

MEMORANDUM

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

Re: Comments Of The State of New York With Respect To The Group 3 Land-Into-Trust Application Of Oneida Indian Nation Of New York

Date: February 28, 2006

This memorandum is submitted on behalf of the State of New York ("State") to address the application (the "Application") of the Oneida Indian Nation of New York (the "OIN") to have approximately 17,000 acres owned by the OIN in fee taken into trust status by the United States Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA"). Included in this Application are 104 parcels of land totaling 7,407 acres scattered throughout Oneida and Madison Counties, New York that are listed as "Group 3" parcels in the attachments to the September 20, 2005 letter from Scott Meneely of the Eastern Regional Office of the BIA to Governor George Pataki. The State objects to, and opposes, the OIN's Application for the following reasons: 1) there is no valid statutory basis for granting the Application; and 2) the relevant criteria set forth throughout 25 C.F.R. § 151 disfavor the Application. Both of these arguments are set forth in more detail below. The State also refers to the State's memorandum, dated January 30, 2006, and related materials submitted under cover of letter dated January 30, 2006 from Richard Platkin, addressing the application of the OIN to have Group 1 and Group 2 parcels taken into trust.

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

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

There is no specific statutory authorization for taking OIN lands into trust status.

Therefore, the only possible statutory basis for granting the OIN's application is the discretionary authority contained in 25 U.S.C. § 465.¹ Section 465 was enacted as part of the Indian Reorganization Act of 1934 ("IRA"). That statute was intended to put a stop to allotment of Indian lands pursuant to the federal policy set forth in the Dawes Act of 1887; and to redress the loss of Indian lands under the allotment system. See, e.g., Hearings before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 1934 ("Hearings") at 26 (Act "aims to prevent further alienation and dissipation of Indian lands" through the allotment system and "to restore to landless Indians some of the lands improvidently alienated in the administration of the allotment system . . ."). See also County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 255 (1992) ("The policy of allotment came to an abrupt end in 1934 with the passage in 1934 of the [IRA]"); F.S. Cohen, Handbook of Federal Indian Law (1941 ed.) at 84.

The Dawes Act -- and the federal policy of allotment -- have never been applied in New York. See Laurence M. Hauptman, The Iroquois and the New Deal (1981) (hereafter, "Hauptman") at 22 ("In New York, where the Dawes Act had not been applied . . ."). Indeed,

¹ The OIN's Application concedes as much. The only statutory authority cited therein is 25 U.S.C. §§ 465, 2202 and 2719. Section 2202 merely addresses when § 465 is applicable and does not provide an independent basis for taking land into trust. Similarly, § 2719, which provides when land taken into trust after 1988 may be used for gaming, does not provide an independent source of authority to take land into trust. It merely imposes additional requirements for taking such action when the land is to be used for gaming. See, e.g., 25 U.S.C. § 2719(b)(1)(A); Artichoke Joe's California Grand Casino v. Norton, 278 F. Supp. 2d 1174, 1883 (E.D. Cal. 2003) (stating that § 2719 "imposes additional requirements for gaming on lands acquired in trust . . ."). It is the State's understanding that the OIN does not seek to have any of the Group 3 parcels taken into trust for gaming purposes and the State therefore does not address Section 2719 in this memorandum.

the Dawes Act specifically excepted the Seneca Nation of Indians (the only tribe in New York with any significant land holdings at the time) from the Act's application. See 25 U.S.C. § 339. Consequently, Section 465 was not directed at New York. Not surprisingly, no Indian land in New York has ever been held in trust status for the Oneidas or any other Indian group.

Even if the IRA was intended to apply in New York, Section 465 is unavailable for a number of reasons. Section 18 of the IRA (25 U.S.C. § 478) conditions application of the IRA on a vote of the affected Indians. When a majority of the adult Indians in a reservation “shall vote against application” of the Act, it “shall not apply.” 25 U.S.C. § 478. Following adoption of the IRA, the Oneidas (as well as other New York Indians) voted to reject the IRA. See Michael T. Smith, Memorandum to Director, Office of Indian Services, Bureau of Indian Affairs, dated Feb. 24, 1982 at 8 (“Initially the Oneida were considered not eligible, but in a reconsideration based on the discussion in the case of U.S. v. Boylan, the Department of Interior changed its position and called for a referendum on June 17, 1936 . . . [t]he vote rejected the IRA 12 to 57”); see also Letter from Curtis Berkey, Indian Law Resource Center to Ray Halbritter, et al., dated June 30, 1986 at 2 (“[T]he Oneidas have rejected the IRA.”); Hauptman at 9 (“[T]he IRA was overwhelmingly rejected in New York”). Consequently, under the plain terms of Section 478, Section 465 is not available to the OIN. Section 2202 does not alter this conclusion. Section 2202 states that “[t]he provisions of this title shall apply to all tribes notwithstanding the provision of Section 478 of this title,” but Section 2201 defines “tribe” to mean “any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust.” 25 U.S.C. § 2201(1). Since the United States

holds no lands in trust for the OIN, the OIN are not a “tribe” within the meaning of Section 2202, and the latter section therefore does not make Section 465 available for the OIN.²

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

There is no legitimate basis for contending that the many parcels owned by the OIN must be taken into trust to secure the economic self-sufficiency of that tribe. There has been no showing that the OIN cannot make productive use of land it owns without having the land taken into trust. Section 465 was never intended to serve, and cannot properly be used, as a vehicle to enable a tribe to accumulate enormous wealth at the expense of the surrounding non-Indian population.³ In addition, the OIN’s request to have non-contiguous parcels taken into trust is at

² In addition, the statute, by its terms, is directed at tribes who were residing on a reservation in 1934. See 25 U.S.C. § 478 (providing that the IRA would not apply “to any reservation” when the adult Indians voted against it); 25 U.S.C. § 479. Section 465 itself reflects this fact, authorizing the acquisition of land “within or without existing reservations...” (emphasis added). The statutory language makes clear that the authorization to take land into trust is keyed to the existence of a reservation in 1934; land “within or without” such an “existing” reservation could be taken into trust, but there is no authorization to take land into trust when the Indians making the application had no existing reservation in 1934.

³ As the BIA itself has recognized: “[W]e will not take additional land in trust for Indians who now have the ability to manage their own affairs. I see no reason why an Indian quite able to successfully manage his own affairs should be permitted to acquire additional land in trust and receive a variety of free real estate services and tax exemptions for his newly acquired land.” Memorandum, dated April 21, 1959, from Commissioner of DOI, BIA, to

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

B. In The Circumstances Present Here Section 465 Is An Impermissible Delegation Of Legislative Authority⁴

Particularly in light of the fundamental policy considerations that the OIN’s Application raises, there are serious questions as to whether the delegation of authority contained in Section 465 is constitutional. It is fundamental that Congress may not delegate its policymaking functions to an administrative agency. Under the Constitution, Congress may only delegate authority to an administrative agency when it articulates an “intelligible principle” that limits the agency’s exercise of that authority. See Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457,

All Area Directors and Supervisors at 1. Although the policy set forth in the 1959 memo was revised in 1960, the Commissioner reiterated that “when trust status would place [the applicant] in a position where the trust status is being used as a ‘tax dodge’ by a ‘big operator,’ or where the trust status is being abused in various ways” trust status is properly denied. See Memorandum, dated August 3, 1960, from Commissioner of DOI, BIA to All Area Directors.

⁴ Section 465 is constitutionally infirm on other grounds as well. For example, to the extent it displaces state sovereignty over the land, it violates the Tenth Amendment, and exceeds Congressional authority under the Indian Commerce Clause. See Printz v. U.S., 521 U.S. 898, 935 (1997) (“The Federal Government may [not] issue directives requiring the States to address particular problems . . . [i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty”). But see Carcieri v. Norton, 423 F.3d 45, 58 (1st Cir. 2005). In addition, taking the land into trust would effectively deprive the State of its property interests created by the 1788 Treaty of Fort Schuyler without just compensation, in violation of the Fifth Amendment. See U.S. Const. Amend. V; see also Block v. N.D. ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 291 (1983).

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

Section 465 violates these precepts by giving the Secretary of the Interior ("Secretary") unbounded discretion to acquire land for Indians. "There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority except that the acquisition must be 'for Indians.' It delegates unrestricted power to acquire land. . . ." See South Dakota v. United States Dep't of Interior, 69 F.3d 878, 882 (8th Cir. 1995), vacated, 519 U.S. 919 (1996).⁵ The IRA states a purpose, but a purpose is not a standard. The power to acquire land for the "purpose of providing land for the Indians" tells who will benefit from agency actions, but it provides no guidance whatsoever as to how much, from where, or for what use the Secretary may acquire land. See id. at 882-83 ("Despite the government's broad, inherent power to acquire land for public use, the nondelegation doctrine surely requires at a minimum that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition").

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

⁵ Although the Eighth Circuit's decision declaring the land acquisition provision of the IRA to be an unconstitutional delegation of legislative authority was vacated, the Supreme Court did not issue a decision indicating the basis for its ruling.

unlawful delegation. Congress' fundamental function is to make public policy and legal standards. It may never delegate this function to an agency. See Yakus v. United States, 321 U.S. 414, 424 (1944).⁶

The problem is highlighted in this case by this Application to the Executive Branch. The OIN seeks to have the Secretary approve trust status for thousands of acres of Group 3 land (and, together with Groups 1 and 2, over 17,000 acres in all) scattered among non-trust lands that are populated almost exclusively by non-Indians. To approve the Application, the Secretary necessarily would have to perform Congress' social policymaking function.

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

Notably, in the context of Eastern land claim settlements, where Congress has expressly authorized the Secretary to take land into trust for the benefit of a settling tribe, it is unheard of

⁶ It is true that some decisions have found that Section 465 does not involve an improper delegation. See South Dakota v. United States Dep't of the Interior, 423 F.3d 790 (8th Cir. 2005); Carcieri, 423 F.3d 45; Shivits Band v. Utah, 428 F.3d 966 (10th Cir. 2005); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999). However, those cases involved trust applications for small tracts of land, many of which were rural and undeveloped. The tracts were either near or on reservation land or only partially located in non-Indian cities. In such cases, the Secretary's decision to place land in trust is practically ministerial and would not affect state or federal policies.

for anything approaching 7,000 acres of land (much less the 17,000 acres in total that the OIN seek to have taken into trust) in the middle of populated areas to be taken into trust. See, e.g., 25 U.S.C. §§ 1941-1941n (Catawba/South Carolina settlement providing for a reservation of up to 3,600 acres); 25 U.S.C. §§ 1751-1760 (Mashantucket Pequot/Connecticut settlement providing for 200 acres to be transferred to tribe by state and 800 acres to be purchased for tribe to add to 220 acre reservation); 25 U.S.C. §§ 1775-75h (Mohegan/Connecticut settlement providing for 700 acres to be purchased for tribe and 175 acres to be transferred to tribe by state); 25 U.S.C. §§ 1771-1771i (Gay Head/Massachusetts settlement providing for approximately 400 acres to be given to and purchased for tribe); 25 U.S.C. §§ 1701-1716 (Narragansett/Rhode Island settlement providing for total of 1,800 acres to be transferred by state and purchased for tribe).⁷

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

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

As a preliminary matter, the Application should be treated under 25 C.F.R. § 151.11 (as opposed to Section 151.10) since the land which the OIN seeks to have taken into trust is not within an existing reservation. That conclusion is clearly demonstrated by the relevant case law and required by the DOI's own regulations.

The Court in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 125 S. Ct. 1478 (2005), expressly determined that the OIN could not “unilaterally revive its ancient sovereignty, in whole or in part, over” parcels purchased in fee by the Oneidas within the last decade that were located within the boundaries of “the area that once composed the Oneida’s historic

⁷ The only instances where large quantities of land were authorized to be taken into trust in the context of an Eastern Indian land claim settlement involved undeveloped, wilderness land.

reservation.” 125 S. Ct. at 1483. “The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.” Id. Consequently, fee lands purchased by the OIN in recent years are not exempt from state and local law. See id. at 1483, 1493. Although the Supreme Court declined to expressly decide whether the former Oneida reservation was diminished or disestablished by the 1838 Treaty of Buffalo Creek (id. at 1490 n.9), the decision makes clear that the area set aside for the historic Oneida Indian Nation by the State in the 1788 Treaty of Fort Schulyer and acknowledged by the United States in the 1794 Treaty of Canandaigua is not a reservation.

As reflected in the DOI’s own land into trust regulations, an “Indian reservation” is an area in which a tribe is “recognized by the United States as having governmental jurisdiction. . . .”⁸ See 25 C.F.R. § 151.2(f). The definition contained in the regulations is consistent with the cases which have repeatedly recognized that one of the distinguishing characteristics of an Indian reservation is the right of the tribe to exercise sovereignty over the land. See United States v. Mazurie, 419 U.S. 544, 557 (1975) (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory” (emphasis added)). As the Supreme Court noted in United States v. Santa Fe Pac. R.Co., “Indian nations [are] distinct political communities, having territorial boundaries within which their authority [is] exclusive....” 314 U.S. 339, 348 (1942) (inner quotations and citations omitted).

⁸ Judge Hurd’s decision in Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005) (“Madison County”), is not persuasive. The court in that case did not consider the significance of the Supreme Court’s finding of no sovereignty on the issue of the reservation status of the land. Moreover, that case improperly relied on the earlier decision by the Second Circuit as to reservation disestablishment. Id. at 231. The reversal of the Second Circuit’s decision deprives it of any preclusive effect. See Stone v. Williams, 970 F.2d 1043, 1054 (2d Cir. 1992) (“A judgment vacated or set aside has no preclusive effect” (citations omitted)); Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1146 (2d Cir. 1992) (“It is well-settled in this circuit that a vacated order has no collateral estoppel effect”), aff’d 510 U.S. 86 (1993).

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

By deciding that the OIN has no right to exercise tribal sovereignty on fee land within the former reservation, the Supreme Court found in substance that the land lacked reservation (and Indian country) status. The Court's language, which repeatedly characterized the reservation in the past tense, is entirely consistent with that conclusion. See Sherrill, 125 S. Ct. at 1483 (describing OIN land as land “that once composed the Tribe's historic reservation”) (emphasis added); see also id. at 1488.⁹ Indeed, Justice Stevens, in dissent, recognized that the majority had “effectively proclaimed a diminishment of the Tribe's reservation.” Id. at 1496.¹⁰

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

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

⁹ We also note that even before Sherrill the United States had repeatedly recognized that with the possible exception of the 32 acres addressed in United States v. Boylan, 256 F. 165 (2d Cir. 1920), the area set aside in the Treaty of Fort Schuyler is not today a reservation. See S. Rep. No. 1836, 81st Cong. 2d Sess. (1950) at 3, 5.

¹⁰ The Second Circuit's decision in Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), confirms that the principles set forth in the Sherrill decision should be accorded its necessary and logical import. As the Second Circuit recognized, Sherrill “dramatically altered the legal landscape against which we consider plaintiff's claims.” See Cayuga, 413 F.3d at 273. The Court there read Sherrill broadly, holding that “the broadness of the Supreme Court's statements indicates to us that Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas... but rather, those equitable defenses apply to ‘disruptive’ Indian land claims more generally.” Id. at 274.

There is no specific statutory authorization for taking OIN fee lands into trust, and as noted above, the general discretionary authority contained in Section 465 is not a proper basis for approving the OIN's Application.

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

Removing land from local tax rolls without proper justification hardly fulfills the intended function of Section 465. The OIN has the capacity to use the land it owns in an economically productive way without having it held in trust status. There is no reason why the OIN needs to, or should, enjoy the significant economic advantages over surrounding non-Indian businesses that come with having its land exempt from state and local taxes and, potentially, state and local regulatory requirements.

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

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

For purposes of the land into trust application process, the land should be treated as land that is not subject to restriction against alienation. There is no basis for concluding that the restriction against alienation contained in the so-called "Non-Intercourse Act" provision (the "NIA") of the Indian Trade and Intercourse Act applies to land purchased by the OIN in fee simple. The State understands that the OIN may argue that the NIA restriction that allegedly applied to the historic Oneidas' possessory interest in the 1790's continues to apply today to land purchased by the OIN in fee. The Supreme Court in Sherrill rejected the theoretical framework for that argument. The Court refused to adopt the so-called "unification" theory advanced in that

appeal, namely, that by acquiring ancient reservation land in the open market, a tribe has “unified fee and aboriginal title.” See Sherrill, 125 S. Ct. at 1489-90 (“We now reject the unification theory of OIN and the United States . . .”). By doing so, the Court necessarily also rejected the OIN’s related contention that recently purchased land is subject to any restriction against alienation that applied to the Oneidas’ possessory interest 200 years ago. Since open market purchases of fee interest in land did not unite that fee interest with the Oneidas’ former possessory interest, any restriction on alienation that once applied to the possessory interest does not attach to the OIN’s fee ownership.

This reading of the Sherrill decision is supported by a recent letter from Jason E. Cason, Associate Deputy Secretary of the DOI, to Hon. Ray Halbritter. “While we would agree . . . that the Supreme Court’s Sherrill decision did not disturb the Court’s 1985 decision on the OIN’s land claim litigation that Section 177 provides the OIN’s right of action to damages for trespass based on its original grant of rights in the lands at issue, we do not agree with [the] assertion that the Court’s ruling in Sherrill recognizes the continuation of restriction on alienation protections over recently acquired lands.” Letter from James Cason to Ray Halbritter, dated June 10, 2005 (“Cason Letter”).

Nor does the NIA apply to the conveyance of land acquired by the OIN in fee through open market purchases from private property owners. Since any restriction against alienation applicable to the historic Oneidas’ possessory interest that may have existed in the distant past no longer applies, the fee interest in the land acquired by the OIN is freely alienable. No case has held that former reservation land that has become freely alienable can thereafter become subject to the NIA when re-acquired by the tribe that may have once held aboriginal title to the land.

The Supreme Court expressly declined to reach that issue in Cass County v. Leech Lake Band, 524 U.S. 103, 115 n.5 (1998). Cases decided before and after Cass County have refused to find the NIA applicable in these circumstances. See, e.g., Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993); Bay Mills Indian Cmty. v. State, 244 Mich. App. 739, 746, 626 N.W.2d 169, 172, 174 (2001), cert. denied, 536 U.S. 930 (2002); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wash. 2d 862, 877, 929 P.2d 379, 387 (1996).¹¹

Finally, we note that the Cason Letter makes clear that the recordation by the BIA of deeds to OIN properties “did not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177.” See also id. (“[P]lease be advised that the BIA is in the process of taking appropriate action to clarify that its recent recordation of OIN deeds does not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177.”).¹²

In any event, there is no question that the OIN fee lands are subject to local real property taxes. That is the clear and unmistakable holding of Sherrill. Taking the land into trust will

¹¹ With the exception of Judge Hurd’s recent decision in Madison County, which the State contends was wrongly decided, see n. 8, supra, we are unaware of any case law that sustained a claim that the NIA prevented transfer of unrestricted fee land purchased by a tribe in modern times. The cases sometimes cited for that proposition do not support it. Tuscarora Indian Nation v. Federal Power Comm’n, 265 F.2d 338 (D.C. Cir. 1958), rev’d 362 U.S. 99 (1960), involved land purchased by the United States for a tribe adjacent to an existing reservation owned and occupied by the tribe with funds generated by the sale of their tribal land located elsewhere (id. at 342), and the Supreme Court overturned the court of appeals’ decision that the NIA barred taking of the land by eminent domain. In Alonzo v. United States, 249 F. 2d 189, 196 (10th Cir. 1957), the land had been owned in fee by the tribe since before the U.S. acquired the territory in which the land of those Indians (the Pueblo) was located in the mid-1800’s and had been made inalienable by a specific federal statute in 1924. See id. at 191, 195. The language in Tonkawa Tribe v. Richards, 75 F.3d 1039, 1045 (5th Cir. 1996), suggesting that the NIA applies to tribal land no matter how it is acquired is dictum; the decision rejected a tribal claim that the tribe had received a vested interest in property by virtue of an 1866 Texas statute and dismissed the tribe’s NIA claim.

¹² Judge Hurd’s decision in Madison County also ignores the view expressed in the Cason Letter and the fact that in Sherrill the OIN advanced and the Supreme Court rejected the argument that the NIA continued to apply to Oneida land.

remove the land from the tax rolls, and the impact of that transfer is therefore a pertinent consideration on the OIN's Application.

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

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

Under any measure, the economic impact of removal of OIN land from local tax rolls would be dramatic. The amount of lost tax dollars is substantial, both in absolute and relative terms. The combined annual anticipated loss of county, municipal and school taxes resulting from the removal of all the OIN parcels (Groups 1, 2 and 3) is estimated to be over \$16.2 million. This number does not take into consideration increases in the taxes on the properties due to increases in tax rates and assessed value or increases resulting from future development and improvement of the property. It is reasonable to assume that the OIN will continue to develop its properties, and that the loss of future tax revenue will be substantially greater than reflected by the current figures.

We understand from the Counties that the OIN property represents a substantial portion of the property in relevant taxing jurisdictions. Thus, for example, OIN-owned properties represent approximately 48% of the taxable property in the Vernon-Verona-Sherrill Central School District. Such parcels represent about \$10.2 million in school district revenue annually, which is 36.7% of the district's 2006 budget. As another example, the total amount of acreage owned by the OIN in the Town of Stockbridge alone constitutes 18% of the town's total acreage.

The real property taxes in Stockbridge that would be lost on these parcels is \$22,917.00, the equivalent of 99.6% of the town's annual contracted fire services spending or 124% of the town's annual debt service. We further understand that the cumulative outstanding real property taxes on OIN properties in Oneida County is over \$26.2 million and that the cumulative amount of delinquent taxes on OIN properties in Madison County is \$7.5 million.¹³ The lost taxes represent a significant portion of the total potential tax revenues for the taxing units in question.

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

The loss of taxes imposes the costs of local services -- schools, road maintenance and repair, police and fire protection -- on a smaller group of property owners, increasing the unit cost for those services. Since the Oneidas receive the benefit of those services -- e.g., Oneida children attend local schools, individual Oneidas and customers of OIN businesses use local roads, and receive police and fire protection -- the non-Indian community is footing the bill for these services for the OIN. This effect imposes real and ongoing hardship on the non-Indian portion of the community.

The effect is particularly acute because in some cases, the demand for the services has actually increased as a result of OIN activity on OIN-owned land. For example, the Turning Stone Casino has resulted in dramatically increased traffic on local streets and higher demand for emergency services.

¹³ This figure does not include the 2005/2006 school taxes owed by OIN to Madison County which, according to the accompanying O'Brien & Gere Report, were purportedly paid "under protest."

The OIN's system of voluntary payments is no substitute for mandatory tax payments. Regardless of the OIN's statements, there is no requirement that the OIN make "silver covenant claim" payments, and its past conduct has made clear that the OIN may use these payments to pressure municipalities to follow OIN dictates. An example is the OIN's withholding of payments from the Stockbridge Valley Central School District because the town refused to accede to the OIN's demand to fire a teacher who was critical of the OIN. The municipalities should not be put in a position where they are hostage to unreasonable OIN demands as a condition of receiving revenues that they would otherwise receive outright through payment of real property taxes.

The Verona volunteer fire department, which provides fire protection services to the Turning Stone Casino and related facilities, is another example. Providing services for heavily used large, multi-story buildings has dramatically increased the demands on the department. Until recently, the OIN had paid for fire services under a negotiated formula based on the square footage of the buildings serviced. We are advised that the OIN has now unilaterally decided it will provide funds only up to a limited dollar limit. Such an abrupt and unilateral limited imposition of a cap on funding may impede the department from acquiring much-needed equipment. Absent the ability to impose charges for the services, the department (and the non-Indian community that supports it) will in effect be subsidizing the OIN's businesses.¹⁴

¹⁴ It is important to recognize that even if the fire department was not required to provide services to OIN land if the land is taken into trust, it may nevertheless feel obligated to do so in order to fulfill its responsibilities to protect the safety and welfare of non-Indian property owners, workers and guests on OIN land. Because of the proximity of OIN facilities to non-Indian properties in the community (including a public school), a fire or other catastrophe on OIN land may threaten adjacent non-Indian land which the fire department is required to protect.

4. Taking The OIN's Lands Into Trust May Result In An Unworkable Jurisdictional Patchwork (25 C.F.R. § 151.10(f))¹⁵
 - (a) The Patchwork Jurisdictional Pattern That May Result From Taking OIN's Land Into Trust Directly Contravenes The Concerns Expressed In City Of Sherrill

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

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

Sherrill, 125 S. Ct. at 1493.

At the heart of the Court’s decision is the concern that allowing tribally-owned land located randomly throughout communities in central New York to be removed from state and local jurisdictions would fundamentally and irreparably injure the affected communities by disrupting the “governance of central New York in counties and towns.” Id. at 1483. The Court’s language reflects a recognition that communities cannot be maintained without the ability to govern in a coherent and comprehensive fashion. As discussed below, land use, environmental and other laws are effective only if they apply uniformly over an extended area.

¹⁵ The Supreme Court has made clear that lands held in trust enjoy no absolute immunity from state law. See, e.g., Nevada v. Hicks, 533 U.S. 353, 362 (2001); Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 458 (1995); Puyallup Tribe, Inc. v. Dep’t of Game, 433 U.S. 165 (1977). See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 (1987). The State believes that state and local regulatory laws, including zoning, land use and environmental laws, should continue to apply to the OIN land even if it is taken into trust. See Sherrill, 125 S. Ct. at 1489 n.6 (2005) (Stevens, J., dissenting) (“Given the State’s strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere”). Nonetheless, it is clear that the OIN will resist any application of state and local regulatory law if the land is taken into trust and, therefore, this memorandum (and the accompanying O’Brien & Gere Report), address the serious difficulties that would be created if the OIN’s position were to be sustained.

Piecemeal removal of land from state and local jurisdiction threatens the regulatory scheme as a whole.

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

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

Id.

The OIN’s effort to have the BIA take the hundreds of parcels scattered throughout Madison and Oneida Counties into trust is an obvious effort to circumvent the type of concerns articulated by the Court. It is also fundamentally at odds with one of the core purposes of the IRA, namely, to consolidate Indian holdings. The OIN’s effort to institutionalize a patchwork of tribal land holdings is totally inappropriate for this reason as well.

(b) The Disbursed And Non-Contiguous Character Of OIN Holdings Would Create A Host Of Jurisdictional And Regulatory Problems If The Land Is Taken Into Trust

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

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

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

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

It is impossible to design and implement a unified and coherent zoning and land use plan when randomly located parcels within the community are not subject to local land use laws and can be developed for uses inconsistent with the overall regulatory framework. To the extent that OIN land when taken into trust status would be exempt from zoning and other land use laws, it would pose a significant obstacle to the non-Indian communities' legitimate land use planning. The effect can be particularly acute on individual landowners whose property is located adjacent to a non-conforming tribal use. Similarly, the inability of local officials to monitor and enforce compliance with building and fire and safety code requirements poses risks not only for those who visit unregulated facilities but also for surrounding properties.

The Court in Sherrill was particularly concerned about the effects on local zoning and land use controls of the OIN's position: "If the OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." 125 S. Ct. at 1493.

Similar considerations apply with particular force in the context of environmental laws. As noted in the O'Brien & Gere Report, the BIA has an obligation under the National Environmental Policy Act, ("NEPA"), 42 U.S.C. § 4321 et seq., to consider the cumulative impacts of taking all the Group 1, Group 2 and Group 3 parcels into trust. Cumulative impact is defined 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. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. The BIA NEPA Handbook amplifies the importance of cumulative impacts by requiring consideration of "past actions, plus proposed action, plus present actions by others, plus reasonably foreseeable future actions by anyone" (Section 4.4.F.(3) at page 19; Section 6.4.E.(8) at page 31). The Handbook further directs staff to:

[i]dentify reasonably foreseeable future actions through documents, such as tribal resolutions, zoning ordinances, Integrated Resource Management Plans or Natural Resource Restoration Plans; and through consultation with tribal and local planning offices. Put boundaries on the cumulative effects analysis for both time and location (e.g. over the next 5-10 years within the X watershed).

BIA NEPA Handbook at Section 4.4.F.(3).

As a result, the cumulative impacts analysis must not only consider the significant negative impacts associated with taking all the approximately 17,000 acres into trust, but must consider, among other things, past actions by the OIN, present action by other tribes, and reasonably foreseeable actions by the OIN and other tribes. Such impacts necessarily include those related to taking the lands into trust, and those related to the likely future development on the parcels, as well as additional future acquisitions and trust applications. Unquestionably, the OIN continues to indicate it has plans to continue acquiring lands for further development and it is incumbent upon the NEPA process to fully analyze those impacts.

Past development, ongoing operations and future development conducted without the proper oversight on lands in New York threaten the environmental resources and public health of Indians and non-Indians alike. The potential for long-lasting and irreparable harm caused by the cumulative impacts of taking at least 17,000 acres into trust is of great significance and consequence.

The purpose of environmental laws is to protect human health and the environment through uniform and systematic requirements designed to ensure that certain activities (such as disposal of waste, discharge of pollutants, storage of petroleum, filling of wetlands) are controlled in terms of location, design, construction, operation, maintenance and monitoring. These environmental laws require, among other things, permits to construct and/or operate landfills, air emission sources, water discharge points and mines. They also regulate the design, installation and maintenance of underground storage tanks and the dredging and filling of wetlands. The State and its political subdivisions require all who are subject to their jurisdiction

to comply with environmental laws because avoidance of such laws by some results in the detriment to all who share the same environment and natural resources.

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

In contrast, NEPA essentially is procedural and places no obligation on a federal agency to mitigate the environmental impacts of an action it approves or permits. See Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415 (1986) ("Moreover, unlike its Federal counterpart and model, [NEPA] . . . , SEQRA is not merely a disclosure statute; it 'imposes far more 'action-forcing' or 'substantive' requirements on state and local decision makers than NEPA imposes on their federal counterparts.'") (citations omitted). See also 2 Gerrard, Environmental Impact Review in New York, § 8.03[1]. Further, environmental reviews are much more likely to occur under SEQRA than they would under NEPA, in part because, unlike

under NEPA, the possibility of a significant adverse impact alone is sufficient to trigger full SEQRA review. *Id.*; Chinese Staff & Workers Ass'n v. New York, 68 N.Y.2d 359, 365 (1986). In short, SEQRA clearly provides for more stringent environmental review than NEPA.

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

The State's law and regulations governing subsurface discharges of pollutants further underscore the difference between state and federal law. Contamination of groundwater occurs through discharges of wastewater from sewage treatment plants and other operations, and spills of toxic chemicals and petroleum products, which can have far-reaching impacts through migration in the underlying aquifer, affecting wells and even surface waters miles away from the initial contamination source. Before discharges of even sanitary wastewater from a water treatment facility, for instance, to a holding pond or the ground may occur, a person seeking to discharge must apply for a DEC permit even before construction is begun. The permit review will include not only technical issues and direct impacts to the environment, but would require mitigation of any adverse effects found, including those that do not relate directly to the discharge of wastewater. In contrast, while any project undertaken on OIN lands arguably would be subject to federal law, the federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"), only addresses surface waters, not discharges to groundwater. Moreover, federal permits are not

required for facility construction. With one narrow exception, CWA permitting relating to all discharges are exempt from NEPA review. See 33 U.S.C. § 1371(c)(1) (exempting permitting decisions under CWA § 402 made by EPA). Similarly, petroleum spills that contaminate land but do not flow into navigable surface waters are not subject to federal control under the CWA or the federal Oil Pollution Act, 33 U.S.C. § 2701 et seq., but are subject to State environmental laws such as the State's Navigation Law.

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

State law protects wetlands 12.4 acres in size or greater and smaller wetlands of local importance. While the CWA protects wetlands smaller than 12.4 acres, the Army Corps of Engineers, which administers CWA § 404 regarding wetland filling and dredging, nonetheless allows clearing of vegetation and converting a wetland to open water, which reduces or eliminates the filtration and cleaning function that wetlands perform. In addition, under New York law, activities within a 100 foot buffer area surrounding a wetland are forbidden absent a permit. There is no similar restriction under federal law. Finally, under state law, a SEQRA review must be performed, and if there may be a significant adverse impact from any activity affecting the wetland, an environmental impact statement ("EIS") must be performed and

adverse impacts mitigated or avoided. In contrast, under federal law, it is the unusual case that requires an EIS under NEPA because the Army Corps has issued many nationwide permits that allow considerable dredging and filling of small wetlands, and in general, only the impacts of dredging and filling on the wetland are evaluated rather than other environmental impacts stemming from an applicant's proposed activities.

Consequently, without the ability to apply regulatory law to tribal property, state and local authorities would be unable to protect the property and health of residents in the surrounding community or the surrounding environment. Contamination issues are of particular concern generally in central New York where many residents rely on ground water as a source of water for household use.

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

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

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

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

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

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

Section 151.10(g) requires the Secretary to consider whether “the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.” The Application contains no assessment of the extent to which the BIA would be impacted by taking the OIN properties into trust, or having to administer those properties, or how federal environmental enforcement authorities would be impacted by having to serve as the sole or primary environmental law enforcement agency. There appears to be a serious question as to the capacity of federal authorities to perform the increased administrative

and enforcement obligations the OIN application, as well as other pending applications of New York tribal groups, would entail. The proposed use of some of the OIN properties to conduct gaming activities further underscores the need for and difficulty of guaranteeing proper supervision over the land parcels.

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

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

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

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

In an apparent effort to come within one of the categorical exclusions contained in Section 1.4 of the DOI Implementing Procedures, 62 Fed. Reg. 2379 (1997), the letter of Ray Halbritter, OIN Representative conveying the OIN's Application asserts: "[w]ith respect to the environmental effect of trust acquisition, please be advised that there is no anticipated change in the use of any of the land that is the subject of this request. All uses have been in place for many years." See Letter of Ray Halbritter to Franklin Keel, Regional Director, Eastern Regional Office, Bureau of Indian Affairs, dated April 4, 2005, at 1.

The position taken by OIN is disingenuous. Because of the Oneidas' ill-advised and incorrect assertion that its property was exempt from state and local regulatory laws, which has now been unequivocally rejected by the Supreme Court in Sherrill, the uses of, and activities engaged in on, the lands in question for a period of years have not been subject to state or local land use or environmental review. Nor, as far as we are aware, have such uses been subject to all appropriate assessments under federal environmental laws. By way of example only, the Oneidas have recently constructed and commenced operation of a cogeneration plant near their Turning Stone Casino without having first obtained the necessary permits and approvals under the Clear Air Act. Moreover, it is apparent based on the rapid development of all land by the OIN that there will be continued development of OIN land. The suggestion that the transfer of the land into trust will not result in any changes entirely ignores this point and is clearly a ploy to avoid the rigors of a complete environmental review.

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

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

25 C.F.R. § 151.13 mandates that prior to taking land into trust the Secretary must require the elimination of liens, encumbrances and infirmities that make title to the land to be taken into trust unmarketable. We understand that BIA policy is to refuse to take land into trust until outstanding tax liens have been extinguished. There are outstanding tax liens on the OIN property resulting from the OIN's refusal to pay real estate taxes required by Sherrill. The liens relating to those tax liabilities would have to be eliminated before the land could be taken into trust.

III. Conclusion

The 104 Group 3 parcels that the OIN seek to have taken into trust by the United States are only part of the over 17,000 acres of land scattered throughout central New York that are the subject of the OIN's Land-into-Trust Application. The State has already commented on the acquisition of the Group 1 and Group 2 parcels in its memorandum to BIA dated January 30, 2006. For the reasons stated therein, and for the reasons stated above, the State strongly opposes the OIN's Application for its failure to satisfy the criteria required under federal law and regulations and for the social and economic disruption that granting the Application would create in the surrounding areas.