UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

VILLAGE OF HOBART, WISCONSIN,

Plaintiff,

v. Case No. 23-CV-01511–WCG

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*

Defendants,

and

ONEIDA NATION,

Intervenor Defendant.

VILLAGE OF HOBART'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This action arises from the Interior Board of Indian Appeals' (the "Board") decision, dated September 21, 2023 (Dkt. 1-1, 69 IBIA 84 (2023) (*Hobart II*) (the "Decision"), affirming the Acting Midwest Regional Director (the "RD"), Bureau of Indian Affairs' (the "BIA") remand decision, dated January 19, 2017 (the "Remand Decision") (Dkt. 1-4). In that Remand Decision, the RD accepted eight properties within the Village of Hobart, Wisconsin (the "Village") into trust, on behalf of the Secretary of Interior (the "Secretary"), for the Oneida Nation (the "Tribe"). The properties consist of twenty-one parcels of approximately 499.022 acres and are known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay properties (the "Properties"). The Board's Decision and RD's Remand Decision (collectively, the "Decisions") to accept the Properties into trust on behalf of the Secretary must be vacated for several reasons.

First, the Decisions are the product of an unconstitutionally biased process, whereby the Tribe, pursuant to a Memorandum of Understanding ("MOU") with the BIA Midwest Division Fee-to-Trust ("Division") (Dkt. 1-3), pays salaries of BIA employees who process and decide fee-to-trust applications—thereafter to receive the RD's rubber stamp.

Second, under the Administrative Procedures Act (the "APA"), 5 U.S.C. § 701, *et seq.*, the Decisions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law concerning the on-reservation criteria under 25 C.F.R. § 151.10 that were reviewed.

Finally, Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108 is unconstitutional. Section 5 is an unacceptable delegation of power from Congress to the Executive Branch. Moreover, the Indian Commerce Clause does not grant Congress unbounded "plenary" authority over Indian tribes to the extent it can result in the elimination of a State with the stroke of an agency bureaucrat's pen.

PROCEDURAL BACKGROUND

In 2007, the Tribe submitted a total of 56 applications requesting 133 parcels with a combined acreage of 2,673 acres in the Village be transferred into trust. Included within those 133 parcels were the Properties. *Village of Hobart, Wis. v. Mw. Reg'l Dir., BIA*, 57 IBIA 4, n.4 (2013) (*Hobart I*) (Dkt. 1-2.)

The Decisions stem from a decision by the Board in 2013. In *Hobart I*, the Board reviewed six notices of decision ("NODs") issued by the RD[1] in 2010 that approved the fee-to-trust applications for the Properties. *Hobart II* at 87. After the Village appealed the NODs and the appeals were consolidated, the Board affirmed in part, vacated in part, and remanded. *Hobart I* at 4-5. Specifically, the Board vacated and remanded to the RD to address the Village's bias claim in the first instance as well as address the Village's comments under 25 C.F.R. § 151.10(e), (f), and (h) concerning tax loss, potential land use conflicts, jurisdictional problems, and environmental concerns. *Id.* at 5.[2] Thereafter, in January 2017, the RD issued her Remand Decision, again accepting the Properties into trust. *Hobart II* at 87. The Village appealed the Remand Decision to the Board. *Id.* at 99. The Board then issued its Decision in *Hobart II* in 2023.

Since 2007, the Tribe's land holdings have grown. Based on the administrative record (the "Record"),[3] as of 2017, the Tribe owned 40.9% of its original Reservation in either fee or trust. (Dkt. 35-8 at 155.) As of the end 2024, that grew to 45%, or the equivalent of 29,406.79 acres.[4]

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[1] The Regional Director and Acting Regional Director (together the "RD") issued the NODs.

[2] The Board did not address the Village's constitutional challenges as it lacked jurisdiction.

[3] The Record consists of 18,739 pages Bates labeled with the prefix "VOH-X" that have been lodged by Defendants as Dkts. 32-4 to 35-14. (*See* Dkt. 32.) For ease of reference, the Village cites to the docket number and corresponding page number throughout its brief.

[4] https://oneida-nsn.gov/wp-content/uploads/2024/11/Quarter-4-Report-ELA.pdf.

LEGAL STANDARD

Summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). Agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" shall be held "unlawful and set aside." *Menominee Indian Tribe of Wis. v. U.S. EPA*, 360 F. Supp. 3d 847, 853 (E.D. Wis. 2018) (citing 5 U.S.C. § 706). An agency's action is arbitrary and capricious if the agency failed to engage in reasoned decision-making that "examine[s] the relevant data and articulate[s] a satisfactory explanation" for the action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

To answer whether the action violates the APA, this Court must determine the meaning of the regulations under that action. *See* 5 U.S.C. § 706(2)(A)-(D). It is "emphatically the province and duty of the judicial department to say what the law is." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Though the Executive Branch's interpretation may "inform the judgment of the Judiciary" it cannot "supersede it." *Id.* at 386. As such, this Court should independently determine the meaning of the fee-to-trust regulations and assess whether BIA has complied with them, and afford no deference to Defendants' interpretation.

ARGUMENT

I. THE DECISIONS ARE ADMINISTRATIVELY BIASED AND PREJUDGED.

A. The Memorandum of Understanding.

Since 2005, the Tribe and BIA have processed and decided fee-to-trust applications under a pay-to-play structure identified as a Memorandum of Understanding ("MOU").[5] "Through funds provided by Participating Tribes," the BIA Midwest Regional Office "hire[s] employees/contract staff *whose sole duties and responsibilities* will be to process Fee-to-Trust applications," from the paying tribes. (*Id.*) The stated purpose for doing so—"*facilitating the expeditious processing of fee-to-trust applications . . . submitted by the Participating Tribes*." (Dkt. 1-3 at 2.)

Per the terms of this MOU it was entered into because of "[*t*]*he need for increased land base is imperative*," and there is an unacceptable *"gap*" that is "widening" between applications and land being "*accepted into trust*." (*Id*.) To accomplish its purposes, a "Division" that is defined to include "[t]he Midwest Region[al] Director and group of staff assigned to work on trust acquisition" was formed. (*Id.* at 3.) An "Oversight Advisory Council" was also formed, which is "composed of the MWRO Regional Director and one representative of each Participating Tribe." (*Id.* at 3, 5.) This Council, who shall meet at least twice a year in a manner determined by the tribes, has "oversight" over the Division, and "decision making . . . shall be by consensus vote of the attending tribes . . . ." (*Id*. at 3.) An executive committee, which is also composed of both

[5] The Board refers to the FY 2008 – 2010 MOU (Dkt. 1-3 at 17-23, Dkt. 35-5 at 160-66), but notes the terms of the FY 2014 – 2017 MOU (Dkt. 1-3 at 2-9; Dkt. 35-8 at 157-164), "do not differ materially, and the Board would reach the same conclusions regarding the Village's claims of bias and violations of due process if that MOU were applicable." *Hobart II* at 101, n.19. However, because the Remand Decision was issued while the FY 2014 – FY 2017 MOU was in effect, that MOU applies and is cited herein – though both MOUs are relevant because Division employees were required to process the Tribe's applications and draft the decisions under both.

federal employees and tribal representatives, may also be formed for the "purpose of providing more timely input to the Regional Director." (*Id.*)

Division employees "necessary to achieve the goals of th[e] Project," are "governed" by the MOU's terms and "*report directly to the Regional Director's office*." (*Id.* at 4-5.) The "specific number and positions" within the Division are determined by the Midwest Regional Office and the Advisory Council through a mutually agreed upon process. (*Id.* at 4.) However, this selection does not apply if "tribal or contract staff are used" to process the applications with Division staff. (*Id.* at 5.) Among other duties, the Division's employees – who are paid by the tribes – are "responsible for assuring" that each "acquisition" complies with the requirements of 25 C.F.R. Part 151. (*Id.*) These same Division employees, not the RD, are responsible for "*preparing the Notice of Decision on a requested parcel*" and "*preparing the record for appeal*[.]" (*Id.* at 6.)

To receive this preferential treatment, a tribe must pay. (*Id.* at 4.) As of 2007, when the applications for the Properties were submitted, the minimum contribution was $215,000 per year per tribe. (Dkt. 35-11.)[6] A tribe must also submit a resolution that "contains an acknowledgement of the financial contribution and/or commitment of the required Tribal Priority Allocation (TPA) funds" and a commitment to be bound by the MOU's terms. (Dkt. 35-8 at 158.) The tribe must also "complete any additional paperwork necessary to facilitate the re-programming of TPA funds" or "sign an agreement detailing outside funds being committed to the Division." (*Id.*)

Per the Tribe, the MOU has "resulted in a more responsive trust application process" and the "continued participation is in [the Tribe's] best interests." (Dkt. 35-11 at 114-16.) In short, the Tribe buys federal employees to ensure lands are acquired into trust pursuant to the MOU.

[6] In 2007, the Tribe agreed to pay (with the understanding it would be reimbursed directly by another tribe) an additional $67,787 on behalf of another tribal participant in the MOU, was who unable to pay its share amount due to federal budget cuts (Dkt. 35-11 at 111-12.)

B. The Inspector General's Bias Findings.

In a 2006, the Government Accountability Office ("GAO") examined the BIA's and tribes' practice of entering into these side agreements to process and decide fee-to-trust applications. (Dkt. 35-8 at 184-234, Dkt. 35-9 at 1-10, *BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications,* GAO-06-781 (July 2006) ("GAO Report").) The GAO Report indicated that "consortium tribes agreed to use a portion of their budget to pay for additional staff positions at BIA dedicated to processing consortium members' land in trust applications[.]" (Dkt. 35-8 at 207.) The report states the Interior Office of Inspector General ("IG") "was conducting an investigation of these consortium agreements to determine whether the tribes' allocation of money to fund the consortiums was legally authorized and whether BIA was favoring land in trust applications from those tribes." (*Id.*)

In late 2005, the IG's investigation of these MOU agreements was initiated after it received a similar MOU between the Pacific Region BIA and several California tribes. (Dkt. 1-5; *see also* Dkt. 35-9 at 106-129 ("IG Report").)[7] In the synopsis of the IG Report, the IG reported:

> The MOU describes a process by which the BIA-PRO "re-programs" Tribal Priority Allocation (TPA) funds back to BIA-PRO to hire federal employees dedicated solely to processing Consortium members' fee-to-trust (FTT) applications.
>
> . . . [T]he funding structure of the MOU . . . creates a situation where *the tribes are literally paying the salaries of federal employees*. The ability of an all-tribal body to influence the selection, performance awards, and duties and responsibilities of the federal consortium staff—coupled with the fact that the tribes control the purse strings from which the consortium staff's salaries are dependent results in a *patent perception of a conflict of interest*. This investigation has found this appearance of a *conflict of interest to be, in fact, real*. . . .

[7] The IG Report the RD obtained and reviewed for its Remand Decision was an incomplete, redacted version that was part of a brief in an appeal before the Assistant Secretary of Indian Affairs – United States Department of Interior, *Kramer, et al. v. Pacific Reg'l Dir., BIA.* (*See* Dkt. 35-9 at 12-148.) After appeal to the Board, the Village was able to obtain through a FOIA, a more complete, yet still redacted version that was still missing critical attachments, including the Solicitor's review of the Midwest MOU and the Solicitor's legal opinion. Attached to the Village's Complaint is a more complete copy. (Dkt. 1-5.)

> Regarding the legality of the consortiums, a recent legal opinion rendered by the Office of the Solicitor (SOL) . . . recommended that BIA discontinue the fee-to-trust consortiums, as they are currently structured.

(Dkt. 1-5 at 2.)

The IG Report, which spans 12 pages and contains 19 attachments including investigative interviews, a Solicitor's review of the Midwest MOU and a Solicitor's legal opinion, revealed several concerns from staff, including that "[t]ribes who donate large amounts of TPA funds . . . receive better treatment than tribes who donate less money to the program"; "if the tribes stopped donating TPA funds . . . consortium employees would be subject to a Reduction in Force" which caused a "substantial amount of stress and anxiety"; and that staff are "work[ing] for the tribes" and "pay [their] salaries and expect results." (*Id*. at 7-10.) The "whole purpose is to ensure these applications receive a favorable recommendation" (i.e., trust acquisition). (*Id.* at 3-4.)

As it relates to the Midwest MOU, the IG Report included interviews from individuals whose identity was redacted. One interview noted the Midwest MOU was established because a majority of tribal representatives thought BIA was not processing their applications fast enough. (*Id.* at 42.) Additionally, "[s]imilar to the BIA-PRO's MOU, under the BIA-MRO's MOU, the salaries . . . are dependent upon TPA funding" and "these consortium positions would also similarly be subject to a RIF if the TPA funding for the MOU were to cease." (*Id.* at 12.)

The IG Report in closing noted the Solicitor's legal opinion that the MOU creates "the patent appearance of a conflict of interest," an "insufficient separation of organizational functions," and "the possibility of the appearance of unfairness of the fee-to-trust application process." (*Id.* at 12.) The Solicitor further found that: (1) the "appearance of unfairness also extends to the approval process itself," because "the functions that would have been performed by the tribes are now performed by BIA employees[,]" and (2) Division employees performing work

under the MOU "raises serious questions about the independence of judgment" as "fee-to-trust applications are frequently controversial and their review and processing requires the exercise of substantial independent judgment." (*Id*. at 13.) The Solicitor concluded it "[did] not believe BIA can assure that the final decisions on the consortium fee-to-trust applications are fair and unbiased" and "the absence of sufficient internal controls creates a potential for bias or the perception of bias." (*Id*.) For these reasons, among others, the IG Report concluded and the Solicitor recommended "that BIA discontinue the fee-to-trust consortiums[.]" (*Id.* at 13.)

C. The Standard for Evaluating Administrative Bias.

An agency must act as an "impartial tribunal" and ensure due process and impartiality. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009); *Amos Treat & Co. v. S.E.C.,* 306 F.2d 260, 263-64 (D.C. Cir. 1962). "[T]he standard of impartiality is applied even more strictly to administrative adjudicators because of the lack of procedural safeguards normally available in judicial proceedings." *Small v. Sullivan*, 820 F. Supp. 1098, 1108 (S.D. Ill. 1992) (citation omitted). Fairness requires not only the absence of actual bias, but also prevention of "even the probability of unfairness." *Fero v. Kerby*, 39 F.3d 1462, 1478 (10th Cir. 1994).

A procedure that would offer even "a possible temptation to the average man as a judge … not to hold the balance nice, clear and true between [the parties], denies ... due process of law." *In re Murchison*, 349 U.S. 133, 136 (1955). When "faced with circumstances that present some actual incentive to find one way or the other or a real possibility of bias a court need not examine whether the judge actually was biased." *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc) (citations omitted). The "appearance of bias demeans the reputation and integrity of not just one [decision-maker], but the larger institution[.]" *Williams v. Pennsylvania*, 579 U.S. 1, 15 (2016). The standard is objective and "do[e]s not require proof of actual bias"—

rather, the question is "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (citations omitted). The Board's view is "the Village must either make a substantial showing of bias or it must establish that the BIA decisionmaker had a 'pecuniary interest in the outcome' of these applications[.]" *Hobart II* at 103. The true test of whether an agency decision is biased and, thus violates due process, turns not only on whether there is actual bias (i.e., a substantial showing), but if the decisionmaker might face possible temptation that poses a risk of even the appearance of bias or prejudgment.

D. The Board's Improper Review Concerning Bias and its Decision in *Hobart II* Violated the APA.

The Board, for the most part, appears to agree with the Village's concerns in the IG Report and the MOU. The Board concluded it is acceptable for the Division employees to process and prepare the decision "*as long as* the Regional Director completed her own independent review and reached her own decision. . . . ." *Hobart II* at 105. (emphasis added.) This is the case according to the Board, because the RD, "who is an independent, neutral decisionmaker whose employment is not funded by the Midwest MOU review . . . cured the[] conflict of interest." *Id.* at 102, 110.

1. The RD did not review the final Remand Decision and did not cure anything.

If the RD actually reviewed the final Remand Decision that is the subject of this appeal, as the Board contends, to cure the conflict, such evidence would be in the Record. There is nothing. Not even one email demonstrates a final draft of the Remand Decision was provided to the RD for "independent" review and signature. Rather than acknowledge this fact, the Board tries to dismiss it (or rather excuse it) by claiming the Village needs to prove a negative. Namely, offer proof she did not independently review the decision. *Hobart II* at 111. However, the Village has shown

there is no evidence the RD "independently" reviewed, let alone even saw the final decision drafted by Division employees in an attempt to "cure" the bias the Board acknowledges otherwise exists.

2. The RD is not an independent, neutral decision-maker.

Even assuming the RD did review the Remand Decision, the MOU's express terms and her involvement under the MOU demonstrates she too is not "independent." Despite the Board's claim that the RD is not a paid Division employee[8] (and therefore, that somehow cures the bias), the MOU's express terms actually reveal she is more than your average BIA employee. She is, by contractual definition, a member of the "Division"; a member of the "Oversight Advisory Council"; is involved in deciding the number of Division employees; and Division employees must report to her. She is the one primarily responsible for achieving the MOU goal of getting as much land into trust as quickly as possible for the paying tribes. This direct involvement within the Division is substantial evidence of the RD's bias in favor of the Tribe and should have "cause[d] the Board to question the impartiality of the Remand Decision." *Hobart II* at 105.

3. The Record substantiates the bias caused by the MOU.

There are numerous examples in the Record of prejudgment, direct pecuniary interest, impermissible communications, and conflict of interests within BIA that the Board ignored – which all led to the RD's rubber-stamp.[9] The bias, compelled by adherence to the MOU, is demonstrated by all aspects of the processing of the Tribe's applications. They are processed by

[8] The fact the RD is not paid directly does not dispense with the fact that Division employees are paid for doing what is the RD's ultimate responsibility—deciding the Tribe's application. She certainly has an indirect pecuniary benefit from the Tribe's payments, and has responsibilities under the MOU.

[9] *See* Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251, 292 (2012) ("Waples") (noting the GAO found "the process is merely an exercise in rubber-stamping. Strong indications of rubber-stamping … include the 100% acceptance rate, the lack of a single factor being found to support denial, meaningless 'filler' considerations, and frequent mention of policy statements capable of negating almost any contrary argument.").

Division staff, hand in hand with the Tribe, and then those same staff draft the actual decision approving the application. The Board contends that "BIA's commitment to processing applications faster is not evidence that it has prejudged those applications; it could still [at least theoretically] deny the applications, consistent with the Midwest MOU." *Hobart II* at 105. However, the Division does not deny applications. The Board acknowledged the Village's observation the RD "has not denied one application from the Tribe related to the Village." *Hobart II* at 105-06. The Board then theorizes that is because the Tribe's applications are withdrawn by the Tribe rather than risking denial. *Hobart II* at 105. However, there is nothing that shows this statement is true and it does not change the fact the RD does not deny the Tribe's applications.

The Board also ignores the MOU's whole purpose is to have BIA work with tribes to get applications "accepted." By the Board's own statements, BIA, through the MOU, "has committed itself … to an outcome" ("for example, by contract") to expeditiously address the "gap" in "accepted" trust applications. *Hobart II* at 105. The Board even acknowledges BIA's pecuniary interest in approving applications stating: (1) the "MOU appears to have given Division employees some interest in having these trust applications resolved …." and (2) "none of th[e] revisions changed the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent." *Hobart II* at 108-09. The Board acknowledges that Division employees are paid by and dependent on the participating tribes' funds, but then inexplicably says "Division employees did not have the kind of direct pecuniary interest in the resolution of these applications that the courts have found disqualifying[.]" *Hobart II* at 108. This conclusion is not rationale. As the Board confirms, if participating tribes are unhappy because their applications are not being processed and approved, there is significant stress and fear by BIA employees that they "would likely lose their jobs if the tribes stop participating in the Midwest MOU." *Id.* at 108-09 (noting

"there is no reason to believe that Division employees hired under the Midwest MOU did not share those concerns" of the Pacific MOU employees.) Having to ensure the tribes remain happy (i.e., their applications are approved) in effort to keep your job, is certainly a disqualifying direct pecuniary interest that makes the processing of applications under the MOU inherently biased.

The Board claims the MOU does not create bias because the Village has not shown evidence of prejudgment. First, as explained earlier, prejudgment is not the only way to demonstrate impermissible bias. Second, the Record tells a different story. The Division and the Tribe have for decades worked together on a "phased" approach to trust acquisition with the remanded cases being a "priority" above all other applications for the Division and BIA – and with "OT" being available to "expedite" the tasks for the Properties. (Dkt. 32-12 at 212; Dkt. 35-5 at 211.) This "phased" approach to "acquisition" has been in place since as early as 2006 with the Division keeping an "Acquisition Activity Log" to document progress. (Dkt. 34-14 at 418-23; *see also* Dkt. 35-1 at 797-803; Dkt. 34-13 at 846-852 (Gerbers property was "1" and a "top priorit[y]" in the Tribe's Phase 4 Properties); Dkt. 34-14 at 774-75 (noting Phase 5 properties).)

In April 2016 Division staff were directed by the Tribe to "prioritize these cases above all of our other[s]." (Dkt. 32-12 at 212; *see also* Dkt. 35-5 at 196-212.) In March 2014, an employee notified the Tribe of 2014 spring visits, including Catlin. The communication was to provide the Tribe with an update on properties, including those identified as being "very close to acceptance" – demonstrating that denial of the applications was not contemplated. (Dkt. 35-5 at 206.)

Other emails in the Record show the RD did not prepare her decision. For example, on August 21, 2013, Deputy Regional Director of Trust Services, Tammie Poitra inquired about the status of the remand cases. (Dkt. 33-13 at 281.) Staff members responded in part stating:

> [W]e have the issue of the MOU to be dealt with before we can issue a decision . . . Jonah was to begin preparing the draft decision so we are ready with the exception of the MOU issue incorporating any comments received and the tribe's response.

(*Id.*)

> I have begun a re-draft of the Boyea NOD. . . . As far as the bias issue is concerned, I guess that the redraft of the MOU would address that issue? Was the IG Report ever closed when the bias issue was investigated? We have not seen any closing reports?

(*Id.* at 281-282.)[10]

The Record also confirms BIA's goal was not to just expeditiously process the applications but to ensure their approval by working with the Tribe. In December 2013, a Division employee, Russell Baker, contacted the Tribe stating: "I was finally able to get a formal request to the Filed Solicitor today regarding our MOU and potential bias. Here is a copy of the memo for your records. I'll keep you posted." (Dkt. 33-10 at 180-82.) In August 2015, the Tribe requested an update on the Solicitor's review of the bias issue in which a phone call was scheduled the next week. (Dkt. 33-2 at 200-03.) That same month, a Tribal member reached out directly to the RD asking the current status of the remand issues, including the bias issue. (Dkt. 33-2 at 198-99.) In September, BIA employee, Diane Baker, contacted the Tribe stating "I am assisting with drafting of the NOD. Can you verify for me what has gone into trust in the [Village] since we started in 2005? I need the information asap." (Dkt. 33-2 at 72.) In October 2015, BIA again reached out asking how many applications "we" have pending within the Village, which the Tribe responded with a list of over 50 applications that "could easily be over 100 parcels." (Dkt. 33-1 at 1-19.)

[10] Other communications the Village only received through FOIA further demonstrate the Division's role in drafting the decisions. In 2013, a Division employee, Russell Baker, thanked the Division staff for their work in getting "several decisions and reservation proclamations completed." (Dkt. 35-5 at 192.) Baker pushed the Division staff to "get as many NOD's completed" by the next week. (*Id.*) A Division employee responded that it felt "good to be getting that (NOD-Monkey) off his back[,]" and further acknowledged the fact that the Tribe's representative "ha[d] been very patient w[ith] [the Division]." (*Id.* at 192-93.) The same employee then confirmed additional decisions would be ready for Baker's review next week. (*Id.*)

In April 2016, Baker requested a rescheduled "Hobart Bias Meeting" with the Tribe and the RD. (Dkt. 32-12 at 192.) In June 2016, BIA and Division employees, including the RD, continued conference calls with one another regarding the remanded cases, including calls with the Solicitor's office and the Tribe. (Dkt. 32-6 at 161-65.) A month later, Baker emailed the Tribe regarding an update on the remand as it related to the IG's Investigation. (Dkt. 32-6 at 151.) The Division employee confirmed to the Tribe's representative "this is the last step in the process before we can issue the NOD." (*Id.*) BIA is supposed to be independently reviewing the Village's concern of bias in favor of the Tribe and who does the BIA consult with? The Tribe.

Certainly, at this point, the Remand Decision was not going to be a denial. In further effort to keep the Tribe involved in BIA's decision-making, the Division employee informed the Tribe's representative that the attorney working on the bias issue from D.C. was invited to the PIA conference to present on the status of the "MOU/BIAS issue" to the parties in attendance, which the Tribe confirmed it would attend. (*Id.* at 152-56.) In August 2016 upon the Tribe's request, the RD and Division employees scheduled a follow-up meeting with the Tribe for discussing the remanded cases. (Dkt. 32-6 at 144-51.) The request asked: "When can the group get back together to follow up on the pending Hobart NOD draft?" (Dkt. 32-6 at 146.) Baker's response, "[l]et me check on the Regional Director's schedule and get back to you." (*Id.*) The meeting was then scheduled—showing the RD, Division, and Tribe all were coordinating on how to address the bias claim. (*Id.* at 144, 147-48.)

Thereafter, the Tribe inquired whether the decision had been signed and issued. (Dkt. 35-9 at 156.) Baker responded that the Solicitors were taking a final look, but that as soon as the decision was routed for signature, the Tribe would be informed. (*Id.*) These types of communications are exactly the type that "possibl[y] . . . could affect" BIA's decision-making.

See Elec. Pwr. Supply Ass'n v. F.E.R.C., 391 F.3d 1255, 1259 (D.C. Cir. 2004). The substantial amount of communications, coupled with the MOU's stated goals, show the BIA, through the Division and the Tribe view themselves on the same team fighting against the Village, seeking the same common outcome: approving the Tribe's application. This interaction is much more than the Tribe "simply" being "allowed to participate in th[e] process with BIA." *Hobart II* at 106.

The Tribes are also invited to semi-annual and annual meetings with the RD to discuss, in part, the Division's accomplishments under the MOU. (Dkt. 35-9 at 159; Dkt. 35-10 at 5-23.) The Division's "Performance Measures" that outline the participating tribes' applications, include a category designated as "Fee to Trust Production: Major Milestones" that identify actual versus projected notices of decisions, acceptance of conveyances, and case completions. (Dkt. 35-5 at 190; Dkt. 35-10 at 1-3.) For the FY2017 accomplishments, the Remand Decision was noted as a "project for completion by 1/20/2017, *adding* an additional 499.022 acres." (Dkt. 35-10 at 1.) In August 2016, just months before the Remand Decision, Russell Baker expressed to everyone that "we are short of our IA-PMS projections for this FY. We projected 23 decisions. To date, only 15 decisions have been issued." (Dkt. 35-5 at 209.)

Likewise, not only does the Division itself have performance measures and expectations, the Division has "new Employee Performance Appraisal Plans and new Individual Development Plans." (Dkt. 35-5 at 192-94.) While the IG Report found it problematic that the Pacific MOU staff had performance pressures and incentives outlined in its terms, it is not clear why the Board ignores that concern for the Midwest MOU staff who share the same performance pressures. In addition, the meetings set forth the Division's budget and expenditures related to the processing of applications. (Dkt. 35-10 at 3.) Put simply, a review confirms the IG Report's findings – the Tribes "pay [BIA] salaries and expect results." (Dkt. 1-5 at 10.)

The prejudgment and coordinated efforts to guarantee acceptance under the MOU includes not only Division staff within BIA, but the RD as well. The Board's acquiescence in this type of practice is unacceptable and an abuse of discretion. Consequently, the Decisions must be vacated.

4. The Board and the RD did not fully review the IG Report.

The Decisions must be vacated for another reason – a complete review was not performed. In *Hobart I*, the Board ordered the RD on remand to consider the Village's bias claim; in particular, the IG's findings concerning the MOU. *Hobart II* at 92. In her Remand Decision, however, the RD simply referenced and cited to a redacted, incomplete version of the IG's Report that did not contain any of the 19 attachments upon which the report was based. *Id.* at 112. Specifically, the RD failed to address two attachments setting forth the Solicitor's review and legal opinion relative to the Midwest MOU. *See id.* Given the passage of 4 years, the RD should have secured a complete copy of the IG Report given the Board's requirement to review its findings.

In *Hobart II*, the Board excuses this lack of review; stating its prior "order required the [RD] to review 'the outcome of the IG investigation,' not the documents on which it was based." *Hobart II* at 112. That level of review, however, is not enough for the APA—particularly, when the Board acknowledges the RD was required to consider the IG's findings, but also contradictorily claims the IG's findings should be disregarded as "second-hand." *Id.* at 112, 114.

Despite ordering the RD to review the IG Investigation, and then excusing the fact the RD did not obtain a complete copy of the IG Report, the Board then also arbitrarily dismisses the IG's findings based on the Solicitor's legal opinion—concluding that "[b]ecause the Board does not have a copy of that legal opinion and cannot assess its reasoning . . . we do not rely on the IG Report's characterization of the opinion of the Office of Solicitor to decide this case and draw no inferences from the Inspector General's summary of it." *Id.* at 109, n.22, 111-12. This self-serving

and arbitrarily rebuff by the Board to excuse the RD's limited review of the IG Report, and then refusal by both the Board and the RD to consider the IG's findings from the Solicitor, violated the APA. Had the RD obtained a complete IG Report so the Board and RD could consider it, the IG Report's summary of the Solicitor's findings would have been confirmed. Instead, the Board disregards the Solicitor's determinations. Critically, what the Board does not acknowledge is the Solicitor's findings led to the recommendation to discontinue the MOUs.

E. The MOU Is Illegal Under Federal Law.

As further stated in the Village's briefing before the Board (Dkt. 35-8 at 108-112), the MOU is also illegal is due to violations of Federal ethics and appropriations law, and being contrary to the Indian Self-Determination and Education Assistance Act and the Tribal Self-Governance Act. (*See* Dkt. 1-5 at 13, 22 (IG concluding 25 U.S.C. § 123 provided "no authority for BIA to receive funds from tribes" and that consortiums "could be seen to be inconsistent with the general intent, if not the letter, of the Indian Self-Determination and Assistance Act.").) Although the MOU provides Division employees are governed by Title 5, such governance under the MOU relates only to the employees' personnel rights as federal employees.

Likewise, 25 U.S.C. § 458cc (1998) (funding agreements) and § 450(j) (1998) (redesign of a program, activity, function, or service carried out by the tribe) do not authorize the reallocation of federal funds back to BIA. The MOU utilizes TPA funds for the preference of specific tribes that request their TPA funds be reprogrammed. This reprogramming, however, is a direct violation of federal law which provides "nothing . . . may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof . . . ." *See* 25 U.S.C. § 5363(b)(2). The reprogramming of federal TPA funds provided by annual funding agreements between the United States and the Tribe for

the purpose of processing fee-to-trust applications on behalf of certain tribes creates precisely the preference forbidden by the statutory exception, especially given a tribe's involvement in the program created through those funds. (Dkt. 35-10 at 24-70.)

II. CONSIDERATION OF SECTION 151.10 VIOLATED THE APA.

The Secretary must consider the criteria under 25 C.F.R. § 151.10(a)-(h) when deciding whether to approve a tribe's on-reservation, discretionary fee-to-trust application. Under that criteria, conclusory and dismissive rationale that does "not respond to [a party's] concern[s], explain why [they] [are] not warranted, or otherwise address [them]" is grounds for remand. *See Jefferson Cnty., Ore., Bd. of Comm'rs v. Nw. Reg'l Dir., BIA*, 47 IBIA 187, 200 (2008). If "there [is] no justification for placing the land in *trust* status and removing the property from the state and local tax rolls[,]" the land should not be accepted into trust. *McApline v. U.S.*, 112 F.3d 1429, 1436 (10th Cir. 1997) (upholding denial of trust application and further noting BIA determined that "taking the land into trust status would create jurisdictional problems.").

Despite this authority, the Board boldly claims that "nothing in the [IRA] or th[e] regulations prohibits the Regional Director from taking land into trust whatever her conclusions about the criteria." *Hobart II* at 115. The Board then erroneously concludes the RD "may take land into trust even if she concludes . . . that doing so will create 'jurisdictional problems,' 'potential conflicts of land use,' or have a significant impact on the tax rolls of the State or its political subdivisions." *Id.* at 116. These statements alone from the Board should require the Board's Decision be vacated because it demonstrates the arbitrary and capricious nature of the RD's consideration. It was not the intended goal, nor purpose, of the IRA to allow tribes to have all the land they acquire be put into trust on the grounds of "policy statements." *See supra* n.9, Waples at 292, 298-302 (noting "'[n]eed' is not without limits" and "too many applications with

vague, nonspecific statements about the proposed use of the land are accepted."). When coupled with the MOU, the Board's rationale demonstrates the 151 regulations are nothing more than an inconsequential checklist of things to mention. This is improper and violates the APA.

A. The Passage of Time Between Decisions, Including the Six NODs Requires, Requires the Decisions Be Vacated for Further Consideration.

The Decisions should be vacated and remanded for further consideration of the Section 151.10 criteria given 15 years have transpired since the NODs were issued by the RD in 2010.

Previously, the Board has vacated BIA's decisions for a failure to solicit or request additional information after such a significant passage of time. In *Okanogan County v. Acting Portland Area Director, Bureau of Indian Affairs*, 30 IBIA 42 (1996), the Board vacated a regional director's decision due, in part, to the amount of time that had passed since the analysis under 25 C.F.R. § 151.10. The Board reasoned that "[w]here such a long period of time has passed since the initial analysis under section 151.10, it is incumbent upon BIA to update its analysis before proceeding with a trust acquisition." *Okanogan Cnty.*, 30 IBIA at 44. The Board concluded that due to the passage of time (five years), "it cannot be assumed that an evaluation made today would result in the same conclusion." *Id.* at 43-44.

Despite the Board's prior precedent requiring further consideration, the Board arbitrarily rejected the Village's argument. The Board claims the Village had its opportunity to provide comments for consideration and "chose not to submit whatever updated information it now believes was relevant[.]" *Hobart II* at 132-33. That is wrong. While true the Tribe, on behalf of BIA, sought supplemental comments from the Village after the Board ordered remand in 2013, since 2013 the Village has been afforded no further comment. The tax impacts are now different. The jurisdictional conflicts have increased, the Tribe's need for trust land has significantly lessened, the purpose is no longer known, and the environmental reviews are grossly outdated.

B. Section 151.10(e)-Tax Impacts and Losses.

Under Section 151.10(e), the Secretary must consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."

1. The Board violated the APA by disregarding the cumulative tax effects.

Of the Tribe's pending applications, these Properties constitute 500 acres of the 2,670+ acres the Village is at risk of losing, in addition to the 1,538 acres that is already in trust. The very Mission Statement of the Tribe confirms its intention is to eradicate the Village by acquiring as much land into trust as possible. (Dkt. 35-8 at 151.) The Tribe has resolved that "regaining control over the land within the original Oneida Reservation in Wisconsin is one of its highest priorities." (Dkt. 35-11 at 114.) As of 2017, the Tribe already owned 40.9% of its original Reservation in either fee or trust. (Dkt. 35-8 at 155.) As of 2024, that percentage has grown to 45% or the equivalent of 29,406.79 total acres.[11]

The Board also ignored the 2009 Beacon Hill Institute study evaluating the Tribe's then currently pending fee-to-trust applications within the Village. (Dkt. 34-8 at 86-105.) A determination was made that "within 50 years all of the land in [the Village's] tax base would be transferred into [the Tribe's] federal trust, completely eliminating property tax revenue." (*Id.* at 89.) The study concluded: "[U]nless the Village secures legal relief or finds an alternative revenue resource, if the [Tribe] continue its trends of transferring land from fee to trust, the Village will face fiscal and geographical extinction." (*Id.* at 101.)

The Board claims the RD did not need to address the other pending applications because BIA "may or may not ultimately" approve those pending applications. *Hobart II* at 116-117. This position ignores reality. The whole system is set up to approve applications. Moreover, the Board

[11] https://oneida-nsn.gov/wp-content/uploads/2024/11/Quarter-4-Report-ELA.pdf.

ignores each acquisition viewed in isolation is death by a thousand cuts—each acquisition harms.

The Board also arbitrarily argues that: "[r]equiring the Regional Director to determine the potential cumulative tax impacts of applications that have not been decided would result in a decision based not on the record[.]" *Hobart II* at 117. This rationale is flawed. The Record – as well as the Board's decision in *Hobart I* – discloses that in 2008 alone, the Tribe requested approximately 2,673 acres of land be transferred into trust. (Dkt. 35-1 at 649-673; Dkt. 35-3 at 640; *Hobart I* at 5, n.4.) To ignore this evidence and contend it would be speculation for the RD to consider these pending applications as part of the tax impacts violated the APA.

Moreover, the Board improperly ignored the Village's inability to increase its tax levy to address the effects of cumulative loss, to continue to fund the services it must provide to its residents, tribal and non-tribal alike. *See Hobart II* at 117, n.27. Wis. Stat. § 66.0602 limits the amount the Village may increase taxes each year. And, even if the Village could raise taxes on non-tribal land, that would significantly increase the burden of all those who pay taxes.

2. The tax loss impacts affect public services.

The Board also improperly dismissed the Village's concerns relating to continued funding of public services, including fire protection and road maintenance. The Board improperly concluded the Village's arguments are just "disagreement," and all the RD was required to do was acknowledge the Village's concern and consider it in her decision. *Hobart II* at 121.

With regard to public services, the Decisions acknowledge the Village will go uncompensated for services it must provide. *Hobart II* at 119. Nonetheless, the Board concludes: "Nothing in the principles of administrative law or Part 151 required the Regional Director to solve this potential problem or prohibited her from taking this land into trust even though doing so may impose some burdens on the Village." *Id.* In other words, according to the Board, the RD may

ignore impacts required to be considered under the Part 151 criteria. This was an error.

It was conceded the Village will go uncompensated for the fire protection service it must still provide. However, the Board dismisses this based on the RD's conclusion that the Village did not provide specific information regarding the exact costs, and because once the Properties are held in trust the situation is similar to services for other tax-exempt properties. *Hobart II* at 120. Yes, the Village must provide these services to other tax-exempt properties. However, those properties do not account for thousands of acres. The fact the Village will be required to provide services – with reduced funding – to thousands of acres of trust land was not considered. If it was, it certainly would weigh against acquisition. Had the RD requested additional information from the Village – like BIA consistently does for the Tribe – she would have confirmed the amount of funding required for the Village's fire and police protection. (Dkt. 35-11 at 118-29.)

The Board claims the RD solicited additional comments from the Village, and the Village could have provided specific information. *Hobart II* at 120. The RD did not solicit information from the Village; rather via an improper delegation, the Tribe did. (Dkt. 33-13 at 292-338.) The Tribe informed the Village that "we are soliciting the Village's comments, if any, on the remanded portions . . . for consideration when the BIA makes its decision on remand." (*E.g.*, *id.* at 293.) As to the tax revenue impact the supplemental notice provided: "In particular, it would be helpful if the Village would explain its relationship with the County vis-à-vis taxes. Please provide any further tax or land use information which you believe is relevant to the BIA's consideration of this issue." (*Id.* at 294.) Nothing within the supplemental notice requested the Village submit specific cost information, and there is nothing in Part 151 requiring a municipality to provide cost information about particular programs or services. And nevertheless, the Secretary is well within

its authority to "request any additional information or justification deemed necessary to reach a decision." 25 C.F.R. § 151.12(a).

Likewise, the Village will also remain responsible for providing the same level of road services, including maintaining and repairing roadways. As justification for affirming the Remand Decision, the Board simply repeats the RD's conclusory rationale that Indian Reservation Road Inventory, which provides tribes with BIA funding for eligible roads, "partially offset[s] the Village's financial burden for road maintenance." *Hobart II* at 121. This conclusion, however, does not address the fact that the Village does not receive that funding—the Tribe receives it.

The future tax loss and resulting harm is not speculative, but rather a real threat to the Village's survival. The Record evidences BIA's one-sided approach to ensure all the Tribe's land is accepted into trust, regardless of the impacts on local governments, when requested by the Tribe. Given the Tribe's stated goal to reacquire 100% of its original reservation and the Village's loss of tax revenue for services, it was arbitrary and capricious to disregard the cumulative tax loss.

C. Section 151.10(f)-Jurisdictional Problems and Land Use Conflicts.

Pursuant to Section 151.10(f), "jurisdictional problems and potential conflicts of land use which may arise" must also be considered. Similar to the conclusory analysis concerning the tax impacts, the Board also erroneously affirmed the RD's consideration under this criterion – claiming Section 151.10 "only requires the Regional Director to consider potential jurisdictional problems and conflicts of land use that may arise from these trust acquisitions." *Hobart II* at 122. Again, the Board concludes the RD "is not required to resolve or prevent those problems, nor is she required to weight those problems[.]" *Id.* This type of conclusion violates the APA.

For its Remand Decision, the Board requested the RD consider the Village's land use concerns regarding zoning and stormwater management "given the increasing checkerboard

geography of fee and trust land within the Village's boundaries." *Hobart I* at 30. The Board noted that "if the Regional Director again decides to approve these trust acquisitions, she should address [the concerns] in more detail to make clear they have been considered and to explain terms that the Village contends it does not understand." *Id.* Despite that, the RD did no such thing.

1. Stormwater management disruptions.

Despite recognition that trust acquisition will "complicate" the Village's efforts to improve stormwater management given the fact that two separate programs will now need to be implemented in a checkerboard pattern, the Board and RD conclude this issue has been resolved because jurisdiction is now clear. *Hobart II* at 122-23. The Board then concludes that because the RD acknowledged the concern, the RD properly considered it. *Id.* at 123. This was wrong.

In *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, 841 (7th Cir. 2013), the Seventh Circuit held that the Village could not assess a storm water management fee on trust land. However, the Seventh Circuit concluded it is "odd" that there should be two separate programs in "tiny Hobart, administered by different sovereigns" and "it's difficult to see how there can be separate programs." *Id.* The Seventh Circuit believed this jurisdictional conflict was so real that it even suggested the Village should seek "an exception of necessity" so as to obtain jurisdiction over tribal land for stormwater purposes." *Id.* These statements from the Seventh Circuit's demonstrate this jurisdictional conflict will only be exacerbated by trust acquisition, contrary to the Board and the RD's views. No meaningful consideration was given to this issue.

2. Zoning checkerboard.

Likewise, the Tribe's continued acquisitions of land and ability to implement its own zoning across the Village only serves to increase the jurisdictional problems and land use conflicts with in the Village. Despite the Board's affirmance of the RD stating the Tribe's proposed uses

are "generally consistent" with the Village's zoning, the Board completely ignores the Village's concern that there would be different zoning designations *within* a single zone if the land is held in trust. The Board concludes the RD considered this, but does not recognize that for the Gerbers property, the Tribe will have trust land designated as residential and agriculture, located within the middle of land zoned and designated by the Village as mixed commercial / industrial. (*See* Dkt. 1-4 at 11; Dkt. 35-11 at 131.) Per the Tribe's 2033 Land Acquisition Plan, "the greater the ownership of land the greater the Tribe's influence in land use and development within the Reservation through the Oneida Tribe's zoning, land use, and development decisions."[12] Because the Tribe's ability to checkboard by trust acquisition and thwart the Village's development through its own comprehensive zoning was not considered, the Decisions violated the APA.

3. *Emergency services.*

Another jurisdictional conflict that the Board and RD conceded was the inability of the Village and the Tribe to reach an intergovernmental services agreement. *Hobart II* at 124. As stated previously, not only does a diminished tax revenue pose additional burdens on the Village to fund those emergency services, additional jurisdictional conflict is created, related to these services, when land is accepted into trust in an increasingly checkerboard fashion. The Board concludes that the RD appropriately considered this by concluding "the most feasible solution" is the development of cooperative services agreements. *Id.* However, this is directly contradictory to the RD's conclusion based upon the Tribe's admission that "entering into a future service agreement is unlikely." (Dkt. 1-4 at 8, n.43.) The Board's justification – the RD simply had to consider the comment. *Hobart II* at 124 (further noting that the RD "was not prohibited from taking land into trust even if it may affect the Village's ability to provide emergency services.").

[12] https://oneida-nsn.gov/wp-content/uploads/2016/03/09-18-10-A-2033-Land-Acquisition-Plan.pdf?_rt=N3wxfDIwMzN8MTc0MjkxMjk3MQ&_rt_nonce=8cf8d28931.

Consistent with the stated goal in the MOU, land must be accepted into trust – even if apparently doing so will result in acknowledged harm. The mere fact that the Board simply affirmed the RD's Remand Decision on the grounds that the RD just had to hear and consider the Village's comments – regardless of the impacts, which both the Board and the RD acknowledge are harmful to the Village – warrants the Decisions be vacated.

D. Section 151.10(h)–Environmental Considerations.

The Board's Decision concerning BIA's review under Section 151.10(h) was arbitrary and not in accordance with the law – further highlighting the Decisions are based on nothing more than "formalist paper shuffling between agency desks" to complete its checklist to acquire the Properties into trust. *See Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123, 1129 (5th Cir. 1974) (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm.*, 449 F.2d 1109, 1113 n.5 (D.C. Cir. 1971). Under Section 151.10(h), the Secretary must consider "the extent to which the [Tribe] has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations." With respect to this criterion, the Board makes two findings: (1) the Village has not shown standing, and (2) even if the Village has standing to challenge Section 151.10(h), there is no harm. *Hobart II* at 124-32.

First, the Board's question regarding standing must be rejected. Put simply, if local governments do not have standing to challenge review under Section 151.10(h) in the context of a fee-to-trust application that seeks to remove local jurisdiction, then who does? Certainly, BIA and the Tribe will not challenge any improper or deficient review that they themselves perform. The Village has standing and the challenged action was not in accordance with the law. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 and 573, n.7 (1992).

NEPA requires "that an agency affirmatively develop a reviewable administrative record supportive of a decision not to file an impact statement." *Nucleus of Chi. Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975) (citing *First Nat'l Bank of Chi. v. Richardson*, 484 F.2d 1369, 1381 (7th Cir. 1973); *Scherr v. Volpe*, 466 F.2d 1027, 1032 (7th Cir. 1972). An agency decision must "'articulate a satisfactory explanation' for its action," rather than stating a mere conclusion. *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)). Likewise, in accordance with 602 Department Manual 2, ECM 10-2 Guidance provides that pre-acquisition site assessments must be prepared in accordance with the required regulations within one year of the date of acquisition, but "the regulations provide that specific elements . . . must be conducted, or updated, within 180 days of the date of acquisition." (Dkt. 35-12 at 41.) Under 602 DM 2, "[b]ureaus/offices are responsible for ensuring that the [Phase I Environmental Site Assessment ("ESA")] . . . is complete in terms of technical accuracy and comprehensiveness . . . ." 602 DM 2.7(B)(4).

Here, the RD failed to comply with agency regulations for NEPA compliance, including its own Environmental Compliance Memorandum No. ECM 10-2 on June 16, 2010 (Dkt. 35-12 at 35-138) and Part 602 of the Department of Interior Manual. For one, the reliance on a categorical exclusion[13] and the Phase I ESAs are outdated now, and appear to be outdated when the Remand Decision was issued. (*See* Dkts. 32-8 to 32-12 (April 29, 2016).) Given Phase I ESAs prepared are over 180 days from the date of the RD's Remand Decision on January 19, 2017, the required regulations under 602 DM 2 were also not fulfilled. *See* 602 DM 2.8(C.) Where an agency fails to follow its own regulations, its actions are reviewable under the APA. *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990) (citing *Service v. Dulles*, 354 U.S. 363 (1957)).

[13] The reliance for this categorical exclusion is based on similarly dated statements.

Per BIA regulations and ASTM standards, a Phase I ESA also requires interviews with "state and/or Local Agency Officials." *Hobart I* at 99; *see also* ASTM 1527-13 7.2.3.2. A review of the Record confirms that did not occur. The Phase I ESAs reveal interviews occurred only with the Tribe. (*E.g.*, Dkt. 32-14 at 174-76.) Under the Standard, "local government agencies" are defined as "those agencies of municipal or county government having jurisdiction over the property. Municipal and county government agencies include, but are not limited to cities, parishes, townships, and similar entities." ASTM 1527-13 3.2.50. A reference to tribe or tribal staff is not listed. Elsewhere in the Standard, "tribe" or "tribal" is distinguished and expressly listed in addition federal, state, or local governments. (*See* 4.6(iii); 5.1; 6.2.1; 8.2.1; and 8.2.3). Accordingly, because local governmental officials, such as Village staff, were not interviewed BIA's failure violates the APA. A decision requiring the proper compliance with Section 151.10(h), which includes contact with the Village, will address the harm traced to the agency's action (or more appropriately, inaction).

III. SECTION 5 OF THE IRA IS UNCONSTITUTIONAL.

Section 5 of the IRA permits the Secretary of the Interior "in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108. This broad and unlimited grant of extraordinary power that allows the Secretary to extinguish state sovereignty creates two fundamental problems.

A. Section 5 Violates the Non-Delegation Doctrine.

The non-delegation doctrine is a cornerstone of separation of powers jurisprudence, *Mistretta v. United States*, 488 U.S. 361, 371 (1989), existing since the days of Locke. *See* John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The legislat[ure] can have no power to transfer their authority of making laws, and place it in other hands."). The doctrine is codified

in the Constitution, which vests "[a]ll legislative Powers herein granted … in a Congress of the United States," U.S. Const. Art. I, § 1, and "permits no delegation of those powers[.]" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). To avoid an unconstitutional delegation when conferring decision-making authority on an agency, Congress is required to articulate, "by legislative act," an intelligible principle to direct the person or body authorized to act. *Id.* at 472. The question, then, is whether "Congress has supplied an intelligible principle to guide the delegee's use of discretion" and the Court's exercise is to "constru[e] the challenged statute to figure out what task it delegates and what instructions it provides." *Gundy v. United States*, 588 U.S. 128, 135–36 (2019).

Recently, the Fifth Circuit relied heavily on the non-delegation doctrine, concluding that it, and other courts, "ought not to shy away from [their] judicial duty to invalidate unconstitutional delegations." *Consumers' Research v. F.C.C.*, 109 F.4th 743, 759 (5th Cir. 2024) (en banc). While the Supreme Court has only applied the doctrine twice, *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), it granted certiorari in the Fifth Circuit action, demonstrating the doctrine's continued significance. *See id., cert. granted*, No. 24-354, ---S.Ct.---, 2024 WL 4864036 (Nov. 22, 2024).

As the Fifth Circuit so recently explained, there are "limits of delegation which there is no constitutional authority to transcend[,]" in part, because "[v]ague congressional delegations undermine representative government because they give unelected bureaucrats—rather than elected representatives—the final say over matters that affect the lives, liberty, and property of Americans." *Consumers' Research*, 109 F.4th at 759 (internal quotations and citations omitted). Such delegations also "offend the deliberation-forcing features of the constitutionally prescribed legislative process." *Id.* "[W]hile the Supreme Court has not in the past several decades held that

Congress failed to provide a requisite intelligible principle … [t]hat does not mean … [courts] must rubber-stamp all delegations of legislative power." *Id.* (internal quotations and citations omitted). Accordingly, it is this Court's responsibility to "invalidate unconstitutional delegations" and ensure unelected bureaucrats are not improperly wielding expansive authority that directly impacts the well-being of the States, their municipalities, and their citizens. *See id.* at 759–60.

The Seventh Circuit wholeheartedly agreed in a recent decision addressing this issue:

> [E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of "fortitude ... to do [our] duty as faithful guardians of the Constitution."

City of Chicago v. Barr, 961 F.3d 882, 920 (7th Cir. 2020) (internal citations omitted).

And so, we return to the text of Section 5:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 5108. Section 5 fails to supply an intelligible principle by which the Secretary of the Interior is to be guided. There are no guide-posts whatsoever, only the identification of the beneficiaries on whose behalf the United States should acquire the land: "for Indians." This is not enough. This Court should conclude Section 5 does not survive the doctrine's application because

it does not provide *any* principle by which the Secretary is directed, let alone an intelligible one.[14]

Neither the United States Supreme Court nor the Seventh Circuit have considered whether Section 5 of the IRA is violative of the non-delegation doctrine. Other Circuits have. As the Eighth Circuit noted in *South Dakota v. United States Department of Interior*, "[b]y its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls." 69 F.3d 878, 882 (8th Cir. 1995), *mandate recalled and vacated*, 106 F.3d 247 (*South Dakota I*). To highlight Section 5's absurdity, the Eighth Circuit stated the section would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* This is possible, thanks to Section 5's lack of "perceptible boundaries" and "intelligible principles" within the four corners of the statutory language, and its delegation of "unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians." *Id.* The result, the Eighth Circuit correctly noted, is an "agency fiefdom whose boundaries were never established by Congress," and thus, held the statute to be unconstitutional under the non-delegation doctrine. *Id.* at 885.

Shortly after the Eighth Circuit reached its conclusion, the Supreme Court granted a petition for writ of certiorari. To evade review, however, the United States then reversed its position on whether judicial review was available under Section 5. The United States requested the Supreme Court to not hear the case but instead remand the case with instructions to vacate the District Courts' judgment and remand the matter to the Secretary for reconsideration. *See Dep't of Interior v. South Dakota*, 519 U.S. 919 (1996). Justices Scalia, O'Connor, and Thomas

[14] The Court should be particularly confident in its authority to make such a decision in light of the Supreme Court's recent and consistent decisions curbing the previously-unchecked authority of administrative agencies. *Cf. Loper*, 603 U.S. 369 (overruling *Chevron* deference); *see also SEC v. Jarkesy*, 603 U.S. 109 (2024); *Garland v. Cargill*, 602 U.S. 406 (2024).

dissented from the decision, and urged the Court to hear the non-delegation challenge, all while lambasting the United States' "about-face" maneuver to evade further review. *See id.* at 920-23.

Despite the Eighth Circuit's holding of unconstitutionality, and a punt by the Supreme Court, the Nation's Federal Courts began scrambling to save Section 5. The Tenth Circuit was first to take the issue following the Eighth Circuit. *See United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999). The Tenth Circuit relied almost exclusively upon Judge Murphy's dissent in *South Dakota I*, which placed an inordinate amount of weight on the legislative history of the IRA—which, of course, did not make its way into the statutory text of Section 5. *See id.* at 1137.[15]

Six years later, a different panel of the Eighth Circuit revisited the issue in *South Dakota v. United States Department of the Interior,* 423 F. 3d 790 (8th Cir. 2005) *(South Dakota II).* The court began by stating it was not bound by its earlier decision given the Supreme Court's "GVR" and stated that it wished to "reexamine the broader context of the IRA." *Id.* at 796. This proclamation, however, was short-hand for abandoning the statutory text in favor of legislative history. *See id.* at 797-99. The Eighth Circuit highlighted the IRA's legislative history repeatedly, positing its intent and purpose was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Id.* at 798. Relying on nothing more than generalized statements from the bill's sponsors, the Eighth Circuit concluded that the phrase "for the purpose of providing land for Indians" supplies an intelligible principle when "viewed in the statutory and historical context of the IRA." *Id.* at 799. In other words, the Eighth Circuit, even in *South Dakota II*, acknowledged that standing alone, the wording of Section 5 does not provide an intelligible principle.

[15] The Tenth Circuit's decision in *Roberts* is conclusory, at best. It spends a mere two paragraphs disposing of the issue and completely disregards the majority's opinion in *South Dakota I*, considering it to be irrelevant given the Supreme Court's use of a "GVR." 185 F.3d at 1137.

South Dakota II is particularly suspect given that nothing meaningfully changed between the Eighth Circuit's decision in *South Dakota I* and *South Dakota II*. The only thing that changed, Justice Scalia tells us, is that the Department of the Interior changed its mind on the availability of judicial review for decisions of the Secretary made pursuant to Section 5. *See South Dakota*, 519 U.S. at 920–21 (Scalia, dissenting). But as Justice Scalia correctly questions—what does the availability of judicial review have to do with an unconstitutional delegation of authority from Congress to the Executive Branch? *See id.* at 922. The answer, of course, is nothing. Given that nothing in Section 5's text changed, it is difficult to understand why the Eighth Circuit concluded that Section 5 was now suddenly constitutional, in direct contradiction of *South Dakota I*.

Nonetheless, since *South Dakota II*, the First and D.C. Circuits have employed an analysis similar to *South Dakota II*—one that relies on the questionable analytical triumvirate of historical/legislative context, legislative history, and the mere length of time since the last successful non-delegation challenge—in reaching the conclusion that Section 5 is not violative of the non-delegation doctrine. *See Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).[16] Crucially, however, the legislative history on which these cases rely does not do the work required of it. After all the Supreme Court has held the intelligible principle must be established "by legislative act," not legislative history. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

It is well-settled that "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018); *see also Carcieri*, 555 U.S. at 387 (noting that, where statutory text is plain and

[16] The D.C. Circuit in *Michigan* also rested its decision, in part, on the Supreme Court previously endorsing "interstitial lawmaking authority" by executive agencies, and relied on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to do so. Of course, that rationale no longer holds water, given that *Chevron* has been overruled. *Cf. Loper*, 603 U.S. 369.

unambiguous, the text of the statute controls). It would seem beyond extraordinary to look to legislative history to determine whether Congress, *in the statute itself*, provided an intelligible principle by which to guide the Secretary.

But, even assuming legislative history is an appropriate tool by which to measure the existence of an intelligible principle, there remains a glaring problem—legislative history is not the law, and is in no way binding upon the Secretary. *See id.* If the intelligible principle is not binding, it is no principle at all—it is mere fodder for the Secretary to consider if he wishes, but to ignore if he desires, given that Section 5 vests sole discretion with him. As such, legislative history should play no role in determining whether Section 5 provides a guiding and intelligible principle.

The fact Section 5 lacks even minimal guidance is demonstrated by cases in which the Supreme Court upheld statutes against non-delegation challenges. For example, in *Gundy v. United States*, 588 U.S. 128, 139 S. Ct. 2116 (2019) (plurality op.) the plaintiff argued that the Sex Offender Registration and Notification Act (SORNA) gave the Attorney General the ability to decide whether to apply the Act to pre-Act offenders. *Id*. at 136. The court denied this challenge finding numerous intelligible principles in the Act, itself. Additionally, per Act's terms, the Court noted the Attorney General had no discretion on whether to implement the Act but instead was mandated to do so. *Id*. at 136. The Court noted it "*would* face a nondelegation question" if the statutory provision at issue had "grant[ed] the Attorney General plenary power to determine [the statute's] applicability to pre-Act offenders – to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." *Id.* at 136 (emphasis added).

Even with guidance far exceeding what can be found in Section 5 three of the Supreme Court Justices in *Gundy* dissented stating "today, a plurality of an eight member court endorses this extra constitutional arrangement but resolves nothing." *Id*. at 149. And wrongfully

"reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing so much power to the Attorney General." *Id*.

The Seventh Circuit agreed with this concern in *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020) noting that both the dissent and the plurality in *Gundy*, acknowledged that if SORNA allowed the Attorney General as much authority as the plaintiff claimed there would be a non-delegation question. *Id*. The Seventh Circuit then stated that "[h]ere the Attorney General's interpretation of the 'other applicable Federal law' language (in the statute at issue in that case) would grant the type of unfettered discretion to determine *whether* a particular federal law will be a precondition of the grant that seven Justices of the *Gundy* court recognized represents a constitutional non-delegation issue. Accordingly, the language of the statute, if read as delegating the authority to the Attorney General to choose which federal laws would constitute conditions of the grant, would raise grave constitutional concerns." [17] *Id*. at 907 (emphasis in original).

Here, Section 5 provides the Secretary complete and unfettered authority to decide *whether* land should be acquired or not, as she sees fit, and to change her policy for any reason and at any time. If she unilaterally decides to do so, it does not state how, if at all, the property should benefit Indians; whether the property should have any historical connection to the individual Indian or tribe involved; or whether the Secretary should consider the impact of the acquisition on the individual States, its municipalities, or its constituents. Section 5 allows the Secretary to act (or not act) with no Congressional oversight. This is the inadequate "guidance" the Supreme Court in *Gundy* and the Seventh Circuit in *City of Chicago* stated "would face a non-delegation question."

This problem creates serious consequences. The acceptance of land into trust exempts the properties from both State and local taxation. *See* 25 U.S.C. § 5108. And, as the regulations are

[17] Ultimately the Seventh Circuit did not rule on the non-delegation issue instead finding the Attorney General exceeded authority delegated by Congress in the statute. *Barr*, 961 F.3d at 931.

currently written, acceptance of land into trust unconstitutionally renders local laws, including ordinances, codes, resolutions, rules, or any other regulations inapplicable. *See* 25 C.F.R. § 1.4. Moreover, emboldened by the lack of action by the Federal Courts and Congress, the Executive Branch is arrogating to itself greater and greater authority in these matters. Look no further than the recently revised Part 151 fee-to-trust regulations that took effect last year. Where the Secretary was once required to give due consideration to the impacts that acceptance of land into trust would have on local governments' regulatory jurisdiction, property taxes, and special assessments, the new regulations permit the Secretary to "presume" that such impacts "will be minimal." *See* 25 C.F.R. § 151.10(c). This Court has the opportunity to prevent this unlawful arrogation of power, and importantly, return the power to Congress. Accordingly, this Court should follow the rationale set forth in *South Dakota I*, recognize the Court's obligation to invalidate unconstitutional delegations as just confirmed by *Consumers' Research* and show the fortitude called for by the Seventh Circuit in *City of Chicago*, and hold that Section 5 of the IRA violates the non-delegation doctrine, and is unconstitutional.

B. Section 5 Exceeds Congress's Power Under the Indian Commerce Clause.

When the Secretary takes land in trust for Indians, that precludes states from asserting fundamental aspects of their sovereignty on what is then deemed Indian Country. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1988); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). "Land held in trust is generally not subject to (1) state or local taxation, *see* 25 U.S.C. § 5108; (2) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); or, (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction, *see* 25 U.S.C. §§ 1321(a), 1322(a)." *Connecticut ex rel. Blumenthal v. United States DOI*, 228 F.3d 82, 85-86 (2d Cir. 2000). Furthermore, "tribal sovereignty is dependent on, and subordinate to, only the

Federal Government, not the states." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). In other words, Section 5 is extraordinarily destructive to the states. If they are to retain any jurisdiction, it is at the federal government's mercy and only when "Congress explicitly delegates" such authority. The power which Congress permits these destructive effects purportedly comes from the Indian Commerce Clause, which provides that Congress have the power to "regulate Commerce … with the Indian Tribes." U.S. Const., Art. I, Sec. 8, Cl. 3. Historically, the Supreme Court has described the Indian Commerce Clause as providing Congress with "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

The assertion the Indian Commerce Clause provides "plenary" power to Congress is problematic. "Neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress's claim to such 'plenary' power." *Upstate Citizens for Equality, Inc. v. United States*, 140 S. Ct. 2587, 2588 (2017) (Thomas, dissenting from the denials of certiorari) (citations omitted). It simply states Congress has the power to "regulate Commerce" with Indian tribes, just as the clause also provides Congress has the power to regulate commerce with "foreign Nations," and "among the several States." U.S. Const., Art. I, Sec. 8, Cl. 3. These powers all appear in the same clause of the Constitution, and nowhere does it state Congress has "plenary" authority over Indians, or otherwise indicate that Congress has greater authority over Indians than it does foreign nations or individual states. *See id.* So, if the Indian Commerce Clause provides "plenary" authority over Indians, then Congress must also enjoy a plenary power over all foreign nations and among the several states, given the Commerce Clause provides Congress with the identical textual authority for those sovereigns. *See id.* Of course, no one believes Congress has plenary authority over foreign nations or states. It is well understood the Commerce Clause itself is not plenary.

See, e.g., *United States v. Morrison*, 529 U.S. 598, 619 (2000). Thus, it is anomalous to say that while the Commerce Clause does not grant the federal government plenary power over the states, it does grant Congress a general police power over the country's Indian tribes.

These concerns are not without endorsement from the Supreme Court. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 378–79 (1886). ("But we think it would be very strained construction of this clause that a system of criminal laws for Indians . . . without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes."). The concern over the true meaning of the Indian Commerce Clause continues. Look no further than Justice Thomas, who has repeatedly authored dissents on the Indian Commerce Clause precedents. *E.g.*, *Upstate Citizens*, 140 S. Ct. at 2587 (collecting cases).

As Justice Thomas has explained, the Indian Commerce Clause extends only to "regulat[ing] trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State." *Id.* (citation omitted). Understood this way, the Indian Commerce Clause "does not appear to give Congress the power to authorize the taking of land into trust under the IRA." *Id.* Even assuming a land transaction is "commerce," many, if not the majority, of transactions under the IRA "do not involve trade of any kind." *Id.* at 2588. Indeed, Section 5 permits the Secretary to accept land into trust that an Indian tribe already owns. *Id.* And, where the tribe already owns the land, "neither money nor property changes hands. Instead, title is slightly modified by adding 'the United States in trust for' in front of the name of 'the Indian tribe or individual Indian' who owns the land." *Id.* This, as Justice Thomas correctly notes, "does not affect the Indian tribe's beneficial ownership of the property, and it does not afford the United States any meaningful property rights." *Id.* Thus, a transaction under the IRA does not resemble "trade with Indians," and therefore, does not fall within the Indian Commerce Clause. *Id.*

"Congress has thus obtained the power to take any state land and strip the State of all most all sovereign power over it[.]" *Id.* This power means "Congress could reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory." *Id.* To this Nation's Founding Fathers, it would be unthinkable the Indian Commerce Clause, "which was virtually unopposed at the founding," would authorize Congress to "destroy the States' territorial integrity." *Id.* "Indeed, they would have been shocked to find such a power lurking in a Clause they understood to give Congress the limited authority 'to regulate trade within Indian tribes living beyond state borders.'" *Id.*

Recently, the Supreme Court held the power is not "absolute" or "unbounded":

> Admittedly, our precedent is unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority. That makes it difficult to categorize cases and even harder to discern the limits on Congress's power. Still, we have never wavered in our insistence that Congress's Indian affairs power "'is not absolute.'" It could not be otherwise—Article I gives Congress a series of enumerated powers, not a series of blank checks. Thus, we reiterate that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.

Haaland v. Brackeen, 599 U.S. 255, 275-76 (2023) (internal citations omitted).

This Court should heed Justice Thomas's warnings and the Supreme Court's recent insistence that Congress's power under the Indian Commerce Clause is not absolute, is subject to limitations, and has borders, and conclude the Indian Commerce Clause does not provide Congress with the authority to accept land into trust for individual Indians or tribes, leading to the wholesale destruction of states. The Court should rule that Section 5 of the IRA is unconstitutional.

The destruction Justice Thomas has repeatedly warned of is real. According to an October 2023 GAO report, the United States currently holds *57 million* acres of land in trust for Indian tribes and another *10 million* acres for individual Indians. *Bureau of Indian Affairs Should Take*

Additional Steps to Improve Timely Delivery of Real Estate Services (October 2023) GAO-24-105875, available at https://www.gao.gov/assets/gao-24-105875.pdf. That's *67 million acres* of sovereign State territory completely removed from the tax rolls and stripped of jurisdiction. The Founding Fathers would have never contemplated such a drain on the States' sovereignty.

Nor would the Founding Fathers have anticipated that Indian tribes would amass significant wealth from casino profits, such that their ability to acquire vast swaths of land, at the direct expense of states, would grow exponentially with time. In 2023, the National Indian Gaming Commission confirmed tribes are generating $41.9 billion per year in gaming revenue.[18] *See* National Indian Gaming Commission, *NIGC FY 2023 Gross Gaming Revenue Report*, available at https://www.nigc.gov/images/uploads/GGR23_Final.pdf. Moreover, the Founding Fathers would not have anticipated the Federal Government would fund Indian tribes to the tune of over $32 billion per year. *See Funding and Programs Meant to Help Tribes May Not Be Reaching Them* (December 2024), available at https://www.gao.gov/blog/funding-and-programs-meant-help-tribes-may-not-be-reaching-them.

This massive amount of funding, combined with Congress's overreach with the Indian Commerce Clause and its wholesale lack of oversight of the Secretary for acquisitions under Section 5, now means the individual States have been hung out to dry. This Court has the opportunity to put an end to this unconstitutional scheme, and it should do so.

CONCLUSION

For these reasons, the Court should grant the Village's Motion for Summary Judgment.

[18] As of 2017, the Tribe generated $211,289,836 *net of payouts* which has resulted in an annual total budget of $453,500,224 of which nearly $10,000,000 per year is dedicated to the purchase of land to then be placed in trust. (Dkt. 35-13 at 1092-99.)

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