOH, the USEPA and the U.S. Coast Guard, may also respond.

Under New York State's Navigation and Environmental Conservation Laws, the responsible party (usually the owner or operator of equipment or a facility that has a release) is responsible for notification of appropriate agencies, and for containment, clean-up and removal of spilled and contaminated materials. The responsible party is liable for all costs associated with a release, including relocation costs and third party damages. If NYSDEC conducts a clean-up, the responsible party must pay not only for the direct clean-up costs, but also for NYSDEC's administrative costs and for any interest and penalty charges. Reimbursement is sought either by NYSDEC, the Spill Fund Administrator or the Attorney General's Office.

It is not likely that the OIN would be able to adequately undertake the roles and responsibilities currently filled by the NYSDEC and other State, local, and federal agencies regarding emergency spill response. A lack of proper response would lead to increased threats to public health and the environment.

Spill Prevention, Control, and Countermeasure Plans. Under authority of Section 311 of the Federal Clean Water Act, regulations have been adopted which set forth the requirements for the prevention of, preparedness for, and response to oil discharges at specific non-transportation related facilities (40 C.F.R. Part 112). Facilities that have aboveground storage capacity of greater than 1,320 gallons or underground storage capacity of greater than 42,000 of non-transportation related oil storage that could reasonably be expected to discharge oil to navigable waters or shorelines in the event of a spill or leak are subject to these regulations. These regulations require that facilities subject to the regulations develop and implement Spill Prevention, Control, and Countermeasure (SPCC) plans that identify site-specific measures to prevent oil from reaching navigable waters and adjoining shorelines, and to contain discharges of oil. The SPCC regulations are designed to protect public health, welfare, and the environment from potential harmful effects of oil discharges. The SPCC plan for a given facility must establish procedures, methods, and equipment requirements to achieve these requirements. The number of facilities within the Group 1 parcels that may be subject to the SPCC regulations is unknown due to the lack of information from the OIN.

Inactive Hazardous Waste Sites and Brownfields. Articles 3, 27, (Titles 9, 11, 13, 14), 56, and 71 of the ECL and selected sections of the New York State Finance and the New York Public Health Laws, provide the State with extensive programs to remediate hazardous substances that constitute a significant threat to health, safety and the environment (the State's hazardous waste, hazardous substance and superfund programs). In addition, these laws provide means for enforcement and sanctions against parties responsible for releasing pollution as well as the funding mechanisms for the clean-up of abandoned polluted sites. The law also provides for a broad "brownfields" clean-up program whereby interested parties can clean-up otherwise neglected, but polluted, sites in exchange for liability releases from the State.

In a related authority, the federal Comprehensive Environmental Responsibility and Liability Act (CERCLA) provides that the NYSDEC, as the appointed Natural Resource Trustee for the State, has the appropriate authorities and powers to assess damages and seek their collection at certain State superfund sites identified under federal and State law.

Due to a lack of information from the OIN, it is not known what, if any, programs the OIN has implemented to clean-up and remediate any existing inactive hazardous waste disposal sites located within the Group 1 parcels. The potential existence of such disposal sites and the absence of oversight by the State of any clean up or remediation actions by the OIN places not only tribal lands within the Group 1 parcels, but properties outside of the OIN lands, at risk for contamination of soils, ground and surface waters, both now and in the future.

The Pesticide Sales and Use Database and Record Keeping and Reporting Law (Pesticide Reporting Law). The NYSDEC regulates the application of pesticides in New York State and is responsible for compliance assistance and public outreach activities to ensure enforcement of State pesticide laws, Article 33 and parts of Article 15 of the

Environmental Conservation Law and 6 NYCRR Parts 320-329. As part of the Pesticide Reporting Law, pesticide applicators are required to maintain records of pesticide applications and report some of this information to the NYSDEC annually. The following information must be reported to NYSDEC for each application: the product's USEPA registration number, product name, quantity used, date applied, and location of application by address. In addition, for each application, records must be kept regarding dosage rate, application method, target organism and/or crop treated.

It can be safely assumed, at a minimum, that the OIN makes extensive use of pesticides in the maintenance of the golf courses that have been developed as part of the Group 1 parcels. Prior OIN activities including: the proper storage and application of pesticides, registration of pesticide user facilities, as well as certification of individuals who apply the pesticides have not been reported to the State. Should the application of the OIN to place the Group 1 parcels in trust be accepted, the permanent removal of State jurisdiction from these properties may place the environment and public health at risk from pesticide management practices.

Zoning Districts. Local right-to-build requirements such as zoning are established under the home-rule provisions of the New York State Constitution and laws to allow municipalities to provide for the well-being of their communities (*i.e.*, public health, safety, morals or general welfare). Within each community, the local electorate chooses representatives who determine zoning and other local planning processes and controls. These local planning processes provide a means to review the short- and long-term implications of land development activities. Under zoning-related reviews, development applications are reviewed for consistency with master/comprehensive plans, local zoning requirements and potential impacts on the health and safety of residents. Regional impacts are evaluated by the county under General Municipal Law Section 239. Towns, including Vernon and Verona, have adopted local zoning ordinances to provide for regulating, controlling and restricting the use and development of land and buildings to promote and protect, to the fullest extent permissible, the environment of the town and its public health, safety and general welfare in accordance with purposes outlined in applicable sections of New York State Town Law. For the purposes of this law, the towns have established zones consistent with master or comprehensive plans for the entire jurisdiction and with associated allowable uses, as well as overlay districts, which impose additional regulations for specific purposes such as historic preservation, flooding, parking or other concerns. General zoning district information for the towns is presented on Figure 20 in Appendix A. Zoning regulations are an aid in the effectuation of a comprehensive plan for sound community development. Placement of significant and isolated parcels in trust bypasses the zoning review processes (*i.e.*, allowable land uses, site plan review, subdivision, special permit, and use and area variances) and significantly impacts the towns' ability to provide for cohesive and consistent community planning. Placement of lands into trust makes it impossible for communities to implement their vision and comprehensive plan for zoning and land use regulations when there is uncertainty surrounding neighboring parcels.

Case Study – As illustrated on Figure 21 of Appendix A, the OIN's gaming facilities are located proximal to the Vernon-Verona-Sherrill Central School District Campus; remaining Group 1 parcels surround the campus. Local right-to-build reviews allow community representatives the ability to review development applications, with discretion to approve, deny or modify proposals based on consistency with master plans and the need to protect public health and

the environment. Local reviews, including a review of environmental impacts under SEQRA, and regional impact reviews under General Municipal Law Section 239, look at the potential for development to impact a wide range of issues (*i.e.*, land use compatibility, traffic, viewshed, wetlands, storm water runoff, utility capacities, nuisances, etc.), that might otherwise be neglected absent the requirements. Construction and operation phase, short-term and long-term, as well as cumulative impacts are reviewed in order to make an informed decision on whether or not the type and magnitude of the project is consistent with the public good. At the State and local levels, those reviews were not accomplished for development of the Group 1 parcel gaming operations, nor has the OIN presented a comprehensive plan of its development objectives that typically forms the basis for New York State local zoning laws. Future reviews of new OIN development proposals should be required to undergo these reviews. Impacts on schools, hospitals and other sensitive receptors should be evaluated.

Building Codes. The Building Code of New York State is based on the 2000 International Building Code (IBC). The code references and requires adherence to the following:

- Fuel Gas Code of New York State
- Mechanical Code of New York State
- Plumbing Code of New York State
- Property Maintenance Code of New York State
- Fire Code of New York State
- Energy Conservation Construction Code of New York State

The building code is necessary to protect the health and safety of the building occupants and the general public, including the many non-OIN citizens that visit the OIN's gaming and other facilities. Codes are based on requirements designed to eliminate health and safety hazards, including but not limited to fire, earthquake, collapse, flooding, wind and storm, communicable disease and so forth. The code requires the issuance of building permits before construction can begin. Such permits can only be issued upon review and acceptance, by the authority having jurisdiction, of building plans and specifications prepared, signed and sealed by Licensed Design Professionals. Design Professionals, by law and common practice are required to comply or exceed such codes as a condition of such licensure. Regardless of the code jurisdiction under which a building is to be constructed and whether or not the owner agrees with such code or jurisdiction, any Design Professional would be expected to comply or to seek a variance before construction.

SEQRA. The New York State Environmental Quality Review Act (SEQRA) requires state and local agencies to "conduct their affairs with an awareness that they are the stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." ECL §8-0103.8. The intent of SEQRA, which is a more rigorous counterpart to NEPA, is to ensure that State and local agencies which regulate the activities of individuals and corporations within the state do so with due consideration to protecting the natural and living resources of the state. ECL § 8-0103.9. Article 8 of the ECL (and its implementing regulations at 6 NYCRR Part 617 *et. seq.*), is a procedural and substantive law that acts as an overlay to the underlying jurisdictional authority that triggers the act, and requires State and local agencies to prepare an environmental impact statement when

a proposed project may have a significant adverse impact on the environment. Stated simply, if a State or local agency has a decision to make on a project or activity, it then must consider environmental impacts and public comments as part of its decision-making process.

A State or local agency may only issue an approval (e.g., permit, grant) if it finds that, consistent with social, economic and other essential considerations from among reasonable alternatives available, the decision avoids or minimizes adverse environmental impacts to the maximum extent practicable. Additionally, SEQRA requires that the agency's decision will mitigate the adverse environmental impacts to the maximum extent practicable through the incorporation into its approval, as a condition of that approval, those mitigation measures that were identified as practicable during the environmental impact statement review process. Any significant loss of jurisdiction under SEQR would have a detrimental effect on the people of the State of New York and the OIN.

IMPACTS ON REAL PROPERTY TAXES

In accordance with the statutory review obligations under 25 C.F.R. § 151.10(e) (i.e., the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls), Appendix E consists of a tabular summary of parcel-specific taxes and special assessments including:

- sale price
- assessed value at sale
- current assessed value (2005)
- town/city/village tax
- county tax
- school tax
- special district taxes (see discussion on special assessments below)

Based on this information provided by the affected towns and counties, the removal of Group I parcels from the tax rolls would result in an estimated annual (2005 dollars) reduction of \$14.3 million in tax and special assessment dollars available to local and State governments, with no significant reduction in the provision of services. Moreover, the development and expansion of these properties and operations continues the expectation for services from local and State governments. According to the affected counties, non-payment of real property taxes by the OIN has contributed to the following financial issues:

- inability to reduce local tax levies;
- reduction in investment grade credit rating; and
- reluctance to undertake significant and necessary capital improvements.

The counties, under statute and pursuant to generally accepted accounting principles, are required to reserve the total amount of the unpaid bill. The obvious impact of the delinquency results in higher county taxes in all towns and for all taxpayers across the county as the reserve is raised countywide for the delinquency and obvious cash flow considerations.

The OIN initiated open market purchases of land included in the fee-to-trust application in the late 1980s, with the most recent acquisition completed in April 2005. While the data presented in Appendix E represents recent annual taxes and special assessments, many of these parcels have been on the delinquent tax rolls for years under claims of sovereignty by the OIN (see section on "Cumulative Impacts"). In correspondence dated June 10, 2005 from the Associate Deputy Secretary of the DOI to the Honorable Ray Halbritter, Nation Representative, the DOI indicated that it is Departmental policy not to accept into trust lands that are encumbered by tax liens.

In its *City of Sherrill* decision, the U.S. Supreme Court decided that the lands at issue (property interests purchased by OIN on the open market) are subject to real property taxes. The placement of OIN-owned lands into federal trust will have a significant adverse impact on the ability of the State, local governments and special assessment districts to provide services to the community – services paid for by tax dollars. If the OIN is successful in its application to the BIA, it is expected that the OIN will continue to purchase lands and apply for trust status resulting in a long-term cumulative drain on the financial resources of the surrounding jurisdictions. To the extent the OIN will continue to benefit from the public infrastructure, social services and amenities (*i.e.*, use of public roads, parks and other landmarks [see Figures 22 and 23 in Appendix A], libraries, schools, solid waste management facilities, etc.) of the State and local communities, OIN will have received such benefit without paying compensation to the affected governmental jurisdictions. These types of impacts are further detailed in the report prepared by the Center for Governmental Research, Inc. (CGR) for Oneida and Madison Counties, a copy of which is included in the counties' comments to the BIA.

IMPACTS ON SPECIAL ASSESSMENTS

As illustrated on Figures 10 and 24 in Appendix A, some of the Group 1 parcels are located in special assessment district areas established pursuant to New York State Town Law and including water/sewer districts, fire districts, and lighting districts. The tabular summary provided in Appendix E identifies the parcels impacted, the special districts in which they are located, and special assessments levied. These special districts were created such that properties in the district are taxed in proportion to the benefits derived from the proposed facilities. District maintenance fees are derived from a combination of taxes on assessed value and frontage, or per parcel taxes on various types of properties, or through some other formula. In a benefit district, extensions of facilities within the district beyond those in the original proposal are paid for by those benefiting from the additional facilities, unless the additional facilities benefit the entire district.

The State of New York and local municipalities have historically assumed the burden of establishing and maintaining infrastructure and support services for its residents. The Group 1 parcels presently receive municipal sewer, water and emergency services. Placement of special district lands in trust will result in fewer users (than originally proposed) financially supporting the district facilities, who then will share the burden of the district's operation and management. This scenario will result in diminished funds to maintain districts, and a need to increase district revenues through user fees/taxes on the remaining parcels in the district.

While the OIN trust application indicates the OIN's goal of becoming self-reliant, it is unclear what impact this will have on the need for the OIN to continue to rely on State

and local services or for future operations on lands included in the OIN application. Continued reliance on such services would seemingly necessitate enforcement and taxation on the same basis as provided other State citizens who benefit from these services. Unfortunately, in the absence of fair compensation for services, reduction or discontinuance of service to the Group 1 parcels is a potential option.

Case Study (Verona Fire District) – The Group 1 parcels are serviced, in part, by the Verona Fire District. In correspondence dated October 2, 2005 from the Verona Fire District to the Deputy Supervisor of the Town of Verona, the Fire District summarized its services to the OIN, compensation received for such services, and the Fire District's position on the OIN's application for trust status on lands within the Fire District. A copy of the Fire District's letter is included as Appendix F.

Case Study (Agricultural Districts) – New York State Agriculture and Markets Law (Article 25-AA) authorizes the creation of local agricultural districts pursuant to landowner initiative, preliminary county review, State certification, and county adoption. As illustrated on Figure 25 in Appendix A, large portions of the OIN Group 1 parcels were previously adopted by Oneida County as Agricultural District lands. The purpose of agricultural districting is to encourage the continued use of farmland for agricultural production. The program is based on a combination of landowner incentives and protections, all of which are designed to prevent the conversion of farmland to non-agricultural uses. These lands are often characterized by prime farmland (see Figure 26 in Appendix A) as defined by the United States Department of Agriculture – Natural Resources Conservation Service.

- Incentives Program. Included in the incentives program are preferential real property tax treatment (agricultural assessment and special benefit assessment), which provide farmland owners with real property assessments based on the value of their land for agricultural production (*i.e.*, based on agricultural soils) rather than on its development value. OIN Group 1 parcels within Agricultural Districts were likely assessed in this manner. During the regular agricultural district renewal process initiated in 2005, the OIN did not respond to Oneida County's request for an update on the status of these lands, and they were subsequently removed from the Agricultural District boundaries (see Figure 27 in Appendix A).
- Protection Program. Included in the protection program are procedures that safeguard farmland owners against overly restrictive local laws, government funded acquisition or construction projects, and private nuisance suits involving agricultural practices. The NYSDAM requires State agencies, local governments and public benefit corporations to avoid or minimize adverse impacts to farm operations in pursuing projects within an agricultural district, which involve either the acquisition of farmland or the advance of public funds for certain construction activities. These entities which may undertake an action within an Agricultural District are required to submit detailed "Notice of Intents" (NOI) to the Department for review, evaluation and recommendation of mitigative measures. Such projects cannot proceed until the notice process is complete.

For private developer/landowner actions, Section 305-a of New York State's Agricultural Districts Law provides for the preparation of an "Agricultural

Data Statement” if the proposed action involves a special use permit, site plan application, use variance, or subdivision application on a property within an agricultural district containing a farm operation or on property with boundaries within 500-feet of a farm operation located in an agricultural district.

Both the NOI and Agricultural Data Statement processes recognize the importance of protecting and preserving the viability of farm and agricultural operations in New York State.

Prior to any transfer of lands into trust, potential financial and agricultural impacts (based on existing and future development) should be assessed relative to:

- value of land based on development potential
- impact on existing agricultural practices
- impact on adjacent agricultural practices
- potential lands in conservation easements
- identification if any of the OIN Group I parcels benefited from State assistance payments to municipalities for the purchase of development rights.

In addition, as a federal action, the placement of land into trust by the BIA would be required to comply with the federal Farmlands Protection Policy Act of 1984. The purpose of the Farmland Protection Policy act is to minimize the extent to which federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses, and to assure that federal programs are administered in a manner that, to the extent practicable, will be compatible with State and local government, and private property programs and policies to protect farmland.

As part of the consideration of this application, the BIA must perform a substantive review of the impacts of this request on local farmland and related issues, such as the impacts of continuing development of these properties on adjacent and area farmland. Such an evaluation was not completed for the OIN's Turning Stone Resort and Casino, which was constructed on agricultural lands.

OTHER CONSIDERATIONS

In additional correspondence dated October 26, 2005, the BIA indicated that “the Counties will have additional opportunities to comment on other aspects of the proposed acquisition during the NEPA [National Environmental Policy Act] process.” In correspondence dated November 22, 2005 from the Associate Deputy Secretary of the Interior to the Honorable John McHugh, “the Department and the OIN have agreed that the most comprehensive level of analysis, an Environmental Impact Statement (EIS), will be conducted for the proposed acquisition.” Based on recent BIA correspondence, it appears that efforts to initiate the EIS process have commenced. Notwithstanding these assertions, additional information beyond the jurisdictional and tax issues requested in the BIA's September 20, 2005 correspondence is provided herein under this category of “Other Considerations”. The State reserves the right to continue to expand on these issues, as well as to identify new issues during the on-going NEPA review process.

Need. It is imperative that the OIN provides detailed analysis on why particular parcels of land need to be held in trust. Information should include financial, marketing and development plans that document the current standing of the OIN, and its future objectives. While it is understood that the OIN wishes to preserve and protect its unique cultural heritage, it needs to be justified why placement of these lands (including gaming operations) is necessary to accomplish that objective.

Removing over 17,000 acres of land from local tax rolls so that the OIN can produce \$100 million of annual revenue for a tribe with a membership of 1,000 hardly fulfills the intended function of 25 U.S.C. § 465. The OIN clearly may use the land that it owns in an economically productive way without having it held in trust. Consequently, there is no reason why the OIN needs to, or should, enjoy the significant economic advantage over surrounding non-OIN businesses that comes along with having its land exempt from State and local taxes and regulatory requirements.

Future Development. The BIA cannot take at face value the assertion by the OIN that it is not proposing any change to the land use. It is inconceivable that there are not going to be any changes to any of the lands included in the application. Past development of the Group 1 parcels demonstrates that the OIN is likely to develop lands, change land uses, and continue to expand its current operations. The OIN application identifies the need to provide housing for its residents, and a speaker at the BIA-sponsored public hearing on January 10, 2006 identified a five year waiting list. Such a track record supports a conclusion that continued development of Group 1 (and other) parcels is a "reasonably foreseeable future action".

Future development will have direct, indirect, short- and long-term, and cumulative impacts on these and adjacent properties. If these lands are placed in trust, the ability for current jurisdictions (local, State and federal) to evaluate potential impacts, review right-to-build applications, and provide for the safety and well-being for all residents in the community may be significantly diminished, if not altogether eliminated.

Regardless of whether the OIN intends to be bound by its "no change in land use" assertion, the BIA should request an evaluation of existing uses, identification of unoccupied facilities, and a plan to minimize the "wasting" and "nuisance" health and safety impacts that abandoned facilities present to the community-at-large.

Additional Consultation. The DOI must make a final determination on the application based on the criteria set forth at 25 C.F.R. § 151.10(a) through (c) and (e) through (h), and any additional information or justification that he considers necessary to reach a decision. Part 516, Chapter 2 of the DOI's manual on "Initiating the NEPA Process" indicates that the BIA "shall initiate early consultation and coordination with other bureaus and any federal agency having jurisdiction by law or special expertise with respect to any environmental issues that should be addressed, and with appropriate federal, State, local and Indian tribal governments authorized to develop and enforce environmental standards or to manage and protect natural resources." Due to the broader and precedent-setting implications of this important decision, several other jurisdictions have been identified that the BIA should consult with prior to making a final determination. Jurisdictions of these agencies are identified in the text of this report.

- Other tribal governments that may also intend to seek trust status in New York State (*i.e.*, the Oneida Tribe of Indians of Wisconsin, the Cayuga Indian

Nation of New York, the Saint Regis Mohawk Tribal Council, the Stockbridge-Munsee Community, the Seneca-Cayuga Tribe of Oklahoma, Mohawk Council of Akwesasne, Mohawk Nation Council of Chiefs, etc.).

- Office of Indian Gaming Management pursuant to gaming and gaming-related acquisitions and the Indian Gaming Regulatory Act of 1988 Section 20 Determinations (25 U.S.C. §§ 2701-2721).
- National Indian Gaming Commission
- United States Department of Agriculture pursuant to the Farmlands Protection Policy Act of 1984.
- Other federal agencies with jurisdiction over resources and activities including: National Labor Relations Board, USEPA, USFWS, and ACOE.

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

Contiguity. In its *City of Sherrill* decision, the U.S. Supreme Court refused to disrupt the longstanding governance of the State and local governments. Similarly, the patchwork pattern of the OIN request makes effective use of the State's jurisdictional authority with respect to the intervening properties and those properties adjacent and in proximity to the Group 1 parcels difficult, if not impossible. As a practical matter, this lack of contiguity of the Group 1 parcels (i.e., "checkerboard sovereignty") may substantially impair the State's jurisdiction in a significantly larger area than just the Group 1 parcels. In addition, the impacts of any loss of State and local governmental jurisdiction with respect to the Group 1 parcels would significantly and negatively impact other properties in the region. The discontinuity of the relationships of these properties, combined with the jurisdictional losses, will be particularly detrimental to the environment; components of the environment are interrelated, making it impossible to disassociate the ecosystem simply by introducing artificial barriers by inserting property lines on a map.

The impacts resulting from the unusual lack of contiguity of the properties in the OIN application include, but will not be limited to, the following issues:

- Emergency services. Emergency services are provided by the Verona Fire District at a significant negative financial impact to the fire district (see Appendix F). The OIN does not consider itself to be responsible for the cost of these vital, lifesaving services that are provided to it. The fire district does have the option of withdrawing service from these properties. However, the fact that the Group 1 parcels are not contiguous places intervening and adjacent properties at risk in the event of a fire or other catastrophic event; the fire district responds to fires and other emergency calls to protect adjacent property owners and the general public. The underlying philosophy of the OIN with respect to this vital service causes serious concern for the public safety on and off the Group 1 parcels should the loss of local jurisdiction be imposed through the acceptance of this application. With present visitors to the Turning Stone facilities estimated at 4 million people per year, and continued development occurring on the Group 1 parcels, the acceptance of this application would result in a significant risk to the public safety through the loss of local jurisdiction.
- Transportation corridors. The maintenance of roads under State, county, or local jurisdiction should the application for the placement of the Group 1 parcels in trust be accepted is questionable. Both residents of the Group 1 parcels, as well as non-residents make use of these roads. The taxes paid for road maintenance ensure that the area roads are repaired as needed, plowed in the winter, and that traffic control measures are provided and maintained to ensure safe and efficient flow of vehicles.
- Wetlands. There are wetlands that are continuous and interconnected onto and off the Group 1 parcels. Effective wetland protection can not end at a property boundary. Any loss of jurisdiction resulting from an acceptance of this application would place at risk the integrity of wetland ecosystems in the region, which are subject to protection by the NYSDEC and also the federal jurisdiction of the ACOE.
- Rare, Threatened and Endangered Species. Additionally, absent jurisdictional authority of the NYSDEC, the continuing development of the Group 1 parcels will impact RTE habitat and species on adjacent properties, including direct impacts on species and habitats (*i.e.*, loss of and segmentation of habitat). The patchwork pattern of the OIN request would make effective management of the sensitive habitats of these species difficult, if not impossible, even with respect to the properties adjacent to the Group 1. As a practical matter, this lack of contiguity effectively renders the State's jurisdiction in these matters non-existent in a significantly larger area than just the Group 1 parcels.
- Clean Air. The patchwork pattern of the OIN request would make effective management of the clean air by the State particularly difficult, if not impossible. As a practical matter, this lack of contiguity would effectively render the State's jurisdiction for the protection of clean air non-existent in a significantly larger area than just the Group 1 parcels since new air emission sources and the operations of existing sources could be conducted without the oversight normally performed pursuant to State regulations.

Environmental Justice. In accordance with federal *Executive Order (EO) 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. This order requires federal agencies to identify and address, as appropriate, any disproportionately adverse human health or environmental impact that federal programs, policies, and activities may have on minority populations and low-income populations. Pursuant to this EO, the BIA should evaluate potential environmental justice impacts that may arise from the transfer of land into trust, including the economic impact of OIN business operations (existing and future) on non-OIN businesses, and the impact on non-OIN residents with fixed or low incomes (*i.e.*, senior citizens). Potential Environmental Justice areas in the vicinity of the Group 1 parcels are identified on Figure 28 in Appendix A.

Economic Development ("Level Playing Field"). Placing a significant amount of land in trust would establish or continue an unfair competitive development advantage to OIN-owned lands over non-OIN lands, the latter of which is required to comply with local right-to-build requirements (*i.e.*, site plan review, etc.), obtain environmental permits, and pay taxes. As the OIN continues to develop parcels and diversify its economic base, this "unlevel playing field" will continue to push non-OIN businesses out, as well as to decrease the marketability and developability of non-OIN owned lands (including areas where the State has invested capital such as in Empire Zones) thereby creating a monopolistic or "big operator" business environment controlled by the OIN. The beginnings of such an environment are evident in the predominance of OIN-owned SavOn gas stations in the area versus non-OIN owned gas stations and mini-marts, as well as marine gasoline sales along the southeastern shore of Oneida Lake (see Figure 17 in Appendix A).

Noteworthy as well, is the potential disproportional use of finite utility resources by OIN operations that also impact local economic development efforts to attract a diversity of sustainable non-OIN owned and operated businesses. The OIN continues to negotiate with local water purveyors to provide a reliable supply of water for the OIN's existing and future needs, including an interbasin transfer from the City of Utica's supply. Current capacities rely on excess capacity that became available when existing non-OIN business operations in the area ceased operations (*i.e.*, Oneida Ltd. in City of Sherrill). However, should the recent economic downturn be reversed, the ability to backfill those vacant facilities by new businesses will be adversely impacted by the lack of potable water.

Case Study (City of Oneida Water System) – In 1926, a cooperative effort among the Cities of Oneida and Sherrill and Oneida Ltd. (located in the City of Sherrill and the Kenwood section of the City of Oneida) was undertaken to find a reliable source of water for Oneida and for Sherrill-Kenwood and its enterprises. \$300,000 (1926 dollars) was provided by Oneida Ltd. to develop the source in Taberg and underwrite the transmission infrastructure costs. For the ensuing 80 years, there were a series of agreements between the City of Oneida and the Sherrill-Kenwood Water District (SKWD), which were renewed periodically without serious controversy. This City of Oneida water system, the source of which is Florence Creek, currently serves over 20,000 people in two counties, three cities, five towns and four villages.

Due to the finite water capacity of and expanding demands on the system, the City of Oneida has sought to diminish the SKWD's and City of Sherrill's water

allocation by 60% (currently permitted by NYSDEC at 2.2 million gallons per day [mgd]) to 0.9 mgd. The expanding demands are, in large part, due to the unplanned and unregulated OIN gaming and golf course operations in the Town of Verona. The OIN is currently receiving a water allocation of 0.6 mgd vs. a permit allocation of 0.15 mgd.

The loss of allocation is crippling to the Sherrill-Kenwood community, which has recently lost the greater region's most important employer (Oneida Ltd.). The closure of Oneida Ltd. operations has left extensive first class facilities located in Empire Zones, with available low cost power ready to be reoccupied, albeit for the potential lack of a sufficient water supply. The former Oneida Ltd. facility is being actively remarketed by local and State economic development agencies, and its "backfilling" by other industry(ies) would greatly benefit Madison and Oneida Counties.

New York State has a longstanding and comprehensive program for regulating the water supply, which integrates with other State and local institutions (municipal governments, local and regional planning boards) to help assure rational growth and use of resources. To grant the trust application and introduce an unregulated sovereign into the midst of these longstanding, developed communities is inappropriate, and is illustrative of "Jurisdictional problems and potential conflicts of land use that may arise..." (25 C.F.R. § 151.10(f)).

Additional Issues. The Center for Governmental Research (CGR) was retained by the affected counties to assess the local impact of the OIN application. A copy of the CGR report is included with the counties' comments to the BIA. In its report, CGR highlights specific impacts associated with local governments' ability to provide services. The following topics are addressed:

- the right of citizens to govern through elected representation is seriously impaired by "Checkerboard Sovereignty";
- citizens lose power to regulate conflicts among individual uses of property;
- public health standards become unenforceable;
- communities lose power to protect consumers and employees;
- public safety is endangered by loss of enforcement power;
- communities lose capacity to protect non-OIN properties from environmental contamination;
- scattered OIN ownership obstructs management of public infrastructure and utilities;
- community planning rendered ineffective without clear hierarchy of authority and sharing of information;
- zoning and land use regulations rendered ineffective;
- justifiable expectations of non-OIN property owners diminished;
- impacts on property values;
- private covenants and agreements rendered unenforceable by transfer of properties into trust;
- unequal treatment under the law;
- non-payment of taxes cripples fiscal capacity of local government;
- land placed in trust no longer available to the marketplace for commercial expansion and development;

- Public works maintenance and repair hindered by lack of tax revenue;
- lost revenue has forced counties to reduce on-going spending on public infrastructure, possibly increasing long-run maintenance burden;
- financial burden of public safety services [from existing OIN operations] has increased;
- expansion of gaming increases social service burden on local government;
- higher property taxes create burden on local income property owners;
- bond rating falls in Madison County due to loss of taxable value, increasing cost of borrowing;
- the failure of the OIN to pay taxes has significantly affected the ability of school districts to educate students;
- public safety infrastructure inadequately funded; and
- economic and fiscal impacts of accepting OIN-owned lands into trust: inappropriate economic multipliers, construction jobs, spillover growth overstated, loss of cigarette sales and job growth, fiscal impact from property taxes, and fiscal impact from sales and excise taxes (cigarettes and gasoline).

CUMULATIVE IMPACTS

Summary. The BIA has an obligation pursuant to NEPA to ensure that cumulative effects from the proposed trust applications are evaluated. The Council on Environmental Quality's (CEQ) regulations (40 C.F.R. Sections 1500 to 1508) implementing the procedural provisions of the NEPA define cumulative effects as:

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

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

1. Each of the approximately 450 parcels *individually* and then *collectively* and *cumulatively*, taking into account, as stated by the U.S. Supreme Court in its decision in *Sherrill*, the justifiable expectations of the people living in the area "grounded in two centuries of New York's exercise of regulatory jurisdiction" (*Sherrill v. Oneida Indian Nation of New York*).
2. All the parcels in a Group, rather than taken individually – Pursuant to NEPA, an analysis and assessment of the potential cumulative impacts of all of the parcels in Group 1 is required, as noted in (2), preceding. While the Group 1 parcels are generally developed, the individual properties have the potential to be developed further; it is neither reasonable nor prudent to disregard this prospect or discount the magnitude of potential impacts. Additionally, the impacts of the operations of existing development, as well as potential further future development, collectively raise substantive negative issues for the local communities, and for the State.
3. The Groups taken collectively – The OIN has applied collectively for Groups 1, 2 and 3 to be placed into trust. The segmentation of these Groups and

consideration of them in that manner represents an artificial construct that begs the regional proximity of the properties and the Groups to each other, the potential uses to which the properties will be placed, the collective impacts that their removal from State and local jurisdiction will have on the surrounding communities, and the impacts that this “patchwork or checkerboard sovereignty” will have on the fabric of the region.

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

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

1. A regional assessment to examine the interrelationships of all types of development expected in the geographical area encompassed by the Group 1, 2 and 3 properties. Such development would include, but not be limited to, those similar to potential land development and present land uses associated with the OIN properties, such as golf courses, retail stores, gas stations and associated stores, restaurants, and entertainment venues. Environmental, jurisdictional, land use, and economic impacts as described in this document must be addressed as part of this assessment.
2. A programmatic assessment to study the impacts of related or similar projects expected to occur as part of the ongoing and future activities of the OIN. In addition to the cumulative environmental and jurisdictional impacts of such projects and ongoing operations, this assessment must include non-competitive economic and market control in certain businesses where the OIN operations are not subject to land use, environmental, economic, or jurisdictional factors that non-OIN businesses must face.

A lesser level of assessment would present an incomplete evaluation of the potential impacts, as well as an impermissible segmentation of the project.

Cumulative impacts on regulatory jurisdiction. As discussed throughout this report, the placement of OIN lands into trust may significantly impair the ability of State and local governments to regulate activities on specific trust parcels. An OIN development project on one or more contiguous parcels has the potential to impact environmental and socio-economic resources that extend beyond those parcel boundaries. A development project combined with other OIN or non-OIN projects has a greater cumulative potential to impact resources and regulatory jurisdictions than the singular project alone.

Simply stated, the non-contiguous characteristics of the OIN-owned lands would in and of itself create a significant impact that otherwise might be overlooked if the focus was solely on specific parcels. Impacts of placing these properties into trust occur across a

variety of natural environments, each under the jurisdiction of separate governmental entities. It is not uncommon that several governmental entities control an environmental media, or an economic or other public function (e.g., taxation, public safety). The cumulative impacts associated with the “checkerboard sovereignty” that would ensue if all the non-contiguous OIN lands were placed into trust would represent a worst case scenario, leaving an absence of social and environmental responsibility or accountability. Such a scenario would create multiple resource and jurisdictional impact zones (“black holes”) with long-term effects; limit the effectiveness of government conduct, resource planning and environmental protection; and restrict the ability of the State and the localities to effectively protect the safety and social welfare of the public, and the quality of the environment. In its decision, the BIA must account for the spatial and life cycle impacts associated with the loss of regulatory jurisdiction including:

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

Cumulative impacts on real property taxes and special assessments. Based on information provided by the affected towns and counties, the cumulative removal of Group 1 parcels from the tax rolls would result in an estimated annual (2005 dollars) reduction of \$14.3 million in tax dollars and special assessments available to local and State governments. Appendix E consists of a tabular summary of Group 1 parcel-specific taxes and special assessments. This data represents a snap-shot in time. Placement of OIN-lands into trust would have the cumulative long-term impact associated with non-payment of taxes in perpetuity and the associated impacts discussed herein.

In addition, based on information provided by Oneida County, there were unpaid real property taxes, beginning with the year 1994 and through and inclusive of the 2006 real property taxes, levied in various jurisdictions against properties owned by the OIN in an amount just over \$26.2 million (including school, town [inclusive of special assessments], and county taxes).

Cumulative impacts on the environment. A review of environmental resource information for the Group 1 properties has been presented herein. It provides a clear perspective on the potential magnitude of the cumulative environmental impacts of the land-into-trust application. Impacts to on site resources have been and continue to be serious in themselves. Ongoing operations and future development conducted without oversight and control continue to place at risk those environmental resources that are integrated with off site properties. Wetlands are hydrologically and biologically connected and do not recognize property boundaries; other habitats similarly are not constrained by local jurisdictional definitions. Stream beds and flows that are modified impact the riparian lands formerly nourished, and modified drainage channels result in erosion, siltation, loss of topsoil, alterations in ground water recharge patterns in a region where wells are used for water supplies, and a deterioration of surface water quality. As a result, the State's jurisdiction has developed to provide an umbrella of environmental protection that supercedes local jurisdictional lines, as does the environment itself.

As is evident from the analysis provided in Figure 4, the environmental impact area of the properties is significant when assessed collectively, and likely is larger than depicted in the figure for purposes of this document. The loss or significant impairment of an active State and local jurisdictional structure and function that is responsible for the protection of the environment and of the public health will not be replaced in whole or in part. It is not credible to assume that the cumulative environmental impacts of taking these properties into trust can otherwise be regulated, monitored or controlled. Therefore, the region's environmental resources and the public health will be severely and irreparably impacted over time. As described elsewhere herein, the actions of the OIN have established precedent, and defined future expectations, in this regard by its lack of accountability for environmental protection at its properties in the region.