Amendment to the May 20, 2008
Record of Decision
for Oneida Indian Nation of New York Fee-to-Trust Request

U.S. Department of the Interior
Assistant Secretary – Indian Affairs
December 23, 2013

Amendment to the May 20, 2008 Record of Decision for Oneida Indian Nation of New York Fee-to-Trust Request

On May 20, 2008, the U.S. Department of the Interior (Department) issued a Record of Decision (ROD) announcing its determination to accept 13,003.89 acres of land located in Madison County and Oneida County, New York, in trust for the Oneida Indian Nation of New York (Nation). Five lawsuits challenging that decision were filed in the United States District Court for the Northern District of New York by the State of New York, citizens' groups, and various local governments.[1] By Memorandum-Decision and Order dated September 24, 2012 (Order) issued concurrently in those lawsuits, the district court remanded the May 20, 2008 ROD to the Department and directed the Department to "establish a record on and determine the outcome of the jurisdictional question raised" whether the Nation was under Federal jurisdiction at the time the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq. (IRA) was enacted in 1934. Order at 38. The Department was directed to issue an amended ROD. Order at 44.

The Department afforded parties to the litigation the opportunity to submit "any evidence or argument they wish[ed] the Department to consider in determining whether the Nation was under Federal jurisdiction in 1934." *See, e.g.*, Letter from Michael S. Black, Acting Assistant Secretary, Indian Affairs, to Mr. Dwight A. Healy, White & Case LLP, at 1 (Oct. 9, 2012). The Department received submissions on this issue in November and December 2012. The Office of the Solicitor has reviewed these submissions and prepared the attached opinion (*Carcieri* Opinion) concluding that the Nation was under Federal jurisdiction in 1934, and that the Secretary is therefore authorized to acquire land in trust for the Nation under the IRA, as amended by the Indian Land Consolidation Act, 25 U.S.C. §§ 2201 et seq.

I hereby adopt the *Carcieri* Opinion. The ROD is amended accordingly. The *Carcieri* Opinion does not alter the remainder of the Department's determination to accept 13,003.89 acres of land in trust for the Nation.

Kevin K. Washburn
Assistant Secretary – Indian Affairs

12/23/13
Date

[1] Those lawsuits, which are being treated as related by the federal district court, include *State of New York et al. v. Jewell et al.*, 6:08-CV-00644 (LEK/DEP); *City of Oneida v. Jewell et al.*, 5:08-CV-00648 (LEK/DEP); *Upstate Citizens for Equality, Inc. et al. v. United States et al.*, 5:08-CV-00633 (LEK/DEP); *Town of Verona et al. v. Jewell et al.*, 6:08-CV-00647 (LEK/DEP); and *Central New York Fair Business Association et al. v. Jewell et al.*, 6:08-CV-00660 (LEK/DEP).

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

DEC 2 2 2013

IN REPLY REFER TO
MEMORANDUM

TO: Kevin K. Washburn
Assistant Secretary – Indian Affairs

THROUGH: Michael J. Berrigan
Associate Solicitor – Division of Indian Affairs

FROM: Jennifer L. Turner
Assistant Solicitor, Branch of Environment and Lands

SUBJECT: Determination of Whether the Oneida Indian Nation was Under Federal Jurisdiction in 1934

On April 4, 2005, the Oneida Indian Nation of New York (OIN, Oneida, or Nation) submitted a fee-to-trust application to the Bureau of Indian Affairs (BIA) requesting that the Secretary of the Interior (Secretary) accept into trust pursuant to Section 5 of the Indian Reorganization Act (IRA)[1] approximately 17,370 acres of land located within the boundaries of the Oneida Reservation, which was confirmed by the 1794 Treaty of Canandaigua.[2] The land consists of 330 parcels, or 440 tax lots, located in Madison and Oneida Counties, New York.[3]

The Nation intends to continue the existing uses of these lands, including the Nation's core cultural, housing, government, agricultural, and economic development uses.[4] On May 20, 2008, after evaluating the record before it, the Department of the Interior (DOI or Department) made the decision to accept 13,003.89 acres in trust for the Nation under the preferred alternative as modified and issued its Record of Decision (ROD).[5]

New York State, various local governments, and citizens' groups brought suit to challenge the decision in the U.S. District Court for the Northern District of New York. While the case was pending, the Supreme Court decided *Carcieri v. Salazar*,[6] in which it interpreted the first definition of "Indian" in the IRA to be limited to tribes that were under federal jurisdiction in 1934.[7] On September 24, 2012, citing *Carcieri*, the Court remanded the decision back to the

[1] 25 U.S.C. §§ 461-479. Section 5 of the IRA is codified at 25 U.S.C. § 465.
[2] Indian Treaty, Six Nations, Nov. 11, 1794, 7 Stat. 44.
[3] Record of Decision, Oneida Indian Nation of New York Fee-To-Trust Request, U.S. Department of the Interior, Bureau of Indian Affairs, May 20, 2008, at 6 (ROD).
[4] *Id.* at 37-39.
[5] *Id.* at 7, 30-31, 73.
[6] 555 U.S. 379 (2009).
[7] *Id.* at 395.

Department to further develop the record regarding DOI's statutory authority to acquire land in trust for the Nation pursuant to Section 5 of the IRA.[8]

By letters dated October 9, 2012, given the unique circumstances and procedural posture of this particular case, the Department afforded parties to the litigation the opportunity to submit "any evidence or argument they wished the Department to consider in determining whether the [OIN] was under federal jurisdiction in 1934."[9] Responses were received from the State of New York and Counties of Oneida and Madison (State and Counties), the Nation, Upstate Citizens for Equality (UCE), and the Citizens Equal Rights Alliance (CERA) and Central New York Fair Business Association (CNYFBA). The State and Counties, UCE, and the Nation then submitted replies responding to the other parties' submissions.[10]

In their submission, the State and Counties included an expert report written by Stephen Dow Beckham (Beckham Report), which they previously had submitted to the federal district court during summary judgment briefing.[11] The Oneida Indian Nation also submitted an expert report written by Christian W. McMillen (McMillen Report), which critiques the Beckham Report.[12] The State and Counties followed up with a reply expert report, also written by Professor Beckham (Beckham Reply Report).[13] Because the Court has requested the Department create a record to guide its review of these voluminous historical materials, the Department has gone beyond its usual process for determining whether a tribe is was under federal jurisdiction for purposes of taking land into trust under Section 5 of the IRA, and addressed the record before it in extensive detail.

Under *Carcieri*, the Secretary must determine whether an Indian tribe seeking to have land placed in trust under the first definition of "Indian" was "under federal jurisdiction" in 1934, the year the IRA was enacted.[14] We conclude that the Oneida Indian Nation was under federal

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[8] Memorandum Decision and Order, *New York v. Salazar*, Case No. 08-644 (N.D.N.Y. Sept. 24, 2012). Other plaintiffs in the consolidated Memorandum-Decision and Order include the City of Oneida, New York; Upstate Citizens for Equality; Town of Verona; and Central New York Fair Business Association.

[9] *See, e.g.*, Letter from Michael S. Black, Acting Assistant Secretary, Indian Affairs, to Dwight A. Healy, White & Case LLP (Oct. 9, 2012), at 1. Parties were given the opportunity to provide initial submissions, and then a follow-up submission responding to submissions of other parties.

[10] Exhibits submitted by the Nation are numbered, whereas exhibits submitted by the State and Counties are signified by letters. In some cases, both the State and Counties and the Nation submitted the same exhibit. In that case, the designation by each party is noted. References to exhibits designated by a letter were included as part of the State and Counties' November 23, 2012 submission; references to exhibits designated by a number were included as part of the Nation's November 23, 2012 or December 17, 2012 submission. Exhibits submitted by UCE, CERA, and CNYFBA are noted.

[11] Ex. WW to Declaration of Aaron M. Baldwin, Report of Stephen Dow Beckham, Ph.D. (Nov. 13, 2011) (hereinafter Beckham Report). Professor Beckham is a Professor of History at Lewis and Clark College in Portland, Oregon. *See id.* at 1.

[12] Report of Christian W. McMillen (Nov. 21, 2012) (hereinafter McMillen Report). Christian W. McMillen is an Associate Professor of History at the University of Virginia. *See id.* at 40.

[13] Stephen Dow Beckham Reply Report on Remnant Lands, State and Federal Relationships, and the Oneidas in Madison County (Dec. 12, 2012) (hereinafter Beckham Reply Report).

[14] *Carcieri*, 555 U.S. at 382-83. The *Carcieri* decision addresses the Secretary's authority to acquire land in trust for "members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the Secretary's authority to acquire land in trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

jurisdiction in 1934 because the Oneidas voted in an election called and conducted by the Secretary of the Department of the Interior pursuant to Section 18 of the IRA on June 18, 1936.[15] Although this is sufficient to establish that the Nation was under federal jurisdiction in 1934, given the unique posture of this land into trust application, the Solicitor's Office has gone beyond this in order to respond to specific arguments raised on remand that the Nation is ineligible to take land into trust under the IRA. Indeed, notwithstanding the IRA vote, additional federal actions, either in themselves or taken together, establish that the Nation was under federal jurisdiction prior to 1934 and retained this status in 1934. These actions include for example, the negotiation and ratification of the 1794 Treaty of Canandaigua,[16] the guarantee by the Treaty of Canandaigua that the Oneida Reservation is subject to federal protection, the ongoing distribution of treaty cloth pursuant to the Treaty, as well as affirmative litigation brought by the United States to protect Oneida Reservation land from conveyance to third parties, culminating in the Second Circuit's decision in *United States v. Boylan.*[17] Moreover, additional historical documents demonstrate significant interactions between federal officials and the Nation prior to and after enactment of the IRA.[18] This federal course of dealings with the Nation has continued into the present day.[19]

The State and Counties and other parties offer additional arguments challenging the historical status of the Nation, but we find that the evidence they offer is drawn selectively from the historical record and does not change our determination regarding the relationship between the United States and the Nation. Nothing in the State and Counties' submissions alters the fundamental and dispositive facts and legal significance of the IRA vote, the Treaty of Canandaigua, the *Boylan* litigation and a multitude of federal dealings with the Nation in New York prior to and after 1934. Thus, the Secretary is authorized to acquire land in trust for the Nation under the IRA, as amended by the Indian Land Consolidation Act.[20]

I. The Department's Application of *Carcieri v. Salazar*

The *Carcieri* decision addressed the Secretary's authority to acquire land in trust for "members of any recognized Indian tribe now under [f]ederal jurisdiction."[21] The Department has evaluated the IRA in light of the *Carcieri* decision and concluded that the text of the IRA does

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[15] *See, e.g.*, Ex. 5, June 24, 1936, letter from W.K. Harrison to Commissioner Collier, at 1; Ex. 6, 1936, Annual Report of the Commissioner of Indian Affairs, at 163.

[16] 7 Stat. 44. *See also e.g.,* Treaty of Fort Harmar, 7 Stat. 33; Treaty of Fort Stanwix, 7 Stat. 15; Treaty of Buffalo Creek, 7 Stat. 550.

[17] 265 F. 165 (2d Cir. 1920).

[18] *See infra* Section II(B) and (C).

[19] *See, e.g., Indian Tribal Entities that have a Government-to-Government Relationship with the United States*, 44 Fed. Reg. 7,235, 7,236 (Feb. 6, 1979) (including Oneida Nation of New York on the first formal list of federally recognized tribes published by the Department); *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 78 Fed. Reg. 26,384, 26,387 (May 6, 2013) (including Oneida Nation of New York on the most recent formal list of federally recognized tribes published by the Department). *See also infra* Section II (B) and (C) discussing federal actions taken demonstrating that Oneida's under federal jurisdiction status remained intact in and after 1934.

[20] 96 Stat. 2515, 2517-19 (codified at 25 U.S.C. § 2201 *et seq.*).

[21] 555 U.S. at 387-88 (quoting 25 U.S.C. § 479).

not define or otherwise establish the meaning of the phrase "under federal jurisdiction."[22] Nor does the legislative history clarify the meaning of the phrase. Because the IRA does not unambiguously give meaning to the phrase "under federal jurisdiction," the Secretary must interpret that phrase in order to continue to exercise the authority delegated to him under Section 5 of the IRA.[23] The canons of construction applicable in Indian law, which derive from the unique relationship between the United States and Indian tribes, also guide the Secretary's interpretation of any ambiguities in the IRA.[24] Under these canons, statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians, and ambiguities are to be resolved in their favor.[25]

The discussion of "under federal jurisdiction" also must be understood against the backdrop of basic principles of Indian law that define the Federal Government's unique and evolving relationship with Indian tribes. The Supreme Court has long held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[26] The Indian Commerce Clause also authorizes Congress to regulate commerce "with the Indian tribes,"[27] and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate.[28] Pursuant to U.S. Const., art. VI, cl. 2, treaties are the law of the land.

The Court also has recognized that "[i]nsofar as [Indian affairs were traditionally an aspect of military and foreign policy], Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.'"[29] In addition, "[i]n the exercise of the war

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[22] Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-cre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (April 22, 2013), at 84 (hereinafter Cowlitz ROD). The two-part framework set forth in this opinion was first adopted in a Record of Decision issued for a trust acquisition for the Cowlitz Indian Tribe on December 17, 2010. A federal district court remanded the December 17, 2010 Cowlitz ROD to the Department on non-*Carcieri* grounds in March 2013. The Assistant Secretary – Indian Affairs issued a new Cowlitz ROD on April 22, 2013, which is cited in this opinion.

[23] The Secretary receives deference to interpret statutes that are consigned to his administration. *See Chevron v. NRDC,* 467 U.S. 837, 844 (1984); *United States v. Mead Corp.,* 533 U.S. 218, 229-31 (2001); *see also Skidmore v. Swift,* 323 U.S. 134, 139 (1944) (agencies merit deference based on the "specialized experience and broader investigations and information" available to them). The Chevron analysis is frequently described as a two-step inquiry. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serves.*, 545 U.S. 967, 986 (2005) ("If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is a 'reasonable policy choice for the agency to make.'").

[24] *Yankton Sioux Tribe v. Kempthorne,* 442 F. Supp. 2d 774, 783 (D.S.D. 2006) (outlining the principles of liberality in construction of statutes affecting Indians).

[25] *Minnesota v. Mille Lacs Tribe of Chippewa Indians,* 526 U.S. 172, 200 (1999); *see also County of Yakima v. Confederated Tribes and Tribes of the Yakima Indian Nation,* 502 U.S. 251, 269 (1992).

[26] *United States v. Lara,* 541 U.S. 193, 200 (2004) (citation omitted); *see also Morton v. Mancari,* 417 U.S 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."), *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 813 (1993) (If Congress possesses legislative jurisdiction, then the question is "whether, and to what extent, Congress has exercised that undoubted legislative jurisdiction").

[27] U.S. Const., art. I, § 8, cl. 3.

[28] U.S. Const., art. II, § 2, cl. 2.

[29] *Lara,* 541 U.S. at 201.

and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation."[30] In order to protect Indian lands from alienation and third party claims, Congress enacted a series of Indian Trade and Intercourse Acts (Nonintercourse Acts)[31] that ultimately placed a general restraint on conveyances of land interests by Indian tribes:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.[32]

Indeed, in *Johnson v. M'Intosh,* the Supreme Court held that while Indian tribes were "rightful occupants of the soil, with a legal as well as just claim to retain possession of it," they did not own the "fee."[33] As a result, title to Indian lands could only be extinguished by the Sovereign.[34] Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities."[35] Once a federal relationship is established with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease.[36] And Congress must authorize the transfer of tribal interests in land.

After considering the text of the IRA, its remedial purposes, legislative history, the Department's early practices, and the Indian canons of construction, the Department construed the phrase "under federal jurisdiction" as entailing a two-part inquiry.[37] The first part examines whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.,* whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions through a course of dealings or other relevant

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[30] *Mancari,* 417 U.S. at 552 (citation omitted).

[31] *See* Act of July 22, 1790, Ch. 33, § 4, 1 Stat. 137; Act of March 1, 1793, Ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, Ch. 30, § 12, 1 Stat. 469; Act of Mar. 3, 1799, Ch. 46, § 12, 1 Stat. 743; Act of Mar. 30, 1802, Ch. 13, § 12,2 Stat. 139; Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729. In applying the Nonintercourse Act to the original states the Supreme Court held "that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 670 (1974). This is the essence of the Act: that all land transactions involving Indian lands are "exclusively the province of federal law." *Id.* The Nonintercourse Act applies to both voluntary and involuntary alienation, and renders void any transfer of protected land that is not in compliance with the Act or otherwise authorized by Congress. *Id.* at 668-70.

[32] Act of June 30, 1834, Ch. 161, § 12, 4 Stat. 729, codified at 25 U.S.C. § 177.

[33] 21 U.S. 543 (1823).

[34] *See Oneida Indian Nation of New York v. Oneida County,* 414 U.S. 661, 667 (1974) ("Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.").

[35] *United States v. Sandoval,* 231 U.S. 28, 45-46; *see also United States v. Kagama,* 118 U.S. 375, 383-385 (1886).

[36] *Grand Traverse Tribe of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan,* 369 F.3d 960, 968-69 (6th Cir. 2004) (citing *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 380 (1st Cir. 1975)); *see also United States v. Nice,* 241 U.S. 591, 598 (1916); *Tiger v. W. Investment Co.,* 221 U.S. 286, 315 (1911).

[37] Cowlitz ROD at 94-95.

acts for or on behalf of the tribe or in some instances, tribal members, that are sufficient to establish or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may, in and of themselves, demonstrate that a tribe was under federal jurisdiction, or a variety of actions, when viewed in concert, may achieve the same result.

For example, some tribes may be able to demonstrate that they were under federal jurisdiction by showing that Federal Government officials undertook guardian-like action on behalf of the tribe, or engaged in a continuous course of dealings with the tribe. Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe. Evidence may also consist of actions by the Office of Indian Affairs, which became responsible, for example, for the administration of the Indian reservations, in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. There may be, of course, other types of actions not referenced herein that evidence the Federal Government's obligations or duties to, acknowledged responsibility for, or power or authority over a particular tribe.

Once having identified that the tribe was under federal jurisdiction at or before 1934, the second part of the analysis ascertains whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. It should be noted, however, that the Federal Government's failure to take any actions towards or on behalf of a tribe during a particular time period does not necessarily reflect a lawful termination or loss of the tribe's jurisdictional status.[38]

This interpretation of the phrase "under federal jurisdiction," including the two-part inquiry, is consistent with the remedial purpose of the IRA and with the Department's post-enactment practices in implementing the statute. We apply the same interpretation in this opinion.

II. Application of the Two-Part Inquiry to the Oneida Indian Nation

Applying the principles above, and based on our review of the Nation's history and record before us, we conclude that the IRA election held by the Secretary in 1936 for the Oneida Indian Nation unambiguously and conclusively establishes that the Nation was under federal jurisdiction in 1934. While no additional evidence is required, the Treaty of Canandaigua, the *Boylan* litigation, and other evidence of interactions between the United States and the Nation either independently or collectively further confirm that the Nation was under federal jurisdiction before 1934, and that the Nation retained this jurisdictional status in 1934.

[38] *See* Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs; Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980).

A. The IRA Vote

1) The IRA vote conclusively establishes that the Oneida were under federal jurisdiction in 1934.

The Department has recognized that some activities and interactions could so clearly demonstrate federal jurisdiction over a tribe as to render elaboration of the two-step inquiry unnecessary. For example, "for some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to accept or reject the IRA following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934. For such tribes, there is no need to proceed to the second step of the two-part inquiry."[39] Here, the factual record, as further described herein, establishes that the Oneidas voted in a special election called by the Secretary of the Interior pursuant to Section 18 of the IRA. This vote definitively established the Nation's "under federal jurisdiction" status in 1934.

Section 18 of the IRA provides that "[i]t shall be the duty of the Secretary of the Interior, within one year after the passage [of the IRA] to call . . . an election" regarding application of the IRA to each reservation.[40] If "a majority of the adult Indians on a reservation ... vote against its application," the IRA "shall not apply" to the reservation.[41] The vote was either to reject the application of the IRA or not to reject its application. Section 18 required the Secretary to conduct such votes "within one year after June 18, 1934," which Congress subsequently extended until June 18, 1936.[42] In order for the Secretary to conclude a reservation was eligible for a vote, a determination had to be made that the relevant Indians met the IRA's definition of Indian and were thus subject to the Act. Such an eligibility determination would include deciding the tribe was under federal jurisdiction and render inappropriate as well as superfluous, in most circumstances, allowing third party challenges to that determination decades later. Preparations were made for the Oneida to vote on the IRA from 1934[43] to 1936.[44] On June 18, 1936, within the extended deadline set by Congress, a majority of Oneida voters voted to reject the IRA.[45] This vote was documented in the Annual Report of the Commissioner of Indian Affairs in 1936, and in other DOI correspondence.[46] The total number of enrolled Oneidas at the

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[39] Cowlitz ROD at 95 n.99.
[40] IRA, Sec. 18, 48 Stat. 984, 988 (1934).
[41] *Id.*
[42] Act of June 15, 1935, 49 Stat. 378.
[43] Ex. 13, November 15, 1934, letter from W.K. Harrison to Commissioner Collier (proposing meetings to explain the IRA to members of the Oneida Tribe); Ex. 14, January 1, 1935, letter from W.K. Harrison to Assistant Commissioner (discussing possible meeting locations); Ex. 15, April 16, 1935, letter from W.K. Harrison to Commissioner (proposed election schedule with hand written query regarding the Oneida); Ex. 16, May 7, 1935, letter from W.K. Harrison to Assistant Commissioner (stating that the Oneida should be entitled to vote).
[44] Ex. II, May 16, 1936, letter from F.H. Daiker to Superintendent W.K. Harrison (directing that notices be posted of the upcoming Oneida IRA election); Ex. 3, May 19, 1936, letter from Charles West, Acting Secretary, to Commissioner Collier (calling a special election for the Oneida to vote on the IRA).
[45] *See, e.g.*, Ex. LL, undated, recorded Oneida vote (showing a final vote of 57-12); Ex. 5, June 24, 1936 letter from W.K. Harrison to Commissioner Collier (relating the results of the Oneida vote).
[46] *See e.g.*, Ex. 6, 1936, Annual Report of the Commissioner of Indian Affairs, at 163 (stating that the Oneida voted to exclude themselves from the IRA).

time was 157; of the votes cast, 57 were "no" and 12 were "yes."[47] While rejecting the application of the IRA, the Oneidas' vote in and of itself is dispositive of the Nation's "under federal jurisdiction" status, since the Department necessarily determined that a tribe was under federal jurisdiction in deciding to conduct a vote. Parties, such as the State and Counties, claiming an adverse impact from such a determination, should have challenged that decision many decades ago.

In 1983, Congress enacted the Indian Land Consolidation Act (ILCA).[48] This Act amended the IRA to provide that Section 5 of the IRA applies to "all tribes notwithstanding section 18 of such Act," including Indian tribes that voted to reject the IRA.[49] As the Supreme Court stated in *Carcieri*, this amendment "by its terms simply ensures that tribes may benefit from [Section 5] even if they opted out of the IRA pursuant to [Section 18], which allowed tribal members to reject the application of the IRA to their tribe."[50] Thus, the Oneidas' vote to reject the IRA, which demonstrates that the Nation was under federal jurisdiction, does not eliminate the Secretary's authority to acquire land in trust for the Nation pursuant to Section 5 of the IRA.

2) *The definitiveness of an IRA vote to a tribe's under federal jurisdiction status in 1934 is consistent with previous Department decisions on the issue of the significance of the IRA vote.*

Since the Supreme Court decided *Carcieri*, the Department has taken the position that an election held pursuant to Section 18 of the IRA on the question of whether or not to reject the IRA's application is dispositive of whether such tribe was under federal jurisdiction in 1934. Because the meaning of "under federal jurisdiction" is ambiguous, an agency's interpretation of an ambiguous statute is entitled to deference.[51] The Interior Board of Indian Appeals (IBIA) has concluded that "[b]y including the Tribe among those tribes for which such elections were conducted, the Secretary necessarily determined that the Tribe was under Federal jurisdiction at that time . . . ."[52] Thus, the Department's determination is that if the Secretary called a vote on the IRA, that vote is conclusive proof of "federal jurisdiction" as that term is understood in the IRA and any challenge to that determination by a third party should have been brought long ago.[53]

For example, in *Shawano County v. Acting Midwest Regional Director, Bureau of Indian Affairs,* the IBIA determined that the Stockbridge-Munsee Community was under federal jurisdiction, despite the fact that the Tribe did not have a reservation.[54] Notwithstanding that fact, on December 15, 1934, the Secretary held an election for the Tribe in which it voted not to reject the

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[47] *See, e.g.*, Ex. LL, undated, recorded Oneida vote; Ex. 5, June 24, 1936, letter from W.K. Harrison, special agent, to John Collier, Commissioner of Indian Affairs.
[48] 96 Stat. 2515, 2517-19 (codified at 25 U.S.C. § 2201 *et seq.*).
[49] *Id.* Sec. 203, 96 Stat. 2517.
[50] *Carcieri*, 555 U.S. at 394-95.
[51] *See Chevron U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 843 (1984) (deference to agency interpretation due where "the statute is silent or ambiguous with respect to the specific issue"); *South Dakota v. U.S. Dep't of Interior*, 401 F.Supp.2d 1000, 1008 (D.S.D. 2005) (IBIA rulings "entitled to substantial deference").
[52] 53 IBIA at 63. *See also Thurston County*, 56 IBIA at 71 n.11.
[53] *Shawano County v. Acting Midwest Reg. Dir.*, 53 IBIA 62, 71-72 (Feb. 28, 2011).
[54] *Id.* at 71-72.

IRA.[55] The IBIA concluded that this Secretarial election confirmed the fact that the Tribe was under federal jurisdiction for *Carcieri* purposes:

> Under § 18 of the IRA, 25 U.S.C. § 478, the terms of the IRA would not apply to a reservation if the adult Indians of a reservation voted to reject its application. To permit tribes to exercise this option, the Secretary was required to conduct elections pursuant to § 478. The Secretary held such an election for the Tribe on December 15, 1934, at which the majority of the Tribe's voters voted not to reject the provisions of the IRA. Regardless of whether the election for the Tribe, in the absence of a reservation, had any immediate, practical effect, the Secretary's act of calling and holding this election for the Tribe informs us that the Tribe was deemed to be "under Federal jurisdiction" in 1934. That is the crux of our inquiry, and we need look no further to resolve this issue.[56]

On May 9, 2013, the IBIA again concluded that an IRA election was dispositive of the under federal jurisdiction question in *Village of Hobart v. Midwest Regional Director*.[57] The IBIA reaffirmed its decision in *Shawano* and rejected an argument by the Village of Hobart that an IRA vote allowed Indians to "become organized and then fall under federal jurisdiction," explaining that:

> in reality § 478 required the Secretary to call special elections to afford the adult Indians of tribes with the opportunity to reject the IRA by majority vote because it otherwise applied by default as a matter of law and remained applicable in the absence of such a vote. This distinction is significant in understanding why the Secretary's decision to hold an IRA referendum for a particular tribe necessarily means that the Secretary recognized the tribe as being under Federal jurisdiction.[58]

Moreover, the recent opinion of the U.S. District Court for the District of Columbia – declining to grant the Plaintiffs' request for injunctive relief in litigation involving a trust acquisition for the North Fork Rancheria of Mono Indians[59] – further supports our conclusion that an IRA vote alone is dispositive on the question of whether a tribe was under federal jurisdiction in 1934.[60]

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[55] *Id.* at 64.
[56] 53 IBIA at 71-72.
[57] 57 IBIA 4, 17 (May 9, 2013). *See also Thurston County v. Acting Great Plains Regional Director*, 56 IBIA 62, 71 n.11 (Dec. 18, 2012) (declining to consider the IRA challenge for the first time on appeal, but noting in *dicta* that the election would be dispositive under *Shawano County*).
[58] 57 IBIA at 42-43.
[59] The Department's ROD for the North Fork trust acquisition decision concluded that "[t]he calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under Federal jurisdiction for *Carcieri* purposes." Record of Decision, Trust Acquisition of the 305.49-acre Madera site in Madera County, California, for the North Fork Rancheria of Mono Indians at 55 (Nov. 26, 2012), *available at* http://northforkeis.com. Stand Up for California! challenged the ROD in Federal district court, but was denied emergency injunctive relief to bar the United States from transferring title while the lawsuit was pending. *Stand Up for California! et al., v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 85 (D.D.C. 2013) (denying plaintiffs' motion for preliminary injunction).
[60] *Stand Up*, 919 F. Supp. 2d at 67-68.

Significantly, in North Fork, the district court judge rejected Stand Up for California's argument, similar to the State and Counties' argument discussed below, that the Nation's vote *against* the IRA had any relevance:

> [T]he fact that the North Fork Indians voted not to reorganize under the IRA in 1935 does not affect the Secretary's authority to acquire land into trust for the benefit of the North Fork Indians. As the Supreme Court acknowledged in *Carcieri*, a provision of the Indian Land Consolidation Act, 25 U.S.C. § 2202, "ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe."[61]

The district court is the only court to have addressed this issue and, although its decision was only issued in the course of ruling on a motion for preliminary injunction, it confirms the Department's consistent holding – expressed through the Solicitor's Office, the Assistant Secretary – Indian Affairs, and the Interior Board of Indian Appeals – that an IRA vote either to reject or not to reject the IRA is dispositive evidence that a tribe was under federal jurisdiction in 1934.

3) The State and Counties' arguments concerning the IRA vote are unpersuasive and unsupported by the record as a whole.

The State and Counties advance a number of arguments against the import of the Nation's IRA vote, including that (1) the IRA vote is not sufficient to establish that the Oneida were under federal jurisdiction in 1934; (2) a tribe must vote to accept the IRA to be deemed under federal jurisdiction; and (3) the Oneidas were not eligible to hold a vote on the IRA. The State and Counties further contend that the view of Commissioner Collier was that a tribe must vote to accept the IRA to be under federal jurisdiction. For the reasons discussed below, we do not find these arguments persuasive, and note that facts, taken out of context can often confuse the relationship between the United States and Oneida, especially given the historical realities of the time. And, for the reasons discussed above and below, the facts and arguments presented do not overcome the dispositive factor in our decision: that the Oneida were determined by the United States to be under federal jurisdiction and therefore allowed to vote, in an election under Section 18 of the IRA.[62]

First, the State and Counties argue that the IRA vote is not sufficient to establish that the Oneida were under federal jurisdiction in 1934. However, this assertion is not supported in the language of the IBIA's *Shawano* decision, which held, contrary to the State and Counties' contention, that "the Secretary's act of calling and holding this election" is dispositive of the "under federal jurisdiction" question.[63]

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[61] *Id.*, at 68 n19 (quoting *Carcieri*, 555 U.S. at 394-95).

[62] Ex. 16, May 7, 1935, letter from W.K. Harrison to Assistant Commissioner (stating that the Oneida should be entitled to vote).

[63] *Shawano County*, 53 IBIA at 72. The State and Counties contend that the *Shawano* decision "has no application to IRA votes by New York Indians in New York" and that it "applies only to Indians who were organized as a tribe in 1934 that was then receiving services through the federal Office of Indian Affairs." *See* Plaintiff's Reply Memorandum of Law in Support of Motion for Summary Judgment, *New York v. Salazar*, Case No. 08-644

Further, the State and Counties' assertion that the Department is precluded from determining that an IRA vote is dispositive based on a statement in a brief filed by the Regional Director before the IBIA in *Village of Hobart* is to no avail. First, *Village of Hobart* dealt with the Oneida Nation of Wisconsin and facts and circumstances specific to that case. Second, we find no support for the State and Counties' position because express language in the Regional Director's brief cited states that "the fact that the Department of Interior [sic] held an election for the Oneida Tribe to determine whether it wanted to accept the terms of and organize itself under the IRA is incontrovertible proof that the United States viewed the Oneida Tribe as being under its jurisdiction in 1934."[64] The brief clearly notes that the Tribe had voted for the application of the IRA in that case, not that any particular outcome was necessary to be deemed under federal jurisdiction. The State and Counties assert that the Department undertook a "comprehensive assessment of the tribe's actual status in 1934," in support of a decision to acquire land in trust for the Oneida Tribe of Indians of Wisconsin, including whether the Tribe voted to adopt the IRA, and thus the IRA vote itself is not dispositive.[65] This argument does not undercut our determination regarding the significance of a vote taken under the IRA. Every inquiry into whether a particular tribe was under federal jurisdiction is made on a case by case basis and where necessary, the Department may go beyond its determination and address other facts or arguments submitted to it, notwithstanding that it believes its reliance on one fact, like a vote under the IRA, is rational and justified.

Second, the State and Counties assert that to be deemed "under federal jurisdiction," a tribe must affirmatively vote not to reject the IRA, rather than voting to reject the IRA's application. This contention is directly refuted by the Supreme Court's majority opinion in *Carcieri*. Writing for the majority, Justice Thomas noted that "§ 2202 [of the ILCA] provides additional protections to those who satisfied the definition of 'Indian' in § 479 at the time of the statute's enactment, but opted out of the IRA shortly thereafter."[66] Thus, the fact that an IRA election was held is the determining factor for a tribe's "under federal jurisdiction" status, not the particular result of the IRA vote.[67] And, as the majority opinion in *Carcieri* correctly states, when Congress enacted ILCA, it extended Section 5 of the IRA to include all tribes who voted in Section 18 elections regardless of the outcome of such elections.[68]

(N.D.N.Y. 2012) (hereinafter State and Counties Memorandum of Law in Support of Motion for Summary Judgment), at 34-37. The State and Counties do not cite to any support in the plain language of the *Shawano* decision for this contention, nor do we find such distinction for New York Indians to be warranted. In fact, the historical record supports the exact opposite conclusion. *See e.g.*, Ex. 11, September 4, 1934, Excerpts from the Address Given by Commissioner Collier on Indian Day of the Four Nations Celebration at Niagara Falls, New York, at 22; Ex. 139, Aug. 31, 1934 letter from Interior Secretary Harold Ickes to Commissioner Collier.

[64] Ex. B/Ex. 8, Sept. 27, 2010, DOI's Appellee's Brief in *Hobart*, at 18.

[65] State and Counties' Submission to DOI on Remand, at 20.

[66] *Carcieri*, 555 U.S. at 395.

[67] Not all tribes that were under federal jurisdiction in 1934 voted under the IRA. However, for those tribes that did vote under the IRA, that action is dispositive of the tribe being under jurisdiction for purposes of the IRA. *See supra discussion* at Section II.A.(2).

[68] *Carcieri*, 555 U.S. at 394-95 (discussing the effects of ILCA's amendment of Section 5). The argument that the Oneida could not have been under federal jurisdiction in 1934 because it voted to reject the IRA is contradictory in light of ILCA's language, extending Section 5 of the IRA to all tribes that voted in a Section 18 election, regardless of the vote's outcome. It more logically follows that up to 1983 when Congress enacted ILCA, it believed that those tribes who voted to reject the IRA were nevertheless still under federal jurisdiction even though they had opted out

The State and Counties argue that Collier, the Commissioner of Indian Affairs from 1933-1945, "chose to allow the scattered Oneidas to vote under the IRA based on his office learning that a possible 32-acre remnant of the Oneidas' historic state-created reservation might still exist in New York."[69] According to the State and Counties, Collier "understood the circumstances of New York Indians were peculiar because New York State actively exercised exclusive jurisdiction over its Indians with the federal government's acquiescence."[70] The State and Counties then assert that Collier "believed that the non-tribal Oneidas in New York could vote to organize as a tribe under the IRA and thereby bring themselves under federal jurisdiction."[71] These points, according to the State and Counties, establish that Collier viewed the Oneidas coming within the federal government's jurisdiction only if they voted affirmatively to adopt the IRA. The State and Counties support this contention with a 1938 letter from Commissioner Collier to the President of the American Association on Indian Affairs. The State and Counties then point to a sentence in a letter which states that a "change in the status" of the tribe would be brought about by an affirmative adoption of the IRA,[72] the State and Counties infer that Collier meant that the Oneidas would be coming under federal jurisdiction; not that they were under federal jurisdiction at that time. As discussed below, we find these arguments and their supporting evidence unpersuasive and unsupported by the historical record as a whole.

The State and Counties' interpretation regarding Collier's beliefs about the Nation's vote are rebutted by the 1938 letter itself read in its entirety. The letter actually states and confirms that the Indians in New York are wards of the federal government.[73] The letter goes on to specifically point out that the federal government provides services and certain federal protections to the Oneida, one of which is the ability to initiate litigation to protect their rights "if and when it appears that the rights of the Indians are being invaded or that the State is exceeding its authority and jurisdiction in the premises."[74] These additional statements from the letter contradict the State and Counties' assertion and more readily demonstrate that the United States' view at the time was that the Oneidas were under its jurisdiction prior to and in 1938. Moreover, based on a complete reading and the context of the letter, it is more plausible that Collier's statement regarding the IRA signaled that an affirmative vote would require further federal

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of the IRA and therefore could not utilize its provisions. ILCA did not have to address Section 5 of the IRA at all; it is a statute enacted primarily for consolidating fractionated individual Indian lands, but Congress chose to use ILCA as a vehicle for extending Section 5 of the IRA to tribes that did not vote to accept it. Additionally, there is nothing in the IRA that supports the proposition that voting to reject the IRA also resulted in a vote to terminate the federal supervision and jurisdiction over a particular tribe.

[69] State and Counties' Submission to DOI on Remand, at 6. *See also id.* at 31 (citing (Ex. DD) September 9, 1935 letter from Collier to Harrison.)

[70] State and Counties' Submission to DOI on Remand, at 6.

[71] *Id.*

[72] State and Counties' Submission to DOI on remand, at 39 (citing Ex. EEE/Ex. 187, February 19, 1938, letter from John Collier to Oliver LaFarge, President of the American Association on Indian Affairs, at 3).

[73] Ex. EEE/Ex. 187, February 19, 1938, letter from John Collier to Oliver LaFarge, President of the American Association on Indian Affairs, at 3; State and Counties Submission, October 5, 2012

[74] Ex. EEE/Ex. 187, February 19, 1938, letter from John Collier to Oliver LaFarge, President of the American Association on Indian Affairs, at 3; State and Counties Submission, October 5, 2012.

efforts to support the Nation's adoption of an IRA constitution, including the calling of a separate election to allow Oneida members to vote to ratify such constitution.[75]

The Beckham Report quotes from a letter dated August 20, 1934, from Collier to Alfred F. Beiter of the House of Representatives, stating that "[p]ossibly most of the New York Indians may come within the scope of the [IRA]. However, our plans for the administration of this act are yet in a tentative stage and no definite program has been formulated."[76] Based on this statement, the Beckham Report concludes that "Collier was thus looking to the IRA voting results to see if the New York Indians would come under the jurisdiction of the Office of Indian Affairs."[77] However, this conclusion is not supported. Collier's statement merely conveyed the status of his efforts to implement the IRA and the fact that no defined plan yet had been formulated for the administration of the IRA. And as discussed above, when implementing the IRA by calling a Section 18 election for the Nation, the Department determined that the Oneida were under federal jurisdiction and eligible to vote under the Act.

The Beckham Report relies on other correspondence as well, but it is also unpersuasive. For example, Beckham cites a report by Henry Roe Cloud, a Superintendent of the Haskell Institute, dated October 18, 1934, in support of his position on the import of the Oneida vote under the IRA.[78] Beckham does not explain how this report is representative or indicative of the views of the Department or how it rebuts other overwhelming evidence of the Oneidas' "under federal jurisdiction" status. Likewise, the Beckham Report selectively cites to a statement by Secretary Harold Ickes in a letter quoted by Collier in a September 4, 1934 speech, in support of the position that only an affirmative vote on the IRA would bring the Oneidas under federal jurisdiction.[79] It is the case that in 1934, Secretary Ickes stated that "[t]here is nothing in the laws of Congress which would justify withholding from the New York Indians those same protections by the Federal Government that are extended to other Indians."[80] But according to the Beckham Report, this statement should be interpreted to mean that the Oneida were not under federal jurisdiction at the time.[81] This conclusion is unsupportable based not only on the express language of the statement (which plainly asserts that tribes in New York have the same federal protections as tribes in other states) but also when read in the context of the remainder of the speech, which conveyed the fact that the New York Indians were *already* under federal jurisdiction, as no law had prevented it, or changed their status.[82] In the same letter, the Secretary also stated: "in my judgment, the jurisdiction and obligation of the United States are quite clear. There is nothing in the special history of the New York Indians which would render them less completely the wards of the Government than in the case of other Indians."[83] Thus,

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[75] *See* 25 U.S.C. § 476 (setting forth the procedures by which a tribe could adopt a formalized government structure as well as discussing the rights and obligations of Indian tribes and the Secretary in that process).
[76] Beckham Report at 39.
[77] *Id.* at 39-40.
[78] Beckham Report at 40.
[79] *Id.*
[80] Ex. 11, September 4, 1934, Excerpts from the Address Given by Commissioner Collier on Indian Day of the Four Nations Celebration at Niagara Falls, New York, at 22 (quoting a letter from Secretary Ickes).
[81] Beckham Report at 40.
[82] Ex. 11, September 4, 1934, Excerpts from the Address Given by Commissioner Collier on Indian Day of the Four Nations Celebration at Niagara Falls, New York (quoting a letter from Secretary Ickes).
[83] *Id.* at 22.

even in 1934, Secretary Ickes believed that notwithstanding any differences in the treatment of New York Indians at the time, they were as much wards of the federal government and under the federal government's protection as other Indian tribes outside the State. Other primary evidence marshaled by the State and Counties similarly fail to support their notion that the Oneida's vote to reject the IRA resulted in a loss of federal supervision and jurisdiction over the Nation.[84]

Third, the State and Counties assert that the Oneida were not eligible to hold a vote on the IRA and rely in large part on selective correspondence to support their argument. In reviewing the correspondence, we have found that the instances of uncertainty regarding the Oneidas' eligibility to vote on the IRA pre-dates the actual vote and is authored by a few agency officials[85] who were not the final decision makers. Such correspondence is rebutted by the fact that the Oneidas' vote was officially authorized and conducted by Secretary of the Interior within the stated statutory deadline. In addition, any speculation as to the eligibility of the Oneida by a few federal officials is outweighed by particular correspondence indicating with certainty the Nation's IRA eligibility status. For example, in a letter dated May 16, 1936, Acting Commissioner Daiker wrote to W. K. Harrison, Superintendent of the New York Agency, stating the Department's decision to "permit the Indians of the Oneida Indian Reservation in New York to vote on the Indian Reorganization Act of June 18, 1934."[86] Also, a letter dated May 19, 1936, from Acting Secretary of the Interior Charles West to Commissioner Collier expressly called for a special election for the Oneida in New York.[87] The final determination that Oneida should vote was made by Department officials not long after Congress enacted the IRA into law.

For these reasons, we find that the evidence offered by the State and Counties is not persuasive. It neither alters the determination the Department made in the 1930s that the Oneidas were eligible to vote in an IRA election, nor nullifies the fact that the Oneidas voted in an IRA election called for and conducted by the Secretary of the Interior. Nor is our conclusion otherwise undermined by the Beckham Reply Report, which merely emphasizes that the Oneidas were the last New York tribe to vote on the IRA and voted on "the last possible day."[88] Being the last tribe to vote under the IRA does not erase the fact or nullify the legal impact of the federal government's determination the Nation was eligible to and did vote on whether to accept or reject the IRA. It is indisputable that federal officials vested with authority to decide whether the adult Indians residing on a reservation were qualified to vote on the IRA determined that the Oneidas were so entitled to vote, and that the Nation voted within the IRA's statutory deadline. Moreover, to the extent the State and Counties challenge the correctness of the decision to allow the Nation to vote under the IRA, they should have challenged the decision at the time it was made, not seven decades later.

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[84] *See e.g. supra* 141 and 148.

[85] *See e.g.,* Ex. GG, December 5, 1935, letter from W.K. Harrison, special agent, to Commissioner Daiker; Ex. Z/Ex. 18, June 5, 1935, Letter from Commissioner Collier to W.K. Harrison, special agent (questioning whether Oneida are entitled to vote because they have no reservation); Ex. 17, May 28, 1935, letter from W.K. Harrison, special agent, to Commissioner Collier (Cayugas and Oneidas not entitled to vote on IRA).

[86] Ex. II, May 16, 1936, letter from Commissioner Daiker to W.K. Harrison, superintendent.

[87] Ex. KK, May 19, 1936, letter from Charles West, Acting Secretary of the Interior, to the Commissioner of Indian Affairs.

[88] Beckham Reply Report at 6-7.

B. Various Treaties, other relevant interactions between the United States and the Nation, and the *Boylan* litigation, separately and conclusively demonstrate that the Nation was under federal jurisdiction before 1934

Notwithstanding the fact that the IRA vote is dispositive of the Oneidas' "under federal jurisdiction" status, there are a number of other interactions between the United States and Oneida that conclusively demonstrate either by themselves or collectively that the Nation was under federal jurisdiction in 1934. Thus, although we disagree with the arguments presented by the State and Counties that more is needed, assuming arguendo that they are correct, the record supports a determination that the Nation was under federal jurisdiction in 1934 for purposes of the IRA.

The Nation is a descendant of the Oneida Indian Nation of the Six Nations Confederacy, also known as the Haudenosounee, an alliance of Iroquois-speaking tribes.[89] Prior to the Revolutionary War, the Nation traditionally occupied approximately six million acres in what is now central New York State.[90] Following the Revolutionary War, "the State of New York came under increasingly heavy pressure to open the Oneidas' land for settlement."[91] "Reflective of that pressure, in 1788, New York State and the Oneida Nation entered into the Treaty of Fort Schuyler," pursuant to which the Oneidas ceded most of their lands to the State.[92] Six years later, in 1794, the United States entered into the Treaty of Canandaigua with the six Haudenosounee Nations, which "both 'acknowledge[d]' the Oneida Reservation as established by the Treaty of Fort Schuyler and guaranteed the Oneidas' free use and enjoyment of the reserved territory."[93] Notwithstanding these treaty guarantees, towards the end of the 18th Century and the beginning of the 19th Century, New York State purchased a substantial portion of the Oneida Nation's remaining land without obtaining Federal approval.[94] The administration of President George Washington objected to such unlawful State action. The lands reserved to the Oneida in the Treaty of Canandaigua were under the supervision of the United States and were not subject to alienation except pursuant to the Non-Intercourse Act.

By 1838, the Oneida Indian Nation had sold all but 5,000 acres of land within their original reservation boundaries without Federal approval.[95] In 1838, the Nation and the United States entered into another treaty, the Treaty of Buffalo Creek, "which envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas."[96] The number of Oneidas remaining in New York and the acreage held by the Oneida continued to dwindle throughout the 19th century, until ultimately, in 1920, only 32 acres continued in Oneida possession within its reservation boundaries.[97]

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[89] *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 (2005); *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230 (1985).
[90] *City of Sherrill,* 544 U.S. at 203.
[91] *County of Oneida*, 470 U.S. at 231.
[92] *City of Sherrill,* 544 U.S. at 203.
[93] *City of Sherrill,* 544 U.S. at 204-05.
[94] *Id. at* 205.
[95] *Id.* at 205-06.
[96] *Id.* at 206.
[97] *Id.* at 206-07.

In 1885, despite the conveyance of the 32-acre tract by individual Oneida Indians to non-Indians, a band of Oneidas continued to live on that land.[98] Later, after a non-Indian brought suit in state court to partition the property, a state court issued an order on November 20, 1909, ejecting the remaining Oneidas.[99] The United States thereafter brought suit as trustee on behalf of the Oneidas to reclaim the land. In *United States v. Boylan*, a federal district court found that the Oneidas "were actually in possession and occupation of the lands in question, together with the adjoining lands, which form a part of the original Oneida Indian reservation."[100] The Second Circuit agreed and also concluded that the Oneida Indians were a "distinct people, tribe, or band,"[101] that the "exclusive jurisdiction over the Indians is in the federal government," and thus the United States had the right to maintain the action.[102] The Second Circuit further held that it did "not think that the state of New York could extinguish the right of occupancy which belongs to the Indians," and that the attempted conveyance of the lands and the subsequent ejectment were null and void.[103] This suit by the United States as trustee for the Oneida and the Second Circuit's affirmance of the United States' role as trustee in and of itself establishes that the Oneida were under federal jurisdiction as of 1920. The State and Counties point to no evidence that Congress or the Executive Branch clearly intended to alter this jurisdictional status between 1920 and 1934.

Thus, as explained in greater detail below, the record reflects that throughout treaty times and into the present day the federal government has continued to have various courses of dealings with the Nation, including inclusion on census records and approving attorney contracts, that either in and of themselves or collectively support a determination that the Nation was under federal jurisdiction in 1934 for purposes of the IRA.

1) Treaty of Fort Schulyer and the Treaty of Canandaigua

In 1788, the Oneida ceded most of their land to the State of New York in the Treaty of Fort Schuyler, retaining a reservation of approximately 300,000 acres.[104] Six years later, in 1794, the United States entered into the Treaty of Canandaigua[105] with the six Haudenosounee Nations, which "both 'acknowledge[d]' the Oneida Reservation as established by the Treaty of Fort Schuyler and guaranteed the Oneidas' free use and enjoyment of the reserved territory."[106] The Treaty declared that "Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations."[107] In Article 2, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations."[108]

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[98] *Id.* at 211 n.3
[99] *United States v. Boylan*, 256 F. 468, 475-476 (N.D.N.Y. 1919).
[100] *United States v. Boylan*, 265 F. 165, 167 (2d. Cir. 1920).
[101] *Id.* at 171.
[102] *Id.*
[103] *Id.* at 174 .
[104] *City of Sherrill,* 544 U.S. at 203.
[105] Ex. 26, Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794).
[106] *City of Sherrill*, 544 U.S. at 204-05.
[107] Ex. 26, Treaty of Canandaigua, 7 Stat. 44.
[108] *Id.*

Pursuant to the Treaty, the United States agreed to make payments for the welfare of members of the Six Nations Tribes. The term of this commitment is "forever."[109] The Treaty also requires the United States to annually deliver cloth to the Six Nations Tribes, including the Oneida Nation.[110] As explained in greater detail below, this treaty cloth obligation, valued at approximately $4,500, was part of the Department's annual budget throughout the 1930s and continues to be honored to the present day.[111] The cloth is given to recognized Oneida leaders who then distribute it to members.[112] The treaty is still the supreme law of the Nation and the treaty cloth still is annually delivered by the United States to OIN pursuant to the terms of the treaty. This evidence of a consistent and ongoing government-to-government relationship is itself dispositive of whether the Oneida were under federal jurisdiction in 1934.

The Department has consistently recognized that a treaty "implicitly established United States jurisdiction over tribes," and that even unsuccessful negotiations constitute "at a minimum, acknowledgment of jurisdiction over those particular tribes."[113] Justice Breyer's concurring opinion in *Carcieri* relied, in part, on longstanding Department policy of recognizing that treaty relations formed a sufficient basis for being under federal jurisdiction.[114] The Oneida were under, and continue to be under, federal jurisdiction by virtue of the treaty relationship between the Nation and the United States, which continues to the present day.

2) The Boylan litigation.

As discussed above, in September of 1915, the Department of Justice filed a complaint in federal district court in *United States v. Boylan*, invoking the Nonintercourse Act[115] and seeking to intervene on behalf of members of the Oneida Indian Nation and to eject appellants from a 32-acre parcel that a state court attempted to convey to appellants.[116] Previously, certain Oneida

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[109] *Id.*

[110] *Id.* at 45. *See also* H.R. Rep. No. 82-2503, at 36 (1952) ("1952 House Report") (indicating the annual obligation to make payments to the Six Nations tribes and deliver $4,500 worth of cloth on an annual basis to them).

[111] H.R. Rep. No. 72-1792, at 21 (1932) (identifying "Annuities and per capita payments" due to tribes, including $4,500 pursuant to the "Treaties with Six Nations, New York" included in the Department's budget for fiscal year 1934); H.R. Rep. No. 73-288, at 23 (1934) (same budget allocation for fiscal year 1935); H.R. Rep. No. 74-249, at 27 (1935) (same budget allocation for fiscal year 1936). *See, e.g., Interior, Environment, and Related Agencies Appropriations for 2010, Justification of the Budget Estimates: Hearings Before a Subcommittee of the House Committee on Appropriations,* 111 Cong., 1st Sess., pt. 2 at 739 (2010) (Department's budget identifying $4,500 payment to the Six Nations pursuant to treaty obligations). *See e.g.,* Act of April 21, 1904, 33 Stat. 199; Act of August 31, 1951, 65 Stat. 254.

[112] *See e.g.,* Ex. 192, July 10, 1935 Letter from Chief William Rockwell of the Oneida Nation to Commissioner Collier (stating that cloth was provided to chiefs).

[113] Cowlitz ROD at 92 (citing *Worcester v. Georgia*, 31 U.S. 515, 556, 569-60 (1832)). In addition, the United States entered into the Treaty of Ft. Stanwix with the Six Nations in 1784 and then the Treaty of Ft. Harmar in 1789. 7 Stat. 15 (Oct. 22, 1784); 7 Stat. 33 (Jan. 9, 1789).

[114] *Carcieri*, 555 U.S. at 398-99 (Breyer, J., concurring). *See also* memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), at 7 (hereinafter Stillaguamish Memo) (noting that a vested treaty obligation, absent abrogation by Congress, is sufficient by itself to bring a tribe under federal jurisdiction).

[115] 25 U.S.C. § 177.

[116] *Boylan*, 265 F. at 165.

Indians had been ejected after a state court-ordered sale of a 32-acre property.[117] This 32-acre parcel had been occupied continuously by Oneida tribal members, as well as subject to the supervision of the United States through the Nonintercourse Act.[118]

In *Boylan*, decided only fourteen years before enactment of the IRA, the Second Circuit made a series of findings demonstrating that the Oneidas were under federal jurisdiction prior to 1934.[119] First, the Second Circuit recognized that the Oneida Indian Nation existed "as a separate band or tribe, and therefore as a separate nation."[120] In addition, the Second Circuit found that "the exclusive jurisdiction over the Indians is in the federal government," making it proper for the United States to bring litigation on their behalf.[121] The Second Circuit further held that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward . . . ."[122] Stating that "not only has the United States government the sole power to act as the guardian of the Indians of the state whose tribal relation still exists," the Second Circuit confirmed that the federal government "has the sole power to legislate as to the distribution of their lands."[123] Since Congress had never legislated to permit the transfer of title from the Indians, the Second Circuit declared the petition action and sale void.[124]

The *Boylan* case shows that the Nation was under federal jurisdiction in the early decades of the twentieth century. In bringing the action, the United States asserted its federal interest and authority in the real property and interests of the Oneida Indian Nation. According to the Second Circuit, those interests were determinative of the federal government's representation of the Oneida's interest in the *Boylan* litigation.[125] As *Boylan* demonstrates, the federal government

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[117] *See id.* at 165-67.
[118] *See id.* at 166-71.
[119] *Id.* at 171-74. The Oneida first petitioned the Governor of New York, and the New York Attorney General investigated their claim. *See* Ex. 104, October 18, 1907, Statements of William Honyost Rockwell and William K. Honyost to Deputy Attorney General Decker at the Old Homestead, the parcel in question in *Boylan*. The New York Attorney General found that the land was not taxed, was tribal, and filed a submission in the New York Supreme Court to deny the foreclosure. *See* Ex. 114, October 28, 1907, Report of Attorney General William Schuyler Jackson, at 4-8 (determining the land was untaxed and tribal); Ex. 115, November 1907, Information In Re Oneida Indians, Attorney General before the Supreme Court at the Broome Special Term (same, and suggesting that the court lacked jurisdiction); Ex. 116, October 29, 1907, letter from Governor Hughes to AG Jackson; Ex. 117, October 30, 1907, Syracuse Post Standard Article: "Indians Keep Tribal Lands." The New York state legislature took up a bill to protect the Oneida from eviction, but it failed. *See* Ex. 118, Memorandum in support of bill entitled "A Bill Providing for the Prosecution of Suits for the Protection and Relief of Tribal Indians in Certain Cases." The state court evicted the Oneida from the parcel. *See* Ex. 118A, *Julia Boylan v. Mary George, et al.* Supreme Court, Madison County, August 18, 1909. Attorney George Decker sent a petition to the U.S. Attorney General in July 1912, supporting the right of the U.S. to sue to recover the tribe's land. *See* Ex. 119, July 19, 1912, letter from the Attorney General to the Secretary of the Interior. After a series of letters between the Tribe, the Department of Justice, and the Department of the Interior (*see* Exs. 80, 108, 120, 121, 122) the Department of the Interior decided that it approved of the institution of suit. *See* Ex. 1, 2, 123 (letters between DOJ, DOI, and the Office of the United States Attorney for the Northern District of New York).
[120] *Boylan*, 265 F. at 171.
[121] *Id.*
[122] *Id.* at 174.
[123] *Id.* at 173.
[124] *Id.* at 173-4.
[125] *Id.* at 171 (determining that the federal government had "exclusive jurisdiction" over the OIN and was "solely vested" with the right to maintain an action on behalf of the tribe).

clearly viewed Oneida Indians and lands as being under its jurisdiction.[126] In 2003, the Second Circuit reaffirmed the *Boylan* decision in *Oneida Indian Nation of New York v. City of Sherrill*,[127] including the determinations of the continuous existence of a federally protected reservation and the continuous existence of the Oneidas as a tribe.[128]

Three indisputable points are derived from the *Boylan* decision, as affirmed in the Second Circuit's decision in *Sherrill*. First, the Oneida were recognized as a tribe by the United States.[129] Second, they had federally protected reservation land.[130] Finally, in the years before the IRA, the federal government had numerous dealings with the Oneida Indian Nation as a ward of the federal government.[131]

The State and Counties' contention that *Boylan* stands for the opposite conclusion – that the Oneida were not under federal jurisdiction – is unsupported by the decision and the Department's actions concerning the litigation. The State and Counties further seek to dismiss the significance of *Boylan* by advancing the following arguments: (1) the 32-acre parcel was owned in fee simple status;[132] (2) statements by DOI around the time of *Boylan* demonstrate that DOI rejected the analysis in *Boylan*[133](3) the Department of the Interior did not authorize the *Boylan* suit; (4) the key facts in *Boylan* happened 25 years before the IRA was enacted, and circumstances had changed by 1934; and (5) a "handful of Indian families" were involved in *Boylan*, and not the Nation.[134] We discuss each argument advanced by the State and Counties below.

The State and Counties contend that a state law passed in 1843 provided that the 32-acre parcel at issue could be divided into severalty, owned in fee by individuals, and freely transferred or encumbered.[135] This conclusion is legally incorrect, as State laws cannot change the status of either a federal reservation or a federally recognized tribe and it is also directly at odds with the

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[126] *Id.*

[127] *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), rev'd on other grounds by 544 U.S. 197 (2005).

[128] *City of Sherrill*, 337 F.3d at 155-58, 161-65, 166-67 (stating unequivocally that the Oneida land remained Indian Country, that the reservation had not been disestablished, and that the record of executive and legislative determinations to which courts defer demonstrated continuous tribal existence). As the Nation has noted, documents such as the *U.S. v. Elm* decision, statements in the 1891, 1893, 1900, 1901, and 1906 reports of the Commissioner of Indian Affairs, the Reeves report, and letters from DOI officials repeating the statement in the 1914 Reeves report, were before the Court in *Sherrill* and "did not affect the Nation's existence or its federal rights. Submission of the Oneida Indian Nation of New York Regarding a Supplemental Record of Decision Addressing the Secretary's Statutory Authority to Acquire Trust Land for the Nation, at 32 (Nov. 23, 2012) (Nation's Submission on Remand).

[129] *See Boylan*, 265 F. at 171.

[130] *Id.* at 173-74.

[131] *See id.* at 167 (describing the course of dealing between the Nation and the federal government); *City of Sherrill*, 337 F.3d at 146-51 (same).

[132] As discussed below, the assertion of the State and Counties is legally incorrect. Even if correct, however, it is unclear how the Oneida owning land in fee defeats a determination that the Nation was under federal jurisdiction prior to 1934, given that the United States engaged in an extensive course of dealings with the Nation as discussed herein, including the filing by the United States of claims on behalf of the Oneida in the *Boylan* litigation.

[133] State and Counties' Submission to DOI on remand, at 28-29.

[134] *Id.* at 30.

[135] *See, e.g.* State and Counties Memorandum of Law at 29; State and Counties' Submission to DOI on Remand, at 27. The State and Counties cite Exhibits C (Reeves Report, House of Representatives, 63d Congress 3d Session, Document No. 1590, September 28, 1914) and E (*U.S. v. Elm*) in support of this contention.

ruling of the Second Circuit in *Boylan*.[136] The Oneida communally owned their land,[137] and the court in *Boylan* expressly confirmed that the Oneida owned the land collectively – not individually under New York's 1843 law.[138] The State and Counties point out eleven sales and mortgages between 1844 and 1885 related to the land in question, insisting that the transactions represent the Oneida's understanding that their land was held in severalty.[139] The Second Circuit rejected this argument in *Boylan*, holding instead that the Oneida did not have the right to hold these lands in severalty or to mortgage or encumber the land. As stated by the court, "there is no authority which will enable one member of the tribe to sell and convey his interest in the reservation to an outsider, and to confer upon such purchaser the right to partition and sell in partition the lands held by several of the tribe in common. No law sanctions the sale of such lands so owned and held in a partition action brought by any person."[140]

The State and Counties also argue that Departmental statements and actions demonstrate that the Department viewed the Nation as under state, and not federal jurisdiction, and that the Department rejected the analysis and holding in *Boylan*. Neither federal inaction with respect to a tribe (such as denying requests for assistance) nor occasional misstatements results in the repudiation of federal jurisdiction.[141] Inactivity does not "necessarily reflect a termination or

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[136] *See City of Sherrill,* 337 F.3d at 159 ("[O]nly Congress can divest a reservation of its land and diminish its boundaries," *quoting Solem v. Bartlett*, 465 U.S. 463, 470 (1984))); *id.* at 163 n.21 ("Contrary to the suggestion of Madison and Oneida Counties, the fact that, under the 1843 law, individual Indians could hold the land in common, and could sell it to non-Indians under specified circumstances, does not reflect the disestablishment of the reservation."); *cf. Lara*, 541 U.S. at 200-03 (explaining that the Constitution grants Congress plenary power over Indian affairs).

[137] Ex. 104, Oct. 18, 1907, Statement of Chief Rockwell, at 4-5; Ex. 105, May 18, 1910, Memorial of a Band of Oneida Indians, at 3; Ex. 106, October 30, 1912, Memorial of a Certain Band of Oneida Indians, at 3-4; Ex. 107, 1912, Oneida Petition to the U.S. Attorney General; Ex. 108, April 18, 1913, Petition to the Secretary of Interior.

[138] *Boylan*, 265 F. at 171-173 (noting that no federal authority authorized holding of the land in severalty).

[139] Beckham Report, at 18. Beckham concludes that these eleven transactions confirm that the Oneida considered the land their personal property in severalty. *Id.* However, the Beckham Report does not analyze Oneida land tenure ideas and understanding, and some of the transactions were between Oneidas themselves, making such a conclusion "unsustainable based on the evidence." *See* McMillen Report, at 13-14.

[140] *Boylan*, 265 F. at 173. *See also City of Sherrill*, 544 U.S. 211 n.3; *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248 (1985); *City of Sherrill*, 337 F.3d at 148.

[141] The State and Counties cite the petitions of individual Oneidas who requested the Office of Indian Affairs for assistance, and were denied: State and Counties' Submission to DOI on remand, at 35-36. *See e.g.,* Ex. VV, July 18, 1931, letter from C.J. Roads, Commissioner, to Wilson Cornelius ("We have not attempted to assume control over any tribal or individual property of the Oneidas of New York"); Ex. U, July 29, 1920, letter from E.B. Merritt, Assistant Commissioner, to Mary Winder ("This office never having assumed any direct supervision over the internal affairs of the Oneida Reservation in New York"); December 9, 1926, letter from Herbert Work, Secretary of the Interior, to W.H. Rockwell, Oneida Nation Secretary and Treasurer ("[T]his department has no jurisdiction over the matter about which you write"); Ex. YY, October 19, 1911, letter from C.R. Hauke, Assistant Commissioner, to Wilson Cornelius ("You are under the jurisdiction and control of the tribal authorities and the State of New York."); Ex. ZZ, July 19, 1911, letter from C.R. Hauke, Assistant Commissioner, to Wilson Cornelius ("Should you or any member of the Six Nations claim lands in the vicinity of Oneida Lake or any other part of the State of New York , . . you should submit the matter to the proper officers of the Indian council and authorities of the State of New York."); Ex. AAA, January 30, 1913, letter from C.F. Hauke, Assistant Commissioner, to E.D. Northrup, at 1-2 ("In the absence of any specific legislation by Congress authorizing this Department to assume jurisdiction over the internal affairs and the lands in [sic] the New York Indians, the Office would not be justified in interfering in any way [referring to certain litigation]"); Ex. BBB, March 29, 1924, letter from Charles Burke, Commissioner, to the Hon. Andrew J. Hickey ("[I]n the absence of legislation this Department has not and could not well assume active jurisdiction or control over the affairs of the New York Indians, though technically a superior

loss of the tribe's jurisdictional status."[142] In addition, occasional misstatements by Department officials do not terminate federal jurisdiction over a tribe.[143] Any interpretation to the contrary would allow inactivity by Department officials to trump Congress' will as expressed in federal statutes like the Non-Intercourse Act as well as expressed in federal treaties.

For the proposition that certain inactivity and misstatements by certain federal officials establish that Oneida was not under federal jurisdiction in 1934, the State and Counties primarily rely on two phrases in a Department memorandum dated December 6, 1926. One phrase in the memorandum stated that "there are no federal statutes specifically subjecting the Oneida Indians of New York or any of their lands in that State to the jurisdiction of the Secretary of the Interior. . . ", and the other that "in the absence of specific legislation granting jurisdiction over the New York Indians this Department has not attempted to assume jurisdiction over their affairs."[144] It is axiomatic that the federal government (specifically, Congress) has plenary authority over Indian affairs and further, that specific federal statutes are not necessary to cause a tribe to be under federal jurisdiction.[145] In addition, this statement, and the other statements cited by the State and Counties, do not change the overriding evidence demonstrating a long history of interactions between the Oneida and the federal government, including evidence showing that the United States ultimately brought the *Boylan* lawsuit.[146] At most, these statements and others cited by the State and Counties[147] amount to nothing more than confusion by some federal officials as to the interplay of state authority over Indian tribes in New York vis-à-vis federal jurisdiction over those same Indian tribes.[148] Despite any such confusion, the fact is that the record as a whole

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sovereignty and jurisdiction might rest in the Federal Government."); Ex. FFF, April 26, 1939, letter from William Zimmerman Jr., Assistant Commissioner, to Lulu G. Stillman ("In the absence of specific legislation by Congress directing this service to do so, we are not in a position to assume active supervision or control over the situation with respect to the Indians in the State of New York.").

[142] Cowlitz ROD at 95. *See also* Stillaguamish Memo, at 2 (noting that enduring treaty obligations maintained federal jurisdiction, even if the federal government did not realize this at the time); *United States v. John*, 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after almost 100 years, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them). Admittedly, these documents reflect confusion regarding how to handle certain matters regarding Oneida. However, they must be viewed in their historical context. *See supra* note 148. And, regardless of statements made by individual federal officials, the evidence on the whole reflects that the United States continued to assert its jurisdiction and protection over the Oneida.

[143] *See generally Carcieri,* 555 U.S. at 397-98 (Breyer, J., concurring) (recognizing that a tribe may have been under federal jurisdiction in 1934 even though the federal government did not believe so at the time).

[144] Ex. V, December 6, 1926, Memorandum for Secretary from Commissioner, at 1-2.

[145] *See supra* notes 26-29 and accompanying text.

[146] *See generally* Ex. 123, 1913-1922, Dept. of Justice Correspondence Re: *Boylan*.

[147] *See infra* note 141 and *supra* note 148.

[148] This confusion is not without historical context, as the original thirteen states strongly resisted the notion of strong federal oversight and involvement, an idea embodied in the Articles of Confederation and persisting even after ratification of the Constitution. *See* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: the Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 19-44 (1979) (detailing the evolving concept of federal versus states' rights, particularly in the realm of Indian affairs, from the British colonial policy to the Articles of Confederation, the Constitution, and then the Non-Intercourse Acts). By the time of the Constitutional Convention in 1789, the drafters were well aware of the challenges with parsing jurisdiction over Indian affairs between the states and federal government. *Id.* at 28. As a result, they eliminated the express reservations of state authority over Indian affairs from the Constitution and expanded the scope of exclusive federal authority, as articulated in the Indian Commerce Clause. *Id.* at 28-9. Nevertheless,

reflects a general understanding and belief by the federal government that the Oneida were under federal jurisdiction prior to and after 1934.

The contention that the United States did not authorize the *Boylan* suit is incorrect and irrelevant. Even if the Department of the Interior's litigation authorization were a prerequisite to a determination of a tribe's jurisdictional status, which it was not, the Department provided such authorization for the *Boylan* suit.[149] The Beckham Report was written without awareness of such authorization, and the State and Counties conclude that the apparent absence of any document authorizing the suit must mean that the Department of Justice acted without authorization.[150] However, a letter dated April 24, 1913, from an Assistant Secretary in the Interior Department to the Attorney General, stated that "this Department would offer no objection to the institution of suit, as requested, but would be glad to see that course pursued if, in your opinion, it is proper and advisable."[151] A letter dated May 3, 1913, from an Assistant Attorney General to the Secretary of the Interior confirmed that the *Boylan* matter had been referred to the U.S. Attorney for action.[152] The record shows that the Department approved the *Boylan* action[153] and subsequently recognized and adhered to the legal rule of *Boylan* in later Departmental correspondence.[154]

The State and Counties' argument about the timing of the facts underlying the *Boylan* litigation does not diminish the Oneida Nation's federal jurisdictional status. The eviction of the Oneida

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several of the original states, including New York, continued to exercise authority over Indians, particularly in the realm of land transactions. *Id.* at 42–43 (citing the difficult transition to a centralized federalism, the original thirteen states' claim to Indian fee title, and federal inaction as three reasons why these states continued to exercise jurisdiction over their Indian populations). However, any such assertion of state jurisdiction does not and cannot extinguish Federal jurisdiction absent express Congressional action, and early efforts to accomplish this in New York failed. *See infra* note 255.

[149] Ex. 1, April 24, 1913, letter from the Assistant Secretary to the Attorney General; Ex. 2, May 3, 1913, letter from the Assistant Attorney General to the Secretary of the Interior.

[150] Professor Beckham states that "this lawsuit was pursued independent of the Department of the Interior and the Office of Indian Affairs in Washington, D.C." Beckham Report, at 20. Beckham, however, also notes in his reply report that he was not aware of the documentation that states otherwise. *See* Beckham Reply Report, at 28.

[151] Ex. 1, April 24, 1913, letter from the Assistant Secretary to the Attorney General, at 2. The letter notes that it is in response to previous correspondence "concerning the petition filed by George P. Decker in behalf of the Oneida Indians in New York requesting that [DOJ] investigate and take appropriate action concerning the claim of said Indians to certain lands. . ." *Id.* at 1.

[152] Ex. 2, May 3, 1913, letter from the Assistant Attorney General to the Secretary of the Interior.

[153] There is some evidence that Assistant Commissioner E.B. Merritt was dismissive of the *Boylan* litigation. *See* Ex. 110/Ex. S, June 24, 1916, letter from E.B. Merritt, Assistant Commissioner to F.J. Cragg, Assistant U.S. Attorney, at 1 (stating that no record of the Departmental request for institution of suit in *Boylan* was found); Ex. 111, July 29, 1920, letter from E.B. Merritt, Assistant Commissioner, to Mary Winder (referring her to state officials regarding Oneida issues); Ex. D, Sept. 30, 1916, letter from E.B. Meritt, Assistant Commissioner, to F.J. Cregg, Assistant U.S. Attorney (reiterating the conclusion of the Reeves Report that the Oneida were "known no more" in New York). However, these letters do not constitute an agency decision because he was not the final decision maker. Rather, as noted above, the Assistant Secretary ultimately gave authorization for the litigation.

[154] *See, e.g.*, Ex. 112, March 8, 1922, letter from Charles H. Burke, Commissioner, to A.W. Kelly, an Oneida (stating "there is no federal law which confers on individuals of the Oneida tribe of New York power to sell or encumber any of the lands of their reservation, and further that the United States may maintain a suit to enforce the restoration of any lands so encumbered or conveyed."); Ex. 113, June 4, 1931, letter from C.J. Rhoades, Commissioner, to the Hon. F.M. Davenport (*Boylan* rule does not apply to land acquired by an Oneida in a market transaction).

Indians that gave rise to the United States' legal action occurred in 1906. After protracted litigation in state court, the United States asserted its right to litigate on behalf of the Oneida in 1920, demonstrating its jurisdiction and supervision over the Nation and its land, only fourteen years before the enactment of the IRA. The United States has discretionary authority on whether and when to initiate affirmative litigation.

Likewise unfounded is the State and Counties' claim that the findings in *Boylan* "concerned the specific Oneida families impacted by the eviction, with whom the modern tribal entity, OIN, has no genealogical, social or political connection."[155] While there are no legal requirements for such a relationship between the individual Indians restored to the land through the *Boylan* litigation and the Oneida Indian Nation today, it is important to note that the findings of the court in *Boylan* were not limited to a certain family or to those who were evicted from the 32 acres. Oneida chiefs who had been recognized by the federal government did not necessarily live on the 32 acre parcel.[156] When Oneida chiefs sent a memorial to New York State seeking to overturn the eviction from the 32 acre parcel, they claimed the parcel on behalf of the "band," enjoyed as "a common and equal right," not just on behalf of the Indians living there before foreclosure.[157]

It is the case that the Second Circuit stated that the *Boylan* suit was "brought on behalf of certain Oneida Indians."[158] In determining that the United States had the authority to bring the action, however, the court also found that the United States was acting on behalf of the larger Nation:

> The first question presented is the right of the United States to maintain this action. The trial judge has found that the Oneida Indians were a distinct people, tribe, or band. With this finding we agree. The record does not disclose, as contended for by the defendants below, that the people have been completely incorporated with us and clothed with all the rights and bound by all the duties and obligations of the state of New York. Since the Indians exist as a separate band or tribe, and therefore as a separate nation, the exclusive jurisdiction over the Indians is in the federal government, and the right to maintain an action in their behalf under the federal Constitution is solely vested in the federal government.[159]

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[155] State and Counties' Submission to DOI on Remand, at 5. The State and Counties also contend that the finding of the court that the Oneida had tribal relations is *dictum* because the federal government has a duty to protect individual Indians as wards, regardless of whether they are part of an organized band or tribe. *Id.* at 42. The finding is not *dictum* because it was necessary for the court to determine that the Oneida exist as a tribe in order to determine that the federal government, therefore, has a right to maintain an action on behalf of the tribe under the federal Constitution. *See Boylan*, 265 F. at 171 ("Since the Indians exist as a separate band or tribe, and therefore as a separate nation, the exclusive jurisdiction over the Indians is in the federal government"). The State and Counties also argue that the court applied the wrong standard for determining whether the Oneida were a tribe, and that the court should have applied the standards in *Montoya v. United States*, 180 U.S. 261 (1901). *See* State and Counties' Submission to DOI on Remand, at 43. *But see* Felix S. Cohen, Handbook of Federal Indian Law (2012 ed.), § 3.02[6][a]-[b] (noting that "reservation tribes with continuing federal contact are considered tribes under virtually every statute referring to Indian tribes" and that the Supreme Court did not apply the *Montoya* test beyond the Indian Depredation Act until 1926). In any event, the *Boylan* Court's ruling is binding circuit precedent that cannot be ignored.

[156] *See* Ex. 105, May 18, 1910, Memorial of a Band of Oneida Indians, at 7 (seeking to overturn eviction, and signed by Oneida Chiefs); Beckham Report, at 9 (citing sources referring to Chief Burning living at Oneida).

[157] Ex. 105, May 18, 1910, Memorial of a Band of Oneida Indians, at 3.

[158] *Boylan*, 265 F. at 165.

[159] *Id.* at 171 (citations omitted).

The State and Counties also seek to distinguish the Oneida Indians based on certain historical actions. They contend, for instance, that because a group of Oneida Indians sought to adopt a new constitution in 1948, this action created a new and different tribe. They also argue that an "informal cultural and social organization" existed before 1948, but no formal tribal governing structure, and hence no official tribal entity.[160] The State and Counties overlook the fact that tribes may establish their own form of government, and may adopt a constitution. A constitution is simply one form of governance, and whether or when a tribe decides to adopt one does not affect the political status of that tribe, as whether or how to organize a tribal government structure is within the inherent sovereign province of Indian tribes.[161] Indeed, many tribes have adopted constitutions long after the IRA was passed.[162] And the very title of the Act, "The Indian Reorganization Act," evidences Congress's intent to provide an overarching mechanism by which tribes can choose to re-organize their political structure through a federally-prescribed process.[163] Thus, neither the adoption of a constitution or the timing of such action has any bearing on the Oneida Indian Nation's status as a tribe or of being under federal jurisdiction.[164] When the Secretary called an election allowing the Oneida to vote on whether to opt out of the IRA, such action in and of itself reflects a determination that the Nation was a "recognized tribe . . . under Federal jurisdiction" in 1934.

The State and Counties next contend that the Oneida exercised no political authority at a certain point in time and, therefore, ostensibly ceased to be a tribe. For this, they rely on an affidavit by a tribal elder from 1979, the "Waterman affidavit," for the contention that "until the 1940's the

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[160] State and Counties' Submission to DOI on Remand, at 34. They base this contention on the affidavit of a Nation elder, Delia Waterman, from 1979 litigation. Ex. TT/Ex. 138), October 25, 1979, Delia Waterman affidavit. That litigation involved a dispute over the group properly entitled to lead the OIN after DOI rescinded recognition of the governing body established in the 1948 constitution. *See Oneida Indian Nation v. Clark*, 593 F. Supp. 257, 259-60 (1984). Waterman argued that, by 1930, the tribe had no elected officials or traditional chiefs performing governmental functions. *See* Ex TT/Ex. 138, October 25, 1979, Delia Waterman affidavit, at 1.

[161] *See Lara*, 541 U.S. at 204-205 (affirming the Supreme Court's "traditional understanding'" of each tribe as "'a distinct political society, separated from others, capable of managing its own affairs and governing itself'" (quoting *Cherokee Nation v. Georgia*, 30 U.S. I, 16-17 (1831))). *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."); 25 U.S.C. § 476 (by authorizing the Secretary to hold elections for "[a]ny Indian tribe" to allow such tribes to vote to organize a formal government, IRA language reflects that status as a "tribe" is independent from and not based upon the adoption of a constitution pursuant to the IRA). *See also* Ex. 177, 1940 Annual Report of the Commissioner of Indian Affairs at 363-366 (when discussing how the IRA has affected Indian tribes, states that the IRA's provisions, including 25 U.S.C. § 476, are optional and Indian tribes maintain inherent sovereignty to determine, for themselves, the form of government best suited to them).

[162] *See* McMillen Report, at 37 (citing to examples of tribes that adopted constitutions in the years, if not decades, after the IRA's enactment).

[163] The State and Counties argue that the Oneida could not have established a tribal governmental relationship with the BIA before adopting a formal government structure via adopting a constitution in 1948. The Beckham Reply Report denies this contention. *See* Beckham Reply Report, at 35 ("I did not write that since there was no constitution, there was no tribe."). For an alternative interpretation, *see, e.g.*, McMillen Report, at 37 ("If tribal status hinged on having a Constitution then the vast majority of groups we know as Indian tribes would not have existed.").

[164] *See Santa Clara Pueblo v Martinez*, 436 U.S. 49, 55-56 (1978) (noting that tribes retain their status as independent political communities entitled to "make their own substantive law in internal matters" subject only to divestment of that authority by affirmative act of Congress).

group exercised no political authority, had no officers, and held no formal meetings."[165] What is meant by "political authority" in this statement is unclear, but what is clear is the relationship between the Nation and the federal government in the early twentieth century, that tribal meetings were held occasionally, and that the Oneida were represented in the Six Nations Council.[166] In addition, the Waterman affidavit is exhaustively analyzed and persuasively discredited in the Nation's remand submissions.[167] As the Nation points out, it is important to understand the context of the Waterman affidavit, which was taken during a tribal leadership dispute in order to accept one form of government over another.[168] Thus, it was not that the Nation was without a tribal government structure, but whether it should adhere to its traditional form of government or accept a modern form of government.

Curiously, the State and Counties go on to take issue with the form of the Oneida's government structure, an argument that in and of itself contradicts their assertion that the Nation had no functioning government and therefore ceased to exist as a tribe. For this they rely on the Beckham Reply Report, which quotes William Rockwell, an Oneida chief, as stating "[w]e elect our chiefs as it comes necessary to take care of our business. The chiefs hold their office until they fail to act in their capacity for the good of the Nation."[169] From this statement, the Beckham Reply Report extrapolates that "the informal role of chiefs" is synonymous with no formal government.[170] However, in our view, the statement establishes quite the opposite conclusion - that the Oneida had a traditional government in which it elected chiefs, and that those chiefs were accountable to the tribal membership. In short, it is additional evidence that the Oneida Indian Nation was and remained a political entity recognized by the federal government and was under federal jurisdiction.[171]

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[165] Beckham Reply Report, at 35.

[166] *See e.g. infra* Section II.B.(3) and corresponding footnotes (Treaty and Other Evidence of Interactions between the Oneida and the United States prior to 1934 demonstrate that the Oneida were under federal jurisdiction). The record contains numerous letters and reports documenting Oneida meetings and the fact that the Six Nations Council included an Oneida representative. *See, e.g.* Ex 146, Nov. 25, 1934 Letter from Oneida Chief Alexander Burning to W.K.Harrison (reporting on a Nation meeting, and plans to hold future meetings at least once a month); Ex. 182, Jan. 20, 1904 Statement by U.S. Indian Agent (certifying that he attended a general council of the Oneida Tribe of Indians for the purpose of considering an attorney to represent the Tribe before the Court of Claims); Ex. 148, June 13, 1924 Meeting Minutes from a meeting of the Oneida Special Council on the Oneida Reservation (providing direction to its delegates to the Six Nations Council meeting); Ex. 188, Sept. 34, 1934 Buffalo Times Article (noting that the Oneidas attended a Six Nations Council Meeting).

[167] *See* Nation's Submission to DOI on Remand, at 64 (arguing that the Waterman affidavit is untrustworthy because it was made in the context of a leadership dispute that Waterman's faction, which was invested in the government of the 1948 constitution and ultimately lost to the preconstitutional traditional government); Further Submission of the Oneida Nation of New York Regarding a Supplemental Record of Decision Addressing the Secretary's Statutory Authority to Acquire Trust Land for the Nation), at 22-24. .

[168] *Id.* The claim of tribal discontinuity is irrelevant because the United States (including the Department) has officially recognized the OIN as a successor in interest to the historic Oneida Nation since treaty times, which recognition is entitled to substantial judicial deference in the absence of a contrary showing of official, formal derecognition. *See*, e.g.,Brief for United States as *Amicus Curiae* at 24-30, *City of Sherrill,* 544 U.S. 197. The Department is not now revisiting the question of the federal recognition of the Oneidas.

[169] Beckham Reply Report at 35-36.

[170] *Id.* at 36 ("The record does not show the existence of any organized formal tribal body . . . .").

[171] Additionally, the State and Counties rely on an internal memorandum by a DOI employee (Ex. 59/Ex. UU, Feb. 24, 1982 Michael T. Smith memorandum) regarding an Oneida leadership dispute in the 1980's. *See e.g.*, Ex. 136, April 25, 1980, letter from the DOI to the Oneida Nation (discussing the Oneida division between an "elective faction" and a more traditional group). Smith concluded that the Oneida evicted from the 32 acres in 1906 were not

3) Treaty and Other Evidence of Interactions between the Oneida and the United States prior to 1934 demonstrate that the Oneida were under federal jurisdiction.

Beyond the historical evidence discussed above, there are other federal actions that either by themselves or collectively lead us to conclude that the Oneida Nation was under federal jurisdiction before 1934. In addition to the 1794 Treaty of Canandaigua, the Oneidas and the United States entered into the Treaty of Buffalo Creek in 1838.[172] The Oneidas and the United States also negotiated an 1868 Treaty that was never ratified by the Senate.[173] As noted above, treaty relations form a sufficient basis for concluding that a particular tribe was under federal jurisdiction.[174]

There are also numerous annual reports and census records that constitute a course of federal dealings that collectively demonstrate that the Oneida were under federal jurisdiction leading up to 1934. Indian census records from 1870 to 1927 and 1940 specifically enumerate the Oneida among the tribes under the jurisdiction of the New York Agency of the U.S. Bureau of Indian Affairs.[175] In the Cowlitz ROD, the Department recognized that being listed on census lists can be sufficient to show that a tribe was under federal jurisdiction at the time of the census.[176] In addition, from 1870 to 1919, the Oneida are specifically listed as a tribe under the jurisdiction of the New York Agency of the Bureau of Indian Affairs in the Annual Reports of the Commissioner of Indian Affairs.[177] In addition, maps published by the Board of Commissioners of Indian Affairs from 1883-1917 depict the Oneida lands in Madison and Oneida counties as the Oneida Reservation. [178] An 1892 Annual Report notes that "[t]his agency covers the entire state

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an organized tribe or band. *See* Ex. 59, Feb. 24, 1982 Michael T. Smith memorandum, at 10. Despite conclusions in the Smith memorandum, the DOI decided that the Oneida Nation was a single tribe and recognized the traditional leadership faction. Ex. 137, July 29, 1987, letter from Ross Swimmer, Assistant Secretary, to Ray Halbritter and Robert Burr. In any event, statements by a single Departmental employee cannot rewrite the Second Circuit's *Boylan* or *Sherrill* decisions.

[172] *City of Sherrill*, 544 U.S. at 203-07. The United States and the Six Nations also entered into the Treaties of Harmar and Ft. Stanwix. *See supra* note 113.

[173] *See* Ex. 30, Exec. Doc. Y, 40th Cong. (3d Sess. 1869) (materials on unratified treaty with the New York tribes).

[174] *See supra* notes 113 & 114.

[175] Ex. 40, Indian Census Records, 1877-1940, at 5, 7, 11, 13, 15, 37, 47, 55, 63, 71, 79, 92, 108, 114, 121, 129, 144, 153, 165, 177, 188, 199, 210, 222, 234, 244, 255, 265, 276, 289 (reporting the New York Oneida census counts by the New York agency for 1877, 1889, 1892, 1895-1901, 1903-09, 1915-22, 1924-25, and 1940). *See also* Ann. Report of the Comm'r of Indian Affairs, at 36 (1925) (Annual Report) (enumerating an Oneida population of 253); 1926 Annual Report at 36 (enumerating an Oneida population of 262); 1927 Commissioner Report at 31 (enumerating an Oneida population of 261). As explained *infra* page 34, population figures for all New York Indians, including Oneida, were estimated in annual reports prepared between 1928 and 1939 in lieu of taking annual censuses, due in part to budget constraints imposed by the Great Depression.

[176] Cowlitz ROD at 100, n.126 (noting that contemporaneous records to census counts treated tribal members enumerated therein as under the agency's "jurisdiction").

[177] *See, e.g.*, Ex. 39, Annual Reports of the Commissioner of Indian Affairs, 1870-1885, at 6, 254, 469, 712, 869, 939 (listing the Oneida in the 1870, 1880, 1890, 1900, 1910, and 1919 annual reports under the New York agency's jurisdiction).

[178] Ex. 47, Board of Indian Commissioners Maps, 1883-1917.

of New York and has within its jurisdiction 5,113 Indians, divided by tribal organization as follows:" and then includes Oneidas.[179] The same report refers to the distribution of treaty cloth.

The State and Counties cite the 1892 Extra Census Bulletin for the notion that the Oneida "no longer retain their ancestral homes in New York,"[180] and assert that the 1892 census map of New York does not depict an Oneida reservation.[181] That Bulletin, however, actually illustrates that the Oneida were one of the tribes with a New York population enumerated by federal Indian agents, and hence under federal jurisdiction.[182] As noted above, numerous annual reports specifically identify the Oneida as a tribe under the jurisdiction of the BIA New York Agency.[183] Further, a 1931 letter from Commissioner Rhoades states that the land involved in the *Boylan* case was Oneida tribal land under the jurisdiction of the federal government.[184]

On the whole we have found that the historical documentation conclusively demonstrates that the Oneida were under federal jurisdiction leading up to 1934. Selective statements to the contrary offered by the State and Counties do not suffice to undercut the evidentiary basis of this conclusion.

C. The Nation's "under federal jurisdiction" status remained intact in, and after, 1934

1) *Treaty Cloth Distributions*

Congress has continuously approved the appropriation of funds to the Nation pursuant to the Treaty of Canandaigua.[185] For example, in 1941, the Department's Office of Indian Affairs highlighted the United States' long-standing fulfillment of its obligations under the Treaty in its periodical, *Indians At Work*.[186] The Department stated that "[t]he calico has been issued every year since 1794, the date on which representatives of the Indians and of the young United States government concluded their treaty of 'peace and friendship.'"[187] On the 146th anniversary of the

[179] Ex. 39, Annual Reports of the Commissioner of Indian Affairs, 1870-1885, at 517-21.
[180] Ex. G/Ex. 52, 1892, Extra Census Bulletin, at 25 (noting that a series of treaties reduced the Oneida land base, with 350 acres held in severalty ultimately remaining).
[181] Ex. H, 1892, Extra Census Bulletin, at 3 (The Six Nations of New York).
[182] Ex. G/Ex. 52, 1892 Extra Census Bulletin, at 6.
[183] For example, in 1920, 132 Oneida were listed as living at Oneida. Ex. 43, 1920, Census prepared by federal Indian agent G.H. Ansley. Ansley also listed the Oneidas as under federal jurisdiction in a 1922 interview. Ex. 44, Dec. 7, 1922 Deposition of G.H. Ansley, Special Agent in charge of the New York Indians, at 1.
[184] Ex. 113, June 4, 1931 letter from C.J. Rhoades, Commissioner, to the Hon. J.M. Davenport (cited in McMillen Report at 23-24).
[185] *See, e.g.,* Interior, Environment, and Related Agencies Appropriations for 2010, Justification of the Budget Estimates: Hearings Before a Subcommittee of the House Committee on Appropriations, 111th Cong., 1st Sess., pt. 2, at 709 (2010) (Department's budget identifying $4,500 payment to the Six Nations pursuant to treaty obligations); Act of April 21, 1904, 33 Stat. 199 (identifying the $4,500 treaty payment); Act of August 31, 1951, 65 Stat. 254 (same).
[186] U.S. Dep't of the Interior, Office of Indian Affairs, *Hundreds Attend Six-Nations Treaty Ceremonies*, INDIANS AT WORK, Jan. 1941, at 5-6, 26. The issue also reprinted a New York Times article describing the ceremony. *Id.* at 7, 27, 29 (cited as Meyer Berger, *As Seen Through the Eyes of the Metropolis*, N.Y. TIMES, Dec. 15, 1940, at A1). This article is also cited as Meyer Berger, *Government Gives Indians Annual Calico, Hailing Keeping of Peace Treaty 146 Years*, N.Y. TIMES, Dec. 15, 1940, at A1.
[187] INDIANS AT WORK, at 5.

treaty cloth distribution, "the annual treaty fulfillment was marked by joint ceremonies in which men and women of the various tribes reenacted the events of the treaty negotiations."[188] Federal officials distributed the treaty cloth to members of the Seneca, Tuscarora, Onondaga, Cayuga, and Oneida tribes.[189] "A total of 4,906 Indians benefited from the distribution."[190]

In the 1950s, the Department tried to end its Treaty cloth obligation to the Six Nations Tribes by offering them a lump sum payment in exchange for the cessation of the annual cloth distributions.[191] The Tribes resoundingly rejected the offer. As a result, the United States' annual Treaty cloth distributions continue to date.[192] The continuing vitality of the federal government's Treaty cloth obligation to the Nation, coupled with the Nation's resistance to its cessation, markedly demonstrate that the Oneida were and continue to be under federal jurisdiction by virtue of the treaty relationship between the Nation and the United States.[193]

The State and Counties' contention that the annual cloth payment in the Treaty is irrelevant, on the theory that the cloth payment is not an acknowledgment of federal authority or supervision,[194] and "does not convey political recognition,"[195] is without merit and unsupported in law and fact. For this proposition, the State and Counties cite an internal memorandum by one BIA employee.[196] That memorandum, however, is an internal and deliberative document, which does not express any official Department position or policy.[197]

2) Other Federal-Tribal Interactions between the Oneida and the United States demonstrate that the Oneida were under federal jurisdiction in and after 1934

As mentioned above, Commissioner Collier spoke to the New York Tribes in September of 1934, in which he stated Secretary Ickes' determination that New York Tribes were fully

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[188] *Id.*
[189] *Id.* at 26.
[190] *Id.*
[191] H.R. Rpt. 82-2503, at 36 (Dec. 15, 1952).
[192] *Supra* note 185 and accompanying text.
[193] Beckham's conclusion that the Treaty of Canandaigua was a "gesture of friendship but not an acknowledgment of federal authority or supervision," (Beckham Report, at 23) is contrary to law and incorrect. The Treaty was ratified by the Senate and the obligations under the Treaty were confirmed in federal law. *See* 7 Stat. 44. Thus, the Treaty is plainly more than a mere gesture of friendship. By its own terms, the Treaty is legally "binding" on the parties, and includes commitments by all the parties thereto. The United States acknowledged the tribes' reservations as well as a federal promise to make annuity payments.
[194] Beckham Report, at 23.
[195] *Id.* at 59.
[196] Ex. UU/Ex. 59, February 24, 1982, Michael T. Smith Memorandum, at 13.
[197] The State and Counties also attempt to undermine the significance of the Treaty cloth distribution by relying on a brief filed by a BIA Regional Director in IBIA litigation involving the Oneida Indian Tribe of Wisconsin. *See* Ex. B/Ex. 8, DOI's Appellee's Brief in *Village of Hobart*, at 10-19 (outlining various arguments in support of the RD's authority to take land into trust). They assert that the Regional Director did not advance a treaty cloth argument in that case to demonstrate federal jurisdiction, even though it would have applied. State and Counties' Submission to DOI on Remand, at 5. The mere fact that a brief filed by a Regional Director did not mention the treaty cloth is simply irrelevant to the significance of the continued distribution of the treaty cloth. In addition, the analysis for determining whether a tribe was under federal jurisdiction depends on analysis of each tribe's record, and the absence of discussion of a fact in the case of one tribe does not mean that it is irrelevant in the case of another.

protected by the IRA and the federal government.[198] Significantly, the Secretary instructed Collier, in a letter, to tell the New York Indians that:

> There is nothing in the special history of the New York Indians which would render them less completely the wards of the Government than in the case of other Indians. There is nothing in the laws of Congress which would justify withholding from the New York Indians those same protections by the Federal Government that are extended to other Indians.[199]

Further, the Secretary's letter to Collier also states plainly that although the States may carry out services to Indians, there is "no repudiation by the Federal Government of its responsibilities."[200] Indeed, the federal government had been involved with the Oneida regarding contract approvals, as well as dealing with tribal leaders, before, during and after enactment of the IRA in 1934.[201] As stated in *United States v. John*, "[n]either the fact that [a tribe is] merely a remnant of a larger group of Indians long ago removed [to another State], nor the fact that federal supervision over them has not been continuous, destroys federal power to deal with them."[202]

In addition, as mentioned above, in the 1930's and 1940's, William Rockwell often was identified as an Oneida Chief,[203] and was the recipient of official communication between the federal government and the tribe.[204] A Department list encompassing the "Enrolled Indian Population, New York Agency" for the period of June, 1942 to June, 1945, lists the Oneida

[198] Ex. 11, September 4, 1934, Excerpts from the Address Given by Commissioner Collier on Indian Day of the Four Nations Celebration at Niagara Falls, New York, at 22 (quoting from letter from Secretary Ickes).
[199] Ex. 139, August 31, 1934, letter from Secretary Ickes to Commissioner Collier. Notably, as explained above, the Beckham Report relies on this same quote to conclude that Indians in New York were not under federal jurisdiction in 1934. *See* Beckham Report, at 40; *but see* McMillen Report, at 25-26.
[200] Ex. 139, August 31, 1934, Letter from Secretary Ickes to Commissioner John Collier.
[201] *See, e.g.*, Ex. 56, January 6, 1904, letter from the Commissioner to B.B. Weber, Indian Agent (regarding the selection of an attorney for the tribe "to represent the tribe on the trial of the claim of the Ontario Oneidas before the Court of Claims."); Ex. 57, Feb. 26, 1951, letter from William B. Benge, Chief Special Officer, to Mary Winder (noting Department approval of a contract between the Oneida and a Chicago law firm, to pursue Indian Claims Commission claims); Ex. 58, Mar. 28, 1967, memorandum of Assistant Secretary of the Interior (approving a contract with a law firm to bring federal land claims based on violations of the Nonintercourse Act).
[202] 437 U.S. at 653.
[203] *See, e.g.*, Ex. 89, Oct. 18, 1938, letter from Superintendent to Commissioner of Indian Affairs (forwarding a letter from "Chief W.H. Rockwell"); Ex. 91, undated 1939 memorandum, (acknowledging responsibility of "Chief Wm. H. Rockwell" for distributing Treaty cloth); Ex. 90, 1940, letter from Charles H. Berry, superintendent, to Commissioner, at 6 (listing the officials of the Oneida Nation); Ex. 92, Meyer Berger, *Government Gives Indians Annual Calico, Hailing Keeping of Peace Treaty 146 Years*, N.Y. TIMES, Dec. 15, 1940, at A1 (discussing ceremony by DOI, led by Chief Rockwell, commemorating Treaty cloth distribution).
[204] *See, e.g.*, Nation's Submission to DOI on Remand, at 28-29; Ex. 86, *Indians of New York: Hearing on H.R. 9720 Before the House Committee on Indian Affairs*, 71st Cong. 26-35 (1930) ("statement of William J. [sic] Rockwell, Chief and Secretary of the Oneida Nation, Oneida Reservation, Oneida, N.Y."); Ex. 93, letter from W.H. Rockwell to Charles H. Berry, Sept. 15, 1940 (responding to information request); Ex. 95, Six Nations resolution, June 12, 1942 (declaration of war on Axis powers, including Rockwell as signatory); Ex. 97, 1943, letter from F.A. Archambault, Senior Clerk, to C.C. Daniels, Special Assistant to the Attorney General (listing tribes "under the jurisdiction of this agency" and their addresses, including the "Oneida Tribe of Indians, William Rockwell, Chief, Oneida, NY."); Ex. 98, letter from Nora M. Anderson, Acting Superintendent, to William H. Rockwell, Chief, Sept. 18, 1946 (requesting information on Oneida governing council).

among the other New York tribes.[205] Additionally, the Indian agent sent a letter to the Commissioner with a list of the population figures for tribes under the Department's jurisdiction in 1943, which included the Oneida.[206] Hence, in 1934 and thereafter, DOI continued to regard the Oneida as being under federal jurisdiction.

The State and Counties point to other historical documents attempting to show that the Oneida were not organized as a tribe or a community in and after 1934.[207] As discussed above, these documents and conclusions are rebutted by the overwhelming historical evidence available.

D. The IRA does not require that a Tribe demonstrate it was "under federal jurisdiction" *and* recognized in 1934, and even if so, the Nation meets this standard.

As a threshold matter, the State and Counties contend that a tribe must have been "recognized" as well as under federal jurisdiction when the IRA was enacted to lawfully have land acquired in trust under the IRA.[208] Neither the plain language of the IRA, nor the Supreme Court's decision in *Carcieri,*[209] supports the State and Counties' argument.[210] The word "now" in the IRA only modifies the phrase "under Federal jurisdiction," and is not related to the phrase "any recognized Indian tribe."[211] Moreover, the Supreme Court majority opinion in *Carcieri* treated a tribe's "under federal jurisdiction" status and being "federally recognized in 1934" as separate and

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[205] Ex. 127, Enrolled Indian Population, New York Indian Agency, Buffalo, N.Y., June 30, 1942, to June 30, 1945.
[206] Ex. 46, letter from C.H. Berry, Superintendent, to the Commissioner of Indian Affairs, January 10, 1945.
[207] Many of the documents and materials cited by the State and Counties are authored by individual, sometimes, but not always low level, federal officials trying to respond to discrete or particular issues or are part of the general debate at the time about the factual living circumstances of various Indian tribes, like Oneida, and are not generally final positions of the United States' executive branch. *See, e.g.,* State and Counties' Submission to DOI on Remand, at 32 (noting that a report prepared by the Superintendent of the New York Agency, C.H. Berry, did not identify an Oneida tribe in New York or an Oneida reservation in New York), 30 (citing Ex. AA, May 20, 1935 Letter from J.N.B. Hewitt to John Collier at 19 (noting that "the [Oneidas and Cayugas] no longer had tribal lands or tribal organization within the State of New York.")). *But see* Beckham Report at 41 (noting that on May 7, 1935, Special Agent Harrison wrote that the Oneidas have no organization but "maintain their tribal organizations and it seems to me they should be entitled to vote as to whether their tribe will accept or reject this Act). The State and Counties also cite miscellaneous statements regarding the lack of federal guardianship made by a few members of the House Committee on Indian Affairs. Ex. D, Aaron M. Baldwin Reply Decl., at 81-82. Yet on the same page there are statements that the New York Indians are still wards of the federal government. The State and Counties also cite another document for the proposition that the tribe only met to vote on the IRA, but the same document mentions other actions taken by the Nation at the meeting. Ex. 146, letter from A.D. Burning to H.K. Harrison, November 25, 1934 (discussing the election of a council secretary, distribution of goods provided by the federal government, the creation of a treasury and election of a treasurer, and a future meeting schedule).
[208] State and Counties' Memorandum of Law in Support of Motion for Summary Judgment, at 19-20 (citing *United States v. John*, 437 U.S. at 650). To reach this conclusion, the State and Counties improperly present *dicta* in *John* as a holding in the case, notwithstanding that the section relied upon contains no analysis of this legal question and no supporting citations other than the statute itself.
[209] 555 U.S. 379
[210] It is notable that in the case on which plaintiffs rely for the supposed requirement of federal recognition in 1934, the tribe at issue was found to have been recognized even though it had not organized a formal government under the IRA as of August 1936, and despite the Interior Solicitor's contemporaneous opinion that the group could not be regarded as a tribe at that time. *See United States v. John*, 437 U.S. at 650 n20.
[211] *Carcieri*, 555 U.S. at 395-96 (holding only that the temporal requirement applies to the federal jurisdiction issue, and making no mention of the federal recognition issue).

distinct concepts.[212] In his concurring opinion in *Carcieri,* Justice Breyer expressly noted that the IRA "imposes no time limit upon recognition."[213]

Furthermore in interpreting the term "recognized" in Section 19 of the IRA, the Department has determined that "the tribe need only be 'recognized' as of the time the Department acquires the land into trust." [214] This issue was exhaustively analyzed by the Department in the Cowlitz decision. As explained in the Cowlitz ROD, the term "recognized Indian tribe" historically has been used in two distinct senses: a "cognitive" or "quasi-anthropological" sense, and a "formal" or "jurisdictional" sense. In the 1970's the jurisdictional sense of the term "recognized Indian tribe" evolved into the modern notion of "federal recognition" or "federal acknowledgement."[215] The members of the Senate Committee on Indian Affairs debating the IRA appeared to use the term "recognized Indian tribe" in the cognitive or quasi-anthropological sense.[216] In fact, the Senate Committee's concern about the breadth of the term "recognized Indian tribe" arguably led it to adopt the phrase "now under federal jurisdiction" in order to clarify and narrow that term. There would have been little need to insert an undefined and ambiguous phrase such as "under federal jurisdiction," if the IRA had incorporated the rigorous, modern definition of federally recognized tribe.

In any event, the Oneida have been recognized since at least 1794, as demonstrated by the series of treaties and treaty negotiations between the Oneida and the United States up to 1868.[217] The U.S. Supreme Court also has noted that the Nation is "a federally recognized Indian tribe and a direct descendant of the historic Oneida Indian Nation . . . ."[218] Further, the United States appeared in *Boylan* fourteen years before the IRA and asserted that the Nation is a tribe under the protection of the United States, and the Second Circuit agreed.[219] *Boylan* shows concrete federal dealings in the years before the enactment of the IRA and the affirmation of the Oneida as a recognized tribe by both the United States and the Second Circuit. Additionally, the Oneida were also included on the first formal list of federally recognized tribes in 1979.[220] Thus, the full historical record, including the IRA vote itself, demonstrates that the Oneida have been recognized both in the cognitive and more formal sense for more than two centuries.

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[212] *See id.* at 386 (summarizing the District Court's judgment, which distinguished the federal recognition issue from the issue of existence at the time of the IRA), *id.* at 388 (specifying that the Court's task was "to decide whether the word 'now under federal jurisdiction'" referred to 1998 or 1934 in order to determine "whether the Narragansetts are members of a 'recognized Indian Tribe now under Federal jurisdiction.'").

[213] 555 U.S. at 397-98 (Breyer, J, concurring).

[214] Cowlitz ROD, at 89.

[215] *Id.* at 87.

[216] *Id.* at 88.

[217] *See supra* section II.B.(1). *See also* Ex. 93, Sept. 16, 1836 Supplementary Article to Treaty of Duck Creek; Ex. 27, Jan. 15, 1838 Treaty of Buffalo Creek; Ex.. 30, Exec. Doc. Y, 40th Cong. (3d Sess. 1869) (materials on unratified treaty with the New York tribes).

[218] *City of Sherrill,* 544 U.S. at 203.

[219] *See United States v. Boylan*, 265 F. at 174 ("[T]he United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward . . . .").

[220] *See* Indian Tribal Entities that have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979) ("Oneida Nation of New York").

We also reject the State and Counties' argument that the Oneida ceased to exist as a tribe before 1934. The evidence proves to the contrary,[221] and indeed, the Second Circuit has previously rejected this argument in *Sherrill*.[222] The State and Counties cite to an 1891 Annual Report stating that "the Oneidas have no tribal relations, and are without chiefs or other officers," [223] but an 1892 Extra Census bulletin refers to "Alexander Burning, a chief [who] lives at Oneida,"[224] and the 1892 Census lists Abram Hill and Burning as chiefs of the Oneida.[225] Burning was referred to by the Acting Comptroller in 1905 as the "head chief" on the "Oneida reservation" with the authority to endorse warrants for payments of Kansas claim shares to incompetent or underage Oneidas. [226] We therefore find no merit in the State and Counties' arguments.

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[221] For example, the Nation brings to attention a memorial submitted to Congress by the leaders of the Oneida Nation, in 1871. The memorial was printed as an official Senate document and sought compensation for their Kansas land. Ex. 71, S. Misc. Doc. No. 43-85 (1874). *See also* Nation's Submission to DOI on Remand, at 30-38; Ex. 73, Nov. 13, 1878, letter from D. Sherman, Indian Agent, to the Commissioner of Indian Affairs (detailing annuity distribution to tribes, including Oneida); Ex. 74, 1885 historical record (discussing a council meeting of the Oneidas, regarding the Kansas claim, where leaders repudiated a contract with an attorney); Ex. 77, Aug. 16, 1905 letter from L.P. Mitchell, Acting Comptroller, to the Treasury Secretary, at 2 (listing Alexander Burning as head chief of the Oneida); Ex. 75, 1892 Census of the Oneidas, at 1, 9 (listing Hill and Burning as chiefs of the Oneida); Ex. 76, April 1895, untitled newspaper article, at 1-2 (reporting Hill's death and the traditional condolence ceremony to replace him).

[222] *City of Sherrill*, 337 F.3d at 166-67 (noting that "the authorities offered . . . merely reflect the opinions of a handful government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased. In particular, letters from the Assistant Commissioner of Indian Affairs in 1916 and 1925 stated that the tribe no longer existed in New York. This conclusion is, to some degree, understandable, since most of the Oneida reservation land had been sold to the State, with the remaining parcels divided among members who, increasingly, lived separate from one another and received state services. But these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in *Boylan*.")

[223] Ex. F, 1891 Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 314. *See also* Ex. J, 1900 Annual Reports of the Department of the Interior, at 298 ("The . . .Oneida have no reservations . . . [and] are voters at the white elections."); Ex. K, 1902 Annual Reports of Department of the Interior, at 288-89 (similar); Ex. L, 1906 Annual Reports of the Department of the Interior, at 288 ("The New York Oneida have no reservation; in fact can hardly be said to maintain a tribal existence."). The State and Counties' argument regarding the significance of the 1891 report is undermined by the fact that the same report unequivocally states that "[t]here are six tribes in the charge of this agency, viz: the Senecas, Oneidas, Onandagas, Cayuga, Tuscaroras, and St. Regis." Ex. 39, Annual Reports of the Commissioner of Indian Affairs, 1870-1885, at 495.

[224] Ex. 52, Thomas Donaldson, Extra Census Bulletin (1892) at 25.

[225] Ex. 75, 1892 Census of the Oneidas, at 1, 9 (listing Hill and Burning as chiefs of the Oneida). *See also* Ex. 76, April 1895, untitled newspaper article, at 1-2 (reporting Hill's death and the traditional condolence ceremony to replace him).

[226] Ex. 77, August 16, 1905, letter from L.P. Mitchell, Acting Comptroller, to the Secretary of the Treasury, at 2. Burning also signed a memorial by Oneida chiefs to Governor Hughes in 1908, also signed by William Rockwell, Simeon Elm, Baptists Day, Daniel Schenandoah, and others. *See* Ex. 78, Jan. 24, 1908 letter from William Honyoust Rockwell to Charles E. Hughes, Governor. Another memorial written to New York State legislature in 1920 lists Burning as a chief as well. *See* Ex. 79, May 16, 1910 Memorial Before the Legislature of the State of New York, at 8. In 1939, William Rockwell replaced Burning as the keeper of the annuity roll. *See* Ex. 83, December 29, 1939 letter from Charles H. Berry, Superintendent, to William H. Rockwell, Chief.

E. The State and Counties' Assertions regarding the Reeves Report, *U.S. v. Elm*, and the Oneida Reservation status are incorrect, as are the additional claims of UCE and CNYFBA.

1) The Reeves Report and U.S. v. Elm

As noted above, it is not necessary for us to determine whether the Oneida were recognized in 1934. Nevertheless, the State and Counties rely on the Reeves Report and the case of *U.S. v. Elm* for the proposition that the Oneida did not exist as a tribe or a community, and did not have a tribal government. The Reeves Report was prepared by John R.T. Reeves, Chief Counsel in the Office of Indian Affairs, on December 26, 1914, after he traveled to New York to "visit several reservations . . .so as to present existing conditions there."[227] The Report was submitted by the Department to Congress in 1915.[228] According to the State and Counties, the Reeves Report documented the "absence" of the Oneidas in New York State.[229]

The State and Counties cite the 1914 Reeves Report to illustrate that the Oneida were "known no more" as a tribe in New York,[230] along with various letters which, according to the State and Counties, contain evidence that the Indians in New York were not under federal jurisdiction.[231] The State and Counties contend that the Reeves Report was the official view of the Department of the Interior, "from at least 1915 to 1941".[232] The 1914 Reeves Report[233] is not an accurate representation of the Oneidas' status in 1934, and the Beckham Report omits significant details in its analysis.[234] Also, the Reeves Report is directly contradicted by the ruling of the Second Circuit in 1920. Moreover, nothing in the record supports the contention that the Reeves Report was the official view of the Department.

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[227] Ex. C/Ex. 21, H.R. Doc. No. 63-1590 at 11 (3d Sess. 1915) (report of John R.T. Reeves).

[228] State and Counties' Memorandum of Law in Support of Motion for Summary Judgment, at 26; Ex. C/Ex. 21, H.R. Doc. No. 63-1590 (3d Sess. 1915) (report of John R.T. Reeves).

[229] State and Counties' Memorandum of Law in Support of Motion for Summary Judgment, at 26.

[230] *See e.g.* Beckham Report, at 26 (stating that the New York Oneida hold their land in severalty and "are known no more in that State");

[231] *See* Exhibit JJJ, November 8, 1923 letter from John R.T. Reeves, Assistant Attorney, to the Secretary of the Interior, at 2, 4-5 (expressing that the state has jurisdiction). The State and Counties fail to note that the Report also states that "technically a superior sovereignty and jurisdiction might rest with the Federal Government."). Thus, at most the Reeves Report can only be cited for the proposition that there might have been confusion as to the interplay of jurisdiction between the State and Federal government. The State and Counties also cite to Ex. M, December 31, 1924 letter from E.B. Meritt, Assistant Commissioner, to John C. Brown, and Ex. N, Jan. 7, 1925 letter from E.B. Meritt, Assistant Commissioner, to Henrietta C. White, for support that the Oneida were "no longer known" in New York. They then point out that the 1942 and 1958 editions of Cohen's Handbook of Federal Indian Law cite the Reeves Report. *See* Ex. W, Felix S. Cohen, Handbook of Federal Indian Law, 416-17 n.1, (1942); Ex. X, Felix S. Cohen, Federal Indian Law, 966-67 n.1 (1958). However, this does not change the fact that the United States continued to have treaty obligations to the Oneida, that they received various federal services, including attorney contract approvals, and were identified and counted in Indian census records as a tribe under the jurisdiction of the Federal government. *See supra* notes 175-84 and accompanying text.

[232] State and Counties' Memorandum of Law in Support of Motion for Summary Judgment, at 26.

[233] Ex. C/Ex. 21, H.R. Doc. No. 63-1590 (3d Sess. 1915), report of John R.T. Reeves.

[234] *Compare* Beckham Report at 27-29, *with* McMillen Report, at 21-22 (both citing Reeves Report, at 6-7). The McMillen Report states "there is nothing in this quote to support Beckham's suggestion that the Federal government is not supreme regarding Indian affairs in New York." McMillen Report at 21-22.

Indeed, in 1914, the same year that Reeves made statements regarding the Oneida's continued existence, the Report of the Commissioner of Indian Affairs listed the Oneida as a tribe under the jurisdiction of the BIA's New York Agency, treating it the same as every other tribe in New York under federal jurisdiction.[235] Also in 1914, the New York Agency conducted a census of the Oneidas as was its accustomed practice.[236] And by 1936, as Chief Counsel to the Office of Indian Affairs, Reeves took the position that, not only did the New York Oneidas exist, but they also qualified to vote on the IRA and therefore were under federal jurisdiction.[237] Reeves even went so far as to question the idea of concurrent state and federal jurisdiction.[238] Indeed, a memorandum by Special Assistant to the Attorney General, C.C. Daniels, later forwarded to the Secretary of the Interior, examined federal and state authority over New York Indians, and confirmed the superior authority of the federal government.[239] Commissioner John Collier, writing to a member of the New York congressional delegation, stated that although much of Indian affairs in New York had been left to the state, his opinion on the Oneida was that "they certainly can [come within the IRA] if they want to."[240] Thus, despite any deference to the State that had been occurring, the Oneida continued to be under the jurisdiction of the federal government as demonstrated, among other things, by the Department's determination that the Nation was entitled to vote on the IRA. Accordingly, the Reeves Report is far from embodying the "official" Department view of the Oneidas and its view of the Oneidas as no longer existent within in New York was contradicted by continued Department dealings with the Tribe during the period the State and Counties allege the Report to be an "official" view.

Moreover, in direct contradiction to such statements, as noted above, Indian census records from 1870 to 1927 list the Oneida among the tribes under the jurisdiction of the New York Agency of the U.S. Bureau of Indian Affairs.[241]

Between 1929 and 1939, the Department estimated the population totals for New York Indians, including Oneida, in lieu of conducting annual censuses in that state. The estimated population figures were initially based on the number of New York Indians receiving annual treaty payments, then adjusted to account for actual or estimated changes in population, based upon

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[235] Ex. 109, 1914 Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 80, 96.
[236] Ex. 109A, June 30, 1914 Census of the Oneida Indians of New York Agency.
[237] *See* Ex. 20, May 12, 1936 memorandum from J.M. Stewart, Director of Lands, to Commissioner Daiker, at 3 (including handwritten note from Reeves that the Oneida should be permitted to vote on the IRA).
[238] *Id.*
[239] *See* Ex. 128, September 12, 1934 Memorandum of C.C. Daniels, Special Assistant to the Attorney General, at 17-20 ("The 'Indian Law' of the State of New York . . . must give way to the laws enacted by Congress and the rules and regulations prescribed by the [BIA] . . . ."). That memo was forwarded to Secretary Ickes by the Attorney General. *See* Ex. 129, September 17, 1934 letter from Homer Cummings, Attorney General, to Harold L. Ickes, Secretary of the Interior. There may have been some confusion regarding state and federal jurisdiction on the part of DOI employees in the early twentieth century. *See* Ex. XX, Nov. 9, 1921 letter from E.B. Merritt, Assistant Commissioner, to Wilson Cornelius; Ex. CCC, May 31, 1939 letter from Commissioner Rhoads to Francis Keenan, April 10, 1933; Ex. HHH, Memorandum from Commissioner Collier to Secretary Ickes. *See also* Ex. KKK, Feb. 25, 1944 Report of Joint Legislative Committee on Indian Affairs.
[240] Ex. 10, August 20, 1934 letter from Commissioner Collier to Alfred Beiter, House of Representatives. *See also* McMillen Report, at 25 (discussing Ex. 10 and the Beckham Report's analysis thereof).
[241] *See supra* notes 175-84 and accompanying text. The 1928 Annual Report did not include a tabulation of Indian population totals for the Oneida or any other tribe.

general rates of population growth.[242] During this period, the Department faced budget shortfalls due to the Great Depression, resulting in some Indian agents, including the New York Indian agent, from conducting annual censuses on all federal reservations.[243] Instead, Indian agents and the Commissioner relied on other documents, such as prior tribal rolls,[244] "earlier and special censuses[,] and estimates based on records."[245]

In 1940, the Department returned to the practice of specifically enumerating the population of the Oneida in census tabulations.[246] The 1940 enumerated population figure is quantitatively consistent with the population figures enumerated in 1927,[247] demonstrating that while not specifically enumerated on censuses between 1928 and 1939, the Oneida population was accounted for and considered under federal jurisdiction by the Department.

The Beckham Report's treatment of the census documents is not persuasive. For example, it quotes the 1939 report of Agent Charles Berry to imply that there were no Oneida Indians in New York. But Berry does mention that there are Oneida "whose names do not appear on the rolls of these [other New York] reservations."[248] Moreover, the Annual Report prepared by the Commissioner of Indian Affairs in 1939 specifically enumerates the Oneida.[249] The consistent practice of taking annual censuses of the Oneida in the many decades prior to 1928, the continued reporting of the estimated population of New York Indians between 1928 and 1938 under the jurisdiction of the New York Agency, as well as the resumption of specifically enumerating the Oneida in 1939, all demonstrate that the Oneida were under federal jurisdiction.

Citing *United States v. Elm*,[250] the State and Counties contend that the Oneida in New York did not have a tribal government in the mid-19th century and "d[id] not constitute a community by

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[242] *See* 1929 Annual Report at 25 n.22 (reporting a combined, estimated population total of New York Indians and discussing the per capita payments made to New York Indians); Ex. 167, 1930 Annual Report at 34 (reporting a combined, estimated population total of New York Indians based upon "1928 per capita payment rolls" and an estimated population increase).

[243] 1931 Annual Report at 28-41 (reporting estimated population totals for all tribes, explaining that "[a]s a result of shortage of funds this office was forced to estimate the 1931 population"); 1932 Annual Report at 33 (reporting estimated population total); 1933 Annual Report at 110-112 (reporting population estimates and explaining that due to budget constraints, obligation to determine population totals was delegated to agents in the field); 1934 Annual Report at 123 (reporting 1932 estimate); 1935 Annual Report at 156-158 (reporting 1932 estimate and discussing change in reporting methods to lessen the cost of tabulating the population figures overall); 1936 Annual Report at 208 (reporting 1932 estimate); 1937 Annual Report at 250 (reporting 1932 estimate); 1938 Annual Report at 261 (reporting 1937 estimate); 1939 Statistical Supplement to the Ann. Rept. of the Comm'r of Indian Affairs at 11 (enumerating Oneida specifically, but reporting estimated population total of 286). *But see* Ex. 45, Census, June 30, 1940 (listing the Oneida population in 1939 as 306).

[244] 1931 Annual Report at 28-41.

[245] 1936 Annual Report at 207.

[246] Ex. 45, Census, June 30, 1940 (enumerating 105 Oneida members residing at the Oneida Reservation, as well as additional Oneida residing elsewhere, for a total population of 313 in 1940; also notes that the Oneida population in 1939 was 306).

[247] *See* 1927 Annual Report at 31 (enumerating an Oneida population total of 261); Ex. 45, Census, June 30, 1940 (enumerating an Oneida population total of 313).

[248] *See* McMillen Report, at 33 (*citing* Ex. NN. the 1939 Berry Report, at 5). McMillen gives examples of other sources in 1940 and 1945 that do enumerate the Oneida Reservation and its population. *Id.*

[249] 1939 Statistical Supplement to the Ann. Rept. of the Comm'r of Indian Affairs at 11.

[250] 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877), Ex. E/Ex. 72, cited in State and Counties' Memorandum of Law in Support of Motion for Summary Judgment, at 27.

themselves."[251] In *Elm*, an individual Oneida man appealed his conviction for illegal voting after voting in an 1876 Congressional election, claiming to be a United States citizen. The district court noted that the defendant had "abandoned his tribal relations," and that the Oneidas "had ceased to maintain its tribal integrity."[252] The court concluded that, because of these facts, the defendant was a citizen within the meaning of the Fourteenth Amendment, and therefore entitled to vote.[253] Whatever import this decision has was overturned by the Second Circuit in *Boylan*. Moreover, the state law proposing to subject Oneida Indians to state court jurisdiction and taxation, which the judge erroneously relied upon, could not and did not terminate the Nation or its relationship with the US.[254] Only Congress can terminate a tribe and its relationship with the federal government.[255] Further, this case was decided 57 years before the IRA was passed. The holding and observations of the Second Circuit in *Boylan*, only fourteen years before the enactment of the IRA, are far more contemporaneous and relevant to the analysis of whether the Oneida were under federal jurisdiction in 1934.

2) The State and Counties' Assertions that the Oneida did not have a reservation are unfounded.

In support of their argument that the Oneidas were not under federal jurisdiction in 1934, the State and Counties have also claimed that, at the time of the 1934 vote, no Oneida reservation remained to be subject to federal jurisdiction.[256] They cite various historical documents – mostly reports from the Commissioner of Indian Affairs during the period – in an attempt to support this proposition.[257] Whether or not the Oneida had a reservation is not necessary to make a determination that the tribe was under federal jurisdiction in 1934.[258] In any event, the question

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[251] State and Counties' Memorandum of Law in Support of Motion for Summary Judgment, at 27.

[252] *See Elm*, 25 F. Cas. at 1007.

[253] *Id.*

[254] Additionally, the status of an individual Indian does not "necessarily affect an entire tribe or its land-base," as pointed out by the McMillen Report at 8. *See also* Cohen's Handbook of Federal Indian Law § 3.03[3], citing, *inter alia*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) ("A member of any Indian tribe is at liberty to terminate the tribal relationship whenever the member so chooses . . . .", however the action of an individual tribal member cannot in and of itself affect the status of the tribe as a whole.).

[255] *See* Cohen's Handbook of Federal Indian Law § 5.02[3], Power to Recognize and Alter Status of Tribes; Cohen's Handbook of Federal Indian Law § 6.01[2], Federal Preemption and the Policy of Tribal Independence from the States. Congress rejected legislation that would have transferred jurisdiction over the Indians, including the Oneida, to New York State, in 1876. *See* Ex. 140, H.R. Ex. Doc. 44-106 (1st Sess. 1876) (presenting draft of bill, Jurisdiction over Indians in Certain States, that would transfer control of the Oneida to the state of New York).

[256] *See* State and Counties' Reply Memorandum of Law in Support of Motion for Summary Judgment, at 31(arguing that the "ownership and occupancy of the land had changed" between *Boylan* and 1934).

[257] *See e.g.* Ex. I, 1892 Sixty-Second Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 3 (stating that the Oneida have no reservation); Ex. F, 1890 Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 314 (same); Ex. J, 1900 Annual Reports of the Department of the Interior, at 298 (same); Ex. K, 1906 Annual Reports of Department of the Interior, at 288-89 (1902) (same); Ex. L, Annual Reports of the Department of the Interior, at 288 (same); Ex. AA, May 20, 1935, Letter from J.N.B. Hewitt, Ethnologist, Smithsonian Institution, to Commissioner Collier [hereinafter Smithsonian Report], at 19 (same); Ex. NN, C.H. Berry, Report on New York Indian Situation, Appendix D (no mention of Oneida tribe or reservation in New York); Ex. OO, September I, 1939 Letter from Charles H. Berry, Superintendent, to Commissioner Collier, [hereinafter the 1939 Berry Report] (stating Oneida reservation does not exist); Ex. PP, October 17, 1939 letter from William Zimmerman, Jr., Assistant Commissioner, to Wilson Cornelius (same).

[258] The fact that a tribe had or continues to have a reservation or land protected by the federal government is relevant to our inquiry, but it does not follow that only tribes that had a reservation or land in 1934 were under federal

of whether the Oneida reservation guaranteed by the Treaty of Canandaigua and protected by the Nonintercourse Act survived into the Twentieth century is a question the Second Circuit has resolved.

The Supreme Court has repeatedly held that "'clear and plain' . . . evidence of congressional intent is required to disestablish" a reservation.[259] This rule is distinct from the principle that equitable considerations may preclude unilateral revival of sovereignty over land that tribal members relinquished decades ago.[260] The force of this rule of law is not lessened by the fact that some Department officials, however preeminent, were mistaken as to the New York Oneidas' reservation land status and made erroneous statements as to the applicable law.[261]

The State and Counties' Beckham Reply Report also states that the statistical tables showing a 350 acre Oneida Reservation from the requisite time period are a "bookkeeping error."[262] However, this conclusion is based on speculation as no evidence supports this inference. Moreover, the argument is not persuasive given the treaties and court decisions against which the statistical tables must be read. In the Annual Report of the Commissioner of Indian Affairs for 1890, the Oneida lands were clearly referenced as "the Oneida Reserve, recognized by the Treaty of 1794 with the Six Nations . . . ."[263] The 1794 Treaty of Canandaigua gave federal recognition to the Oneida Reservation,[264] and the reservation endured through the signing of the Buffalo Creek treaty and beyond.[265] Regardless, only Congress can disestablish a reservation, and the

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jurisdiction. *Shawano County,* 53 IBIA at 71-72 (rejecting argument that a Tribe must have had a reservation in 1934 to be under Federal jurisdiction.) Rather, a tribe may be "under federal jurisdiction" but have no reservation, rendering disestablishment of the Oneida reservation irrelevant. It is a basic principle of federal Indian law that tribal governing authority arises from a sovereignty that predates establishment of the United States, and that "[o]nce recognized as a political body by the United States, a tribe retains its sovereignty until Congress [affirmatively] acts to divest that sovereignty." Felix S. Cohen, Handbook of Federal Indian Law § 4.01[1][a] (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142-43 (D.D.C. 1976)). A tribe remains a tribe, and retains regulatory authority over its *membership* regardless of whether it has regulatory authority over *territory*, because the former authority is derived "from a source of sovereignty independent of the land [tribes] occupy." *Baker v. John*, 982 P.2d 738, 754 (Alaska 1999).

[259] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

[260] *Compare City of Sherrill*, 544 U.S. at 214-16 (analogizing the equitable considerations of "rekindling embers of sovereignty" after a long quiescence regarding the tribe's land sale to the justifiable expectations arising in the diminishment context) *with id.* at 215n9 (reciting *Yankton Sioux*'s admonition that only Congress can divest a reservation of its land). The State and Counties erroneously conflate the two issues, and thereby reach the conclusion that the Court's holding as to OIN sovereignty over land relinquished in the 19th century also applies to land that remained in tribal hands. *See* State and Counties' Reply Memorandum of Law in Support of Motion for Summary Judgment, at 50-51.

[261] *See* Felix S. Cohen, Handbook of Federal Indian Law § 3.04[3] (summarizing the case law, which states that Indian country status can be terminated by treaty or agreement between a tribe and Congress, by unilateral action of Congress, or by the operation of equity in the context of reacquired land).

[262] Beckham Reply Report at 7.

[263] Ex. 39, Annul Reports of the Commissioner of Indian Affairs, 1870-1995, at 461-463 (recognizing the existence of the reservation, subject to the misconception that the New York law legally converted the landholdings into severalty). Beckham does not cite this document. Of the Annual Reports Beckham cites, some of them state there is no reservation. *See supra* note 223. However, McMillen notes that only Agent Ferrin, the author of the 1891, 1892, 1893, and 1900 ARCIA reports, and Thomas Donaldson, author of the 1892 Special Census Report, claim that there was no Oneida reservation in the period before *Boylan*. McMillen Report, at 12.

[264] Ex. 26, Nov. 11, 1794 Treaty of Canandaigua, 7 Stat. 44.

[265] *See City of Sherrill* 337 F. 3d at 167; Brief of the United States as Amicus Curiae, at *21-22, *City of Sherrill*.

Second Circuit has held that the Oneida Reservation has *never* been diminished or disestablished.[266] The Oneida Reservation existed before and at the time of the IRA's enactment and still exists today. Any confusion evidenced by the communication of DOI employees as to the existence of a reservation[267] was resolved in the federal courts.

The Beckham Reply Report ventures into legal matters when it asserts that the judge in the *Boylan* case "created (or re-created)" the Oneida reservation.[268] The expert's contentions are statements of law, not fact. It is a historical observation that the 1842 Treaty between the Oneida and the State of New York "explicitly provided for the division of that land into discrete parcels and assigned the ownership of those tracts to individual Oneida Indians in severalty."[269] It is a legal conclusion, and an incorrect one, that that treaty and 1843 New York legislation somehow disestablished a federal reservation. This conclusion is incorrect, if for no other reason than that the Second Circuit has said it is incorrect: "[i]t remains the law of this Circuit that the Oneidas' reservation was not disestablished," and it will remain so until the Second Circuit sitting *en banc* or the Supreme Court says otherwise.[270]

[266] *New York v. Salazar*, No. 6:08-CV-644 (LEK/GJD) at *8-9 (N.D.N.Y. Sept. 29, 2009) ("This Court agrees that the Second Circuit's holding [that the Oneida reservation was not disestablished] remains good law."). The Second Circuit recently reaffirmed this holding. *See Oneida Indian Nation of N.Y. v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011) (refusing to disturb the prior holding that the reservation was not disestablished). *See also Boylan*, 265 F. 165 at 165-67.

[267] *See, e.g.,* Ex. DD/Ex. 18A, September 9, 1935 letter from Commissioner John Collier to W.K. Harrison, Special Agent in Charge; Ex. EE/Ex. 19, January 16, 1936 letter from W.K. Harrison, Special Agent, to Commissioner Collier; Ex. HH/Ex. 20, May 12, 1936 letter from J.M. Stewart, Director of Lands, to Commissioner Daiker, (determining that the Oneida have a reservation, ostensibly under state jurisdiction). In any event, numerous other reports and letters document the existence of the Oneida Reservation. Ex. 100, 1870 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 319; Ex. 47, Board of Indian Commissioner's maps, 1883-1917; Ex. 130, Sept. 9, 1928 letter from E.B. Merril, Assistant Commissioner, to the Special Agent in Charge (requesting collection of census information regarding the New York tribes, including the Oneida "reservation"); Ex. 41, Sept. 18, 1889 report of N.E. Carpenter, Chief Inspector, Indian Division, at 2 (including visit to Oneida Reservation); Ex. 48, F.A. Archambault, memorandum, Lands Under the Jurisdiction of the Office of Indian Affairs (listing the Oneida reservation as "Trust Allotted" land); Ex. 49, COMMITTEE ON PUBLIC LANDS, COMPILATION OF MATERIAL RELATING TO THE INDIANS OF THE UNITED STATES AND THE TERRITORY OF ALASKA, H.R. Serial No. 81-30 (1950), at 80 (lists the Oneida reservation in New York). An 1858 local map depicts an Indian Reservation south of Vernon, New York. Ex. 102. Indian Agent Earl Kimble visited the Oneida reservation in 1874. Ex. 103, August 18, 1874 letter from Earl C. Kimble, Indian Agent, to Commissioner Smith. Ex. 114, letter from W.S. Jackson, New York Attorney General, to Hon. Charles E. Hughes, Governor, at 4-5 (finding that the Oneidas' land was not taxed); Ex. 124, 1939 Map of Indian Tribes, Reservations, and Settlements in the United States (including Oneida); Ex. 145, Oct. 22, 1901 letter from A.W. Ferrin, Indian Agent, to the Commissioner of Indian Affairs (referring to Oneida Reservation); Ex. 125, April 3, 1940 DOI New York Indian Enrollment List (the Oneida are listed among the tribes and reservations in the state); Ex. 126, July 1, 1939 Census (listed as a reservation).

[268] Beckham Reply Report, at 5.

[269] *Id.* at 3.

[270] *Madison County*, 665 F.3d at 443 (internal quotations omitted).

3) Additional Claims of UCE are Unpersuasive[271]

UCE makes five claims similar to the claims made by the State and Counties.[272] First, UCE contends there was no entity known as the Oneida Indian Nation of New York that was either federally recognized in 1934 or in any way under federal jurisdiction in 1934.[273] Secondly, "any entity that may have been recognized or in some limited way under federal jurisdiction in 1934 may have been the Oneida Tribe of Wisconsin."[274] These contentions have been answered above, and this opinion does not discuss the separate status of the Oneida Tribe of Wisconsin, which is outside the scope of this opinion. Third, UCE claims that "even if the entity known as the Oneida Indian Nation of New York is found to have some standing by the BIA, there is no legitimate link between the Oneida Indian Nation of New York and the entity currently enjoying BIA 'recognition.'"[275] This claim also has been addressed above and the Nation has been found to be a successor in interest to the historical Oneida Indian Nation.[276] UCE argues that the Oneida have no reservation, or that the reservation they have is a state rather than a federal reservation, which is incorrect and addressed above.[277] Finally, UCE contends that "the State of New York exercised jurisdiction over all lands and people associated with the Oneida tribe or its

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[271] UCE has included in its submissions to DOI on remand its complaint in the fee-to-trust litigation, *see* UCE Ex. A (arguing that the Secretary has not been delegated any authority to take lands purchased by an Indian Tribe into trust, that the IRA and ILCA do not apply to Indians in New York, that the delegation of power under Section 465 is unconstitutionally overbroad, and making other arguments that are contrary to well-settled law or outside the scope of this opinion). Further, UCE submits Ex. D, a petition of the appellants in an IBIA case (*Shenandoah v. BIA*), that takes issue with tribal government matters not addressed and outside the scope of this opinion. *See* UCE Ex. D at 3. Finally, Ex. E submitted by UCE is an excerpt of a letter from the Acting Solicitor Richmond F. Allan dated Feb. 3, 1969, which states that "[n]one of the ten reservations presently located within the State, including St. Regis, was created by federal treaty, statute, or executive order." The Acting Solicitor's statement, however, is directly inconsistent with the historical facts and law discussed throughout this opinion. *See, e.g.*, Treaty with the Seven Nations in Canada, 7 Stat. 55 (May 31, 1796) (establishing the St. Regis reservation).

[272] UCE also seeks to "incorporate by reference the entirety of the litigation known as 5:08- cv- 633", which is not a reasonable submission on remand without further differentiation of pertinent facts and arguments and is outside the scope of the remand. Nov. 22, 2012 Letter from David B. Vickers to Jennifer Turner, SOL, at 2. UCE also cites to "relevant pages of Plaintiffs Verified Complaint, dated June 16, 2008." *Id.*

[273] UCE cites Ex. B (the Haas Report) and Ex. C (various maps), and Ex. E (an excerpt of a letter from Richmond F. Allan, Acting Solicitor, to Joseph W. Scott, Director for relations with Canada, Feb. 3, 1969, stating that "[n]one of the ten reservations presently located within the State, including St. Regis, was created by federal treaty, statute or executive order") in support of its claims.

[274] The recognition of the Wisconsin Oneida is not at issue in this opinion. UCE continues "and by deciding to take land into trust for Oneida Indian Nation of New York, the fiduciary and trust responsibility the federal government may have with the Oneida Tribe of Wisconsin is violated." November 22, 2012, Letter from David B. Vickers to Jennifer Turner, SOL, at 1. UCE does not explain this contention, nor is the status of the Oneida Tribe of Wisconsin relevant to the determination here.

[275] UCE mentions Arthur Raymond Halbritter, stating "there has never been a 'Men's Council'" and Mr. Halbritter "has not bee[n] for more than a decade a legitimate entity to 'represent' the Oneida 'Nation.'" UCE Ex. A pt. II, at 9-10. UCE also references UCE Ex. D to its submission, a petition of the appellants in an IBIA case (*Shenandoah*) regarding late 20th century leadership disputes. Any discussion of internal tribal governing disputes is irrelevant and tangential from the issue at hand, which is whether the Oneida were under federal jurisdiction in 1934. As noted previously, tribes have inherent authority to determine their internal affairs, including tribal governance structures. The question of whether a tribe was under federal jurisdiction in 1934 is a distinct and separate question from leadership disputes that may arise from time to time.

[276] *See supra* discussion at pp. 23-25 and note 168 in (OIN is a successor in interest).

[277] *See supra* discussion in Section II.E(2).

remnants in 1934 and except for flawed court decisions to the contrary, continues to exert jurisdiction to this day."[278] As discussed above, this claim has no merit and must be rejected.[279]

4) Additional Claims of CERA and CNYFBA

CERA and CNYFBA make claims similar to those discussed above. They contend that the Oneida Reservation was disestablished with the Treaty of Buffalo Creek in 1838 and the remaining Oneida were under state jurisdiction.[280] This claim is refuted above.[281] CERA and CNYFBA also make various claims that are not relevant to the current discussion or are already matters of well-settled law.[282]

III. Conclusion

Based on the analysis above, we conclude that the *Carcieri* decision does not limit the Secretary's authority to acquire land in trust for the Oneida Indian Nation. Consistent with the Supreme Court's decision in *Carcieri*, the Oneida Indian Nation was under federal jurisdiction in 1934, as conclusively evidenced by the IRA election held by the Secretary on June 18, 1936, the 1794 Treaty of Canandaigua, the *Boylan* litigation, and the historical record.

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[278] Nov. 22, 2012 Letter from David B. Vickers to Jennifer Turner, SOL, Nov. 22, 2012.

[279] UCE takes issue with the McMillen Report (*see, e.g.* November 14, 2012, Letter from David B. Vickers to Jennifer Turner, SOL, (the date appears to be a mistake as it was submitted in response to the Nation's November 23, 2012 submission) at 2 ("I am somewhat pleased to consider [McMillen's] 'hired gun' status to be more that of a pea-shooter than a 'gun' of any real substance")), but simply disagrees with the conclusions without substantive documentation or argument. These criticisms have already been addressed above, to the extent that they were discernible and relevant. Arguments regarding leadership challenges in the late twentieth century are not relevant to the "under federal jurisdiction" analysis.

[280] November 20, 2012 Letter to Jennifer Turner from J. Devine, Jr., Esq.

[281] *See e.g., supra* notes 129-54 and accompanying text.

[282] CERA and CNYFBA submitted a collection of letters and memos from Assistant Secretary Ada Deer, but do not state their relevance to the current matter. They also argue that a Carcieri "fix" would racially discriminate against all non-Indians in contradiction of the 14th amendment. They contend that the reasoning of *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) "expressly limiting the authority of the Secretary and Congress to prevent reconsideration of the terms of grants of public lands to the States be expanded to declare fee to trust unconstitutional." November 20, 2012 Letter to Jennifer Turner from J. Devine, Jr., Esq., November 20, 2012. Finally, they state that "without knowing what the reasoning of the Secretary will be to produce a decision on whether the OIN is a tribe eligible to receive the benefits of the IRA there is no way to guess which documents will be relevant to the final determination," and hence no more documents were submitted. *Id.* To the extent plaintiffs rely on the *Office of Hawaiian Affairs* case, their assertions appear to be derived from *dicta* to the effect that if federal action "purported to 'cloud' [a state's] title to its sovereign lands" it would raise "grave constitutional concerns," *Office of Hawaiian Affairs*, 556 U.S. at 176, and that the land-into-trust process clouds state title. Contrary to their claims, the Court made no substantive determination on the constitutionality of such federal action; and to the extent that the Court did make a substantive holding, it was narrowly applicable to the language of the specific Congressional resolution at issue. *See* Memorandum from Associate Solicitor, Division of Indian Affairs to Pacific Regional Director, May 23, 2012, Determination of Whether *Carcieri v Salazar* or *Hawaii v. Office of Hawaiian Affairs* limits the authority of the Secretary to Acquire Land in Trust for the Santa Ynez Band of Chumash Mission Indians, at 14-15 (arguing that Congress' Apology Resolution for deposing the Hawaiian monarchy is irrelevant to land-into-trust cases generally, and that *Office of Hawaiian Affairs* is distinguishable from other land-into-trust decisions that do not concern land to which the state had title). In any event, the possibility of a "*Carcieri*" fix is speculative and outside the scope of this opinion.