



NIXON PEABODY LLP

ATTORNEYS AT LAW

Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(585) 263-1000
Fax: (585) 263-1600
Direct Dial: (585) 263-1341
E-Mail: dschraver@nixonpeabody.com

January 30, 2006

BY FEDERAL EXPRESS AND REGULAR MAIL

Mr. Scott C. Meneely
Acting Director
United States Department of the Interior
Bureau of Indian Affairs
Eastern Regional Office
545 Marriott Drive, Suite 700
Nashville, TN 37214

RE: Land-In-Trust Application of Oneida Indian Nation of New York per Letter
Dated September 20, 2005, Proposed Acquisition of 17,310.43 Acres

Dear Mr. Meneely:

This Firm is counsel to Madison and Oneida Counties in this matter. This letter responds to your letter dated September 20, 2005, inviting comments and other information on the proposed acquisition of approximately 17,310.43 acres of land comprised of 444 parcels by the United States to be held in trust for the use and benefit of the Oneida Indian Nation of New York. The Counties are providing additional comments and information directly and have provided information to the State of New York and its contractor, O'Brien & Gere; and we incorporate by reference on behalf of the Counties the comments and information submitted by the State. The time to provide comments regarding the Group I parcels was extended to January 30, 2006 and regarding the Group II parcels to January 30, 2006. We have been advised by David Moran that comments on both the Group I and Group II parcels will be timely if posted by January 30, 2006. We and the Counties expect to provide additional comments regarding the Group III parcels within the time as extended to March 1, 2006 for those parcels.

The Counties oppose the application because granting it would create exactly the checkerboard reservation that was condemned by the Supreme Court of the United States in *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), would seriously burden the administration of state and local governments in Central New York, would adversely affect

Scott C. Meneely
January 30, 2006
Page 2

adjacent landowners and would otherwise be extraordinarily disruptive, all as described more fully below, in the report of the Center for Governmental Research submitted with this letter, and in the comments submitted by the Counties and the State. Furthermore, the Counties object to the consideration of this Application as not being within the intent or scope of 25 U.S.C. § 465, object to the consideration of the Application as relating to “on reservation” lands, object to the Application based on the absence of any showing of “need” by the tribe, and object to the Application because it would reward the tribe for its self-help purchases of land during court-ordered mediation over the objection of the court-appointed mediator and the Counties. As stated above, the Counties also join in the comments of the State of New York and the materials submitted by or on behalf of the State.

Granting the Application Would Be Extraordinarily Disruptive

The Counties have long taken the position that any lands taken into trust and any Indian reservation to be created in the land claim area should be reasonably compact, contiguous, limited in size, and should have recognizable boundaries.¹ Representatives of the Department of the Interior have informally indicated to the Counties that they agree with these concepts and generally try to achieve these goals with respect to taking lands into trust. The tribe’s application would achieve none of these objectives and would, in fact, undermine them. In *City of Sherrill*, the Supreme Court specifically recognized that “[a] checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at OIN’s behest – would ‘seriously burden the administration of state and local governments’ and would adversely affect landowners neighboring the tribal patches.” 125 U.S. 1493 (internal citations omitted). Granting the tribe’s application in full would confirm the very jurisdictional checkerboard that the tribe has created unilaterally and would cause the disruptive practical consequences that troubled the Supreme Court and led it to apply the impossibility doctrine in *City of Sherrill*.

The regulations require that “[j]urisdictional problems and potential conflicts of land use which may arise” be considered in evaluating the request that lands be taken into trust. 25 CFR § 151.10(f). This consideration deserves great weight here because of the size and scope of the jurisdictional checkerboard presented by the application and the disruptive practical consequences it presents, as recognized by the strong language of the Supreme Court. The Department of the Interior has itself recognized, citing *City of Sherrill*, that the process of

¹ In the context of negotiations aimed at achieving a comprehensive settlement of the Oneida land claim litigation and related issues, the Counties have previously indicated a willingness to consider a limited amount of land being designated as Indian country, subject to the criteria of compactness, contiguity, recognizable boundaries, finality, and appropriate intergovernmental agreements. The grouping of properties by the applicant into three groups does not meet these criteria, and the Counties have been advised and understand that the application is one application to have the United States take into trust all of the lands now owned by the applicant. County representatives have called for the development of alternatives to the all-or-nothing approach being taken by the Department of the Interior and the need for a comprehensive settlement of all issues related to the Oneida land claim and related disputes.

Scott C. Meneely
January 30, 2006
Page 3

considering this application is intended to be “sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory.” Letter from James E. Cason, Associate Deputy Secretary, to Hon. John McHugh dated November 23, 2005, p.1.

United States District Judge David N. Hurd, who has presided over much of the litigation between the tribe and the Counties, recently recognized such disruptive consequences in dismissing a Cayuga complaint seeking immunity from zoning and land use laws. “Even the lone dissenter [in *City of Sherrill*], Justice John Paul Stevens, opined that local taxation was the ‘least disruptive to other sovereigns,’ and noted that ‘[g]iven 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.’” *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y., 2005). Just as obviously and based on the same considerations, the tribe’s application to take into trust 444 parcels scattered throughout Madison and Oneida Counties, the very checkerboard the Supreme Court addressed, should be denied.

For assistance in gathering information and framing the jurisdictional, economic and fiscal impacts of the application, the Counties retained the Center for Governmental Research (“CGR”), a nonprofit public interest organization, founded in 1915 on the principle that nonpartisan research and objective analysis can improve public policy and decision-making. For 90 years, CGR has been working with New York state, county and municipal governments and school districts (among others). CGR’s report, a copy of which is submitted on behalf of the Counties with this letter, uses the BIA requirements for consideration of land-into-trust applications, applies these requirements to data gathered from local government officials, and concludes that “[t]ransferring parcel-by-parcel jurisdiction from New York State to the Oneida Nation now would seriously jeopardize the ability of the State of New York and its county and municipal governments to effectively govern in these communities.” Center for Governmental Research, *Jurisdictional and Economic Impacts of Granting the Oneida Indian Nation’s Application to Take Lands Into Trust in Oneida and Madison Counties*, January, 2006, at 4. CGR’s report provides a detailed discussion and analysis of the proposed land-into-trust acquisition and the impacts such an acquisition would have on local government; public health and safety; the environment; management of public infrastructure and utilities; community planning, zoning and land use regulation; emergency services; non-Indian property owners; the capacity of local government to raise needed revenues and provide public services; unfair shifting of the local tax burden; and other governmental, economic and fiscal considerations. Together with the comments provided directly by the Counties and the comments provided by the State of New York, the CGR report provides further, objective support for the conclusion that granting the Oneida Indian Nation’s application would be extraordinarily disruptive in Madison and Oneida Counties.

Scott C. Meneely
January 30, 2006
Page 4

The Application Should Not Be Treated As "On-Reservation"

We object to the treatment of this application as an "on-reservation acquisition" pursuant to 25 CFR § 151.10. The land in question is not "Indian reservation" within the meaning of the regulations. The regulations provide that "[u]nless another definition is required by act of Congress authorizing a particular trust acquisition, 'Indian reservation' means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction...." 25 CFR § 151.2(f). The Oneida Indian Nation of New York does not exercise governmental jurisdiction or "sovereignty" over these lands in whole or in part. *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478, 1483, 1489-90, 1491 n.9, 1492, 1493 (2005). Furthermore, as the Supreme Court recognized, the territory within which the Oneidas' lands are located has been settled by non-Indians and under state sovereign control since the early 1800's, with the acquiescence of both the United States and the Oneidas. 125 S. Ct. at 1490. See, Affidavit of David M. Schraver sworn to November 10, 2000 and exhibits thereto, filed on behalf of Madison County and Oneida County in *Oneida Indian Nation v. City of Sherrill*, (N.D.N.Y., Case No. 00-CV-223) to show the non-Indian character of the area and jurisdictional history (copy enclosed).

The Bureau of Indian Affairs/Department of Interior may not overrule the Supreme Court of the United States by treating the Oneida Indian Nation of New York as "having governmental jurisdiction" over the lands in question, regardless of whether the ancient Oneida reservation has formally been disestablished or diminished, an issue currently being litigated in the Oneida land claim litigation now pending in the United States District Court for the Northern District of New York. *Oneida Indian Nation of New York v. The County of Madison*, Civil Action No. 74-CIV-187 (Kahn, J.). Even if the lands were "on-reservation" for this purpose, which they are not, the ancient Oneida Indian reservation was not the reservation solely of the Oneida Indian Nation of New York; other tribes (namely, the Oneida Tribe of Indians of Wisconsin and the Stockbridge-Munsee Community) currently claim rights equal to the Oneida Indian Nation of New York. These conflicting claims should be resolved before any lands are taken into trust to avoid continuing competition, conflict and unrest in the area.

We acknowledge that Judge Hurd issued a decision on October 27, 2005 in *Oneida Indian Nation of New York v. Madison County*, Case No. 5:00-CV-506, in which he determined that the Oneida Indian Nation's reservation was not disestablished. Madison County has filed a Notice of Appeal from that decision. (In the meantime, Judge Hurd's decision appears to take these lands out of the disestablished reservation part of the § 151.2(f) definition, without recognizing that the tribe exercises governmental jurisdiction over these lands. Thus, these lands do not come within either part of the definition.) Further, Madison County has filed a post-judgment motion under Fed. R. Civ. P. Rules 52, 59 and 60 asking Judge Hurd to declare the boundaries of the "not disestablished" reservation; his decision of that motion may affect which properties are and are not within the reservation. The Stockbridge-Munsee Community has moved to intervene in the *Madison County* case and in a companion action, *Oneida Indian*

Scott C. Meneely
January 30, 2006
Page 5

Nation of New York v. County of Oneida, (N.D.N.Y., Case No. 6:05-CV- 0945), with respect to its claimed six-by-six mile square reservation, which includes a significant number of parcels that are included in the application.

The Counties disagree that any properties within the 1788 Treaty boundaries (acknowledged in the 1794 Treaty of Canandaigua), with the possible exception of the 32 acres held of record by an individual named Rockwell, are currently reservation lands; and we are not aware of the Secretary having “defined” any area of land constituting the former reservation to be “reservation” within the meaning of 25 CFR § 151.2(f). Clearly, at least some of the lands within the 1788 treaty boundaries have been removed from reservation status by treaties after 1794² or, as in the case of the Stockbridge reservation, were never part of an Oneida reservation. In addition, we particularly object to the application to take into trust the seven Group II parcels in the Town of Vienna, Village of Sylvan Beach, Oneida County (or any other parcels in the Town of Vienna) because the Town of Vienna is outside the boundaries of the Oneida Indian reservation as described in the 1788 Treaty.

Based on the foregoing and the checkerboard nature of the application, the application should be processed under 25 C.F.R. § 151.11 and the Secretary should give greater scrutiny to the tribe’s justification (if any) of anticipated benefits from the acquisition (151.11(b)), should require the tribe to provide a plan which specifies the anticipated benefits associated with the proposed use as to each parcel (151.11(c)), and should give greater weight to the concerns raised by state and local governments (151.11(b) and (d)).

The Tribe Has Not Demonstrated “Need”

The two-page letter application of the Oneida Indian Nation of New York [April 4, 2005 letter from Ray Halbritter to Franklin Keel] contains only one conclusory sentence regarding the tribe’s need to have these lands taken into trust and is totally inadequate to provide a basis for evaluating “the need of the...tribe for additional land” [25 CFR § 151.10(b) as applicable under § 151.11(a); “greater scrutiny” is required under § 151.11(b)], especially when this criterion is applied to an application to take into trust over 17,000 acres comprised of 444 parcels scattered over two counties, ten towns, two cities, several school districts, villages and hamlets. The tribe

² One example of lands within the 1788 treaty boundaries that have been removed from reservation status by post-1794 treaties are lands within the areas described in the 1798 Treaty. In its Memorandum of Law In Support of Motion for Summary Judgment (“Oneida MOL”) filed December 5, 2005 in *Oneida Indian Nation v. Oneida County, New York*, Civil Action No. 6:05-CV-0945(DNH/GJD), the tribe agreed: “The Nation does not seek a declaration of reservation status concerning six tax parcels that were wholly or partly within the 1798 sale to the State of New York that was approved as a federal treaty.” Oneida MOL at 1, n.1. Other lands that must be considered as having been removed from reservations status by post-1794 treaties include at least those within the 1802 Treaty areas (sale to New York submitted to Senate by President Jefferson and approved by the Senate but not proclaimed by President) and the post-1838 treaty areas (later sales to the Governor of New York authorized by the federal Treaty of Buffalo Creek).

Scott C. Meneely
January 30, 2006
Page 6

should be required to justify its alleged need to have particular parcels as well as the aggregate of these lands taken into trust, and the Counties should have a meaningful opportunity to comment once information concerning “need” has been submitted by the tribe.

Furthermore, as indicated above by reference to *City of Sherrill*, it is not a matter of “reserving” the tribe’s sovereignty. Taking these lands into trust will be creating “sovereignty” over lands which have been subject to state and local jurisdiction for the better part of two centuries. The tribe can maintain its ownership of these lands without the United States taking them into trust. The tribe can also provide for its other needs and for the needs of its members without the United States taking these lands into trust. The tribe has made no showing to the contrary.

Finally, the stated purpose of the Indian Reorganization Act of 1934, of which 25 U.S.C. § 465 is a part, was “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). No one can seriously argue that granting the application is necessary in order to rehabilitate the Oneida Indian Nation of New York’s economic life, give it a chance to develop initiative, or “permit [it] to enter the white world on a footing of equal competition.” *Mescalero*, 411 U.S. at 152. The materials submitted with the application show that the applicant is an extremely wealthy, economically successful, sophisticated Indian tribe that has had extraordinary success in the modern world and has purchased the lands in question independently of the United States Government. It does not need to have these lands taken into trust to serve the purposes of the statute, and the statute should not be applied to its application. The statutory and historical context of the Indian Reorganization Act show that the purposes of § 465 are to provide lands sufficient to enable Indians to achieve self-support and to ameliorate the damage caused by the prior allotment policy of the United States. See, *South Dakota v. Department of the Interior*, 423 F.3d 790, 798 (8th Cir., 2005). The second of these purposes clearly does not apply to the Oneida Indian Nation of New York;³ and the tribe owns enough land in fee and has enough other resources and business interests to be self-sufficient without taking the subject lands into trust.

The Tribe’s Self-help During Mediation and Settlement Negotiations Should Not Be Rewarded

The tribe has acquired these lands over the past fifteen years or so, many at a time when the parties were engaged in settlement negotiations in the land claim litigation. By these

³ In view of the legislative intent of 25 U.S.C. § 465 to ameliorate damage caused by the prior allotment policy of the United States, the fact that there are no allotment lands in the State of New York, and the absence of any constitutional authority for the United States to take into trust any land within the State of New York, the Counties object as a matter of law to the use of the land-into-trust process under this statute and to the United States taking any land into trust within Madison or Oneida County.

Scott C. Meneely
January 30, 2006
Page 7

purchases, the tribe has attempted unilaterally to change the status quo, despite the urging of the court-appointed mediator and the Counties that such self-help was not consistent with good faith negotiations. The mere fact that the tribe has purchased these lands does not mean they should be taken into trust, particularly because of the self-help and the scattered, checkerboard nature of the acquired parcels, some of which represent prime commercial properties throughout the area. To permit the tribe's unilateral purchases to be a basis for granting the tribe's application would be to sanction exactly the disruption that the Supreme Court rejected in *City of Sherrill*.

Very truly yours,



David M. Schrauer

DMS/tsj
Enclosures

cc: (with enclosures):
Randal B. Caldwell, Oneida County Attorney
S. John Campanie, Madison County Attorney
Michael D. Olsen, Esq.

(without enclosures):
Rocco J. DiVeronica, Chairman, Madison County Board of Supervisors
Joseph A. Griffo, Oneida County Executive
Hon. Charles E. Schumer
Hon. Hillary Rodham Clinton
Hon. Sherwood L. Boehlert
Hon. John M. McHugh
Hon. George Pataki
Hon. Raymond E. Meier
Hon. David J. Valesky
Hon. RoAnn Destito
Hon. William D. Magee
Hon. David R. Townsend