IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN GREEN BAY DIVISION

VILLAGE OF HOBART, WISCONSIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR et al.,

Defendants.

Case No. 1:23-cv-01511-WCG

UNITED STATES' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff challenges the Acting Midwest Regional Director's ("Regional Director") January 19, 2017, decision ("2017 Decision") and September 21, 2023, Interior Board of Indian Appeals ("Board") decision (together, "Decisions") to acquire approximately 499.022 acres of land located within the Oneida Reservation and the Village of Hobart, Brown County, Wisconsin ("Property") into trust for the benefit of the Oneida Nation ("Nation").[1] Plaintiff argues in support of its Motion for Summary Judgment that the Decisions were arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act ("APA"), for failing to meaningfully consider Plaintiff's comments or correctly apply certain regulatory criteria. Dkt. 57 at 25-35. Plaintiff also argues that the decision-making process was inherently biased under a Memorandum of Understanding between the BIA Midwest Regional Office and the Nation ("MOU"). Dkt. 57 at 11-25. Finally, Plaintiff facially challenges the constitutionality of Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108, under the nondelegation doctrine and Indian Commerce Clause. Dkt. 57 at 35-47.

Plaintiff fails to meet its burden under the APA to show that the Decisions were arbitrary, capricious, or an abuse of discretion, and fails to demonstrate bias stemming from the MOU. In addition, Plaintiff's constitutional challenges are meritless. Defendants the United States Department of the Interior et al. ("United States" or "Interior") thus respectfully request that this Court deny Plaintiff's Motion and enter an order affirming the Decisions.[2]

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[1] The properties are known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay properties.

[2] At a March 18, 2024, scheduling conference, the Court stated it would decide the case not on summary judgment, but as "an administrative determination by a governmental agency." Dkt. 22. Plaintiff moved for summary judgment. Dkt. 56. Defendants respectfully ask the Court to enter judgment in the United States' favor with or without reference to summary judgment.

II. BACKGROUND

A. The Indian Reorganization Act and Fee-to-Trust Regulations

Congress enacted the IRA in 1934 to provide mechanisms to support tribal self-determination and self-governance, both politically and economically; and to reverse the disastrous assimilationist policy of the nineteenth century that sought to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254-55 (1992); *Morton v. Mancari*, 417 U.S. 535, 542 (1974); *see also Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 151 (1973). That is, a key purpose of the IRA is to remedy historical harm. *See Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 565 (D.C. Cir. 2016). To that end, the IRA provided for the reacquisition of tribal homelands and reorganizing of tribal governments. *See*, *e.g.*, 25 U.S.C. § 5101 (prohibiting further allotment of land); *id.* § 5102 (extending indefinitely periods of trust or restrictions on alienation of Indian lands); *id.* § 5110 (authorizing Secretary to proclaim new Indian reservations); *id.* § 5123 (creating a federal process for tribes to adopt constitutions or bylaws).

Section 5 of the IRA authorizes the Secretary to acquire land "through purchase, relinquishment, gift, exchange, or assignment, . . . within . . . existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108. Lands taken into trust are exempt from State and local taxation and protected from involuntary re-alienation. *Id.* Interior regulations provide eight criteria the Department must evaluate when processing fee-to-trust applications, including the impact on state and local governments, potential jurisdictional and land use issues, and the extent to which the applicant provided information allowing the Secretary to comply

with environmental requirements. 25 C.F.R. § 151.10 (2010).[3]

B. Procedural History of the Property Acquisitions

The Property consists of several parcels totaling 499.022 acres located within the Nation's reservation and the borders of the Village of Hobart. *Village of Hobart v. Acting Midwest Reg'l Dir.*, 69 IBIA 84, 2023 I.D. LEXIS 34 (IBIA 2023) ("*Hobart II*").[4] In 2007, the Nation submitted applications for the Secretary to acquire the Property in trust to return the land to its original status as inalienable, ensuring that tribal investments within the Oneida Reservation will never be lost. *See, e.g.*, Dkt. 35-3 at 653 (Lahay).[5] BIA and the Nation notified the State and local governments of the Nation's applications. *Village of Hobart v. Midwest Reg'l Dir.*, 57 IBIA 4, 14, 2013 I.D. LEXIS 51 (IBIA 2013) ("*Hobart I*") (Dkt. 33-13 at 344); Dkt. 35-3 at 19 (BIA's notice); *id*. at 635 (Nation's notice). The Village submitted comments objecting to the applications. *Hobart I* at 6-7; Dkt. 35-3 at 978. As required by 25 C.F.R. § 151.10, BIA referred the comments to the Nation, which addressed them and provided supplemental information in support of its responses. *Hobart I* at 7; Dkt. 35-3 at 846.

The Nation's application and Plaintiff's comments were initially reviewed by BIA employees funded under a FY 2008–2010 Memorandum of Understanding between the BIA Midwest Regional Office and the Nation ("MOU"). Dkt. 34-10 at 24. Under the MOU, consistent with the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 5301 *et*

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[3] In December 2023, Interior promulgated revised regulations, which took effect on January 11, 2024. *See* Land Acquisitions, 88 Fed. Reg. 86,222, 86,222-55 (Dec. 12, 2023). References herein are to the regulations in place at the time of the 2010 Decisions.

[4] The Board's September 21, 2023, decision, challenged here, can be found at Dkt. 1-1. References herein are to the Board's reporter citation, 69 IBIA 84.

[5] The Notices of Decision and administrative records are substantially identical for each decision. Unless otherwise stated, all references are to documents regarding the Lahay property.

seq., as amended by the Tribal Self-Governance Act, 25 U.S.C. § 5361, *et seq*. ("ISDEAA"), the Nation and some other tribes served by the Midwest Regional Office pooled their congressionally apportioned Tribal Priority Allocation funds[6] and reprogrammed them to the Division of Fee-to-Trust to support BIA staffing for trust application processing. *See* Dkt. 34-10 at 25.[7] This reprogramming has allowed the Nation and other participating tribes to reprioritize government spending in consultation with BIA to address the significant backlog in application processing. *See* Dkt. 34-10 at 24-26. The Regional Director, whose position is not funded by tribes under the MOU, retained final, independent decision-making authority over the decisions to acquire the Property in trust. *See* Dkt. 35-3 at 373; *Hobart II* at 110-11.

After thoroughly considering the materials submitted by the Nation and interested parties, the Regional Director issued decisions to take the Property into trust. Dkt. 35-3 at 367-73 ("2010 Decisions"). The decisions discussed Interior's authority to take the land into trust under 25 C.F.R. § 151.3(b)(1)—authorizing "on-reservation" acquisitions—and the criteria in 25 C.F.R. § 151.10. *Id.* at 367-72. Plaintiff appealed the 2010 Decisions to the Board, raising the same allegations as here: that the reasoning violated the APA, that the MOU created structural bias within BIA, and that Section 5 of the IRA is unconstitutional. Dkt. 33-14 at 3-52.

The Board affirmed in part, and vacated and remanded in part, each of the 2010 Decisions. The Board affirmed under 25 C.F.R. § 151.10(a) that Interior had the authority to

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[6] Tribal Priority Allocation ("TPA") refers to BIA's "budget formulation process that allows direct tribal government involvement in the setting of relative priorities for local operating programs." *See, e.g.*, 25 C.F.R. § 46.2. Tribes can use TPA funds through contracts or by leaving them with BIA for BIA-funded services. U.S. Dept. of Interior, Bureau of Indian Affairs, Report on Tribal Priority Allocations 14 (July 1999) at 48,140-42, https://www.tribalselfgov.org/wp-content/uploads/2021/05/BIA-Report-of-TPA.pdf (last visited May 14, 2025).

[7] The operative MOU is the FY2008–2010 version in place when the 2010 Decisions were issued, not the 2014–2017 version to which Plaintiff cites, *see* Dkt. 1-3.

acquire land in trust for the Nation under the IRA and declined to consider the constitutionality of the IRA because the Board lacks jurisdiction over such arguments. *Hobart I*, 57 IBIA at 18-25. The Board also concluded that the Regional Director had properly considered three of the remaining § 151.10 criteria: § 151.10(b) (the need for the land); § 151.10(c) (the purpose for and use of the land); and § 151.10(g) (BIA's ability to discharge any additional responsibilities that might result from the acquisition). *Id.* at 25-28. The Board also rejected the Village's procedural argument that it was given insufficient time to respond to comments, *id.* at 14, and denied the Village's motion to strike the Nation's brief on appeal, *id.* at 15. But the Board concluded that the Regional Director had failed to adequately consider the Village's comments concerning two of the § 151.10 regulatory factors: (e) (impact on State and local tax rolls), and (f) (jurisdictional problems and potential land use conflicts). *Id.* at 28-30. The Board also found that environmental reviews had not been completed when the Village submitted its comments and ordered the Regional Director to consider arguments on environmental concerns. *Id.* at 30-31; *see* 25 C.F.R. § 151.10(h) (provision of environmental information). Finally, the Board ordered the Regional Director to address the Village's allegations of bias stemming from the MOU. *Id.* at 15-16.

On January 19, 2017, the Regional Director issued the decision on remand ("2017 Decision"), approving the Nation's fee-to-trust applications. Dkt. 32-4 at 28-53. As required by *Hobart I*, the Regional Director reconsidered §§ 151.10(e), (f), and (h), *id.* at 32-44, and concluded that the Village had failed to demonstrate bias in approval of the Nation's applications, *id.* at 44-52. The Village appealed to the Board, Dkt. 32-4 at 11, which fully affirmed it in a thorough decision. *See Hobart II*, 69 IBIA 84. Plaintiff now challenges the Decisions.

III. STANDARD OF REVIEW

Defendants acknowledge that this Court specified that this case would not proceed on summary judgment. *See* Dkt. 22; *see infra* note 2. Nevertheless, Plaintiff moved for summary judgment, Dkts. 56 and 57. No matter how the Court enters judgment here, Defendants agree that the standard for summary judgment should be applied. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment "serves as a 'mechanism for deciding, as a matter of law, whether the agency action is . . . consistent with the APA standard of review.'" *Star Way Lines v. Walsh*, 596 F. Supp. 3d 1142, 1149 (N.D. Ill. 2022) (quoting *Fisher v. Pension Benefit Guar. Corp.*, 468 F. Supp. 3d 7, 18 (D.D.C. 2020)).

A court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiff bears the burden of proof. *Bd. of Trs. Hosp. v. Shalala*, 135 F.3d 493, 502 (7th Cir. 1998) (citing *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995)). The scope of review is narrow, and a court is not to substitute its judgment for that of the agency so long as the agency "articulated a rational connection between the facts found and the choice made." *Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 608 (7th Cir. 2015) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). A reviewing court must uphold the challenged decision unless it "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view." *State Farm*, 463 U.S. at 43.

The challenged decision is also entitled to a presumption of regularity. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). "Even when an agency explains its decision with 'less than ideal clarity,'" a court "will not upset the decision on that account 'if the agency's

path may be reasonably discerned.'" *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). The agency need only articulate a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43; *Pioneer Trail Wind Farm*, 798 F.3d at 608.

IV. ARGUMENT

A. The Passage of Time Since 2010 Decisions Does Not Warrant Vacatur

The Village argues that the passage of time since the 2010 Decisions warrants vacatur and remand for reconsideration of the 25 C.F.R. § 151.10 criteria. Dkt. 57 at 26. Not so. As the Board explained, the Regional Director in 2013 sought specific information regarding tax and jurisdictional and land use impacts and asked the Village to articulate its environmental concerns. *Hobart II*, 69 IBIA at 90. The Village provided information regarding Seventh Circuit stormwater management litigation and updated tax information but otherwise indicated that it "[stood] by its previously submitted comments." *Id.* at 91. While the Village contends that "since 2013[,] the Village has been afforded no further comment," Dkt. 57 at 26, it fails to identify any authority that would have required the Regional Director to continue soliciting comments from the Village between 2013 and issuance of the 2017 Decision. Nor does the Village suggest that it tried to provide more information and was refused the opportunity to do so.

Apart from reviewing new information submitted by the Village, between 2013 and 2016, BIA updated information (e.g., tax information), completed reviews of historic property and endangered species impacts, and updated environmental site assessments. 69 IBIA at 91-92. Thus, the Village's claim that the 2017 Decision relied on outdated information is unfounded.

The Village identifies no authority requiring vacatur based solely on the passage of time, and its position contravenes principles of administrative law. Federal courts review final agency

actions based on the administrative record that was before the agency at the time it made its decision. *See, e.g.*, *John Casey v. Berryhill*, 853 F.3d 322, 326 (7th Cir. 2017). Passage of time does not render an agency's decision, made on the record then available, arbitrary or capricious.

The Village rests its argument on *Okanogan County v. Acting Portland Area Dir.*, 30 IBIA 42, 1996 I.D. LEXIS 79 (IBIA 1996), which is non-binding and easily distinguished. There, BIA preliminarily approved a trust acquisition in 1991 but did not issue a final decision until 1996. *Id.* at 43. The 1996 decision did not analyze the § 151.10 factors, and the most the Board could say of the 1991 analysis was that "probably the Area Director[] gave some consideration to those factors in 1991." *Id.* The Board concluded that, given the passage of time, it could not be assumed that an evaluation under § 151.10 would have come out the same in 1996 as it did in 1991, particularly since the views of the affected local government had changed from non-opposition to opposition. *Id.* at 44. Here, there is no "substantial chronological gap in the record," *id.* at 43. To the contrary, in the time between the Board's decisions, BIA undertook additional analysis and developed a comprehensive record to address the concerns the Board identified in *Hobart I*. Further, the Board properly found that *Okanogan County* is "inapposite" because, here, the Regional Director actively solicited updated comments from the Village. 69 IBIA at 132-33; *see* Dkt. 33-1 at 129-78; Dkt. 33-2 at 1-44.

B. Interior Properly Analyzed the Regulatory Factors Under Section 151.10

Plaintiff has the burden to demonstrate that BIA's consideration of the regulatory factors set forth at 25 C.F.R. § 151.10 was arbitrary and capricious. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005); *see Bd. of Trs. Hosp.*, 135 at 502. Plaintiff must "present evidence that the [BIA] did not consider a particular factor; it may not simply point to the end result and argue generally that it is incorrect." 423 F.3d at 800. BIA is only required to

consider the factors and "need not exhaustively analyze every factor." *Id.* So long as BIA "base[d] its determination upon factors listed in the appropriate regulations" and used a "reasonable interpretation of the regulation and the statute" in its decision-making, BIA's decision should be upheld. *Id.* Plaintiff's arguments that BIA failed to adequately consider the tax impacts to state and local governments, or the jurisdictional or land use conflicts that might result from the trust acquisition of the Property, are meritless.

1. Section 151.10(e): Tax Impacts to State and Local Governments

Section 151.10(e) requires BIA to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e). Plaintiff asserts (1) that BIA should have considered the "cumulative effect" of all tax revenue losses resulting from each trust acquisition over time, including future losses that might occur, Dkt. 57 at 27-28; and (2) that BIA did not address or adequately respond to the Village's comments and concerns that "tax loss impacts affect public services," *id.* at 28-30. Plaintiff's contentions are not supported by precedent or the Administrative Record.

First, the Board properly concluded that §151.10(e) does not require BIA to consider the "cumulative effect" of previous and potential future trust acquisitions. 69 IBIA at 116-17; *see Cnty. of Charles Mix v. U.S. Dep't of Interior*, 799 F. Supp. 2d 1027, 1046 (D.S.D. 2011); *Upstate Citizens for Equal., Inc. v. Jewell*, No. 5:08-CV-0633, 2015 WL 1399366, at *11-12 (N.D.N.Y. Mar. 26, 2015) (BIA not required to speculate as to impacts, and it could balance the "economic and tax benefits" the tribe brought to the community through its businesses), *aff'd*, 841 F.3d 556 (2d Cir. 2016), *cert. denied*, 583 U.S. 1004 (2017); *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, (D. Or. 2002) (BIA need not speculate as to future tax revenues). Rather, BIA must only consider tax impacts stemming from the proposed acquisition,

and Plaintiff does not dispute that the agency did so. As the Board explained, while BIA "may be required to consider 'the collective tax impact of simultaneous trust acquisitions,'" 69 IBIA at 116, it need not consider the impacts of other applications pending before the agency that may or may not be approved.[8] The Village characterizes the Board's position as "ignor[ing] reality" on the grounds that the "whole system is set up to approve applications," Dkt. 57 at 27, but that argument is merely a restatement of the Village's unsupported allegation that acquisitions resulting from the MOU are biased. The Village identifies no authority for its position that BIA must consider the cumulative effects of future, hypothetical trust acquisitions. To the contrary, the Board properly found that requiring the Regional Director to speculate on such impacts "would result in a decision based not on the Record, but on speculation," 69 IBIA at 117, contrary to the APA, 5 U.S.C. § 706.

Second, the Board correctly found that the Regional Director adequately considered the Village's comments regarding the effects of the tax losses, including loss of funding for public services, fire protection, and road maintenance. Dkt. 57 at 27-30. As the Board explained, the Regional Director must consider comments submitted, "but she need not 'resolve' all objections raised in such comments to the commenter's satisfaction." 69 IBIA at 118. Plaintiff objects that this standard allows the Regional Director to "ignore impacts" that must be considered under the regulations. Dkt. 57 at 28-29. That is not true; the Regional Director must consider and address the comments received, and if that consideration is lacking, the Board has authority to remand BIA's decision. Indeed, the Board remanded the 2010 Decisions in part because it found her

[8] As the Board noted, BIA *did* consider the cumulative tax impacts of acquiring the Property in trust. 69 IBIA at 117 n.28.

consideration of § 151.10(e) unsatisfactory. On remand, the Regional Director prepared a thorough analysis of tax impacts, Dkt. 32-4 at 32-35.

With respect to fire protection services, the Village commented that it was unlikely to enter into a fire protection agreement with the Nation and that, therefore, the Village may be uncompensated for services provided to the Property. *Id.* at 34-35. In response, the Regional Director observed that the same is true for other tax-exempt properties within the Village, such as churches and schools, *id.* Plaintiff concedes this fact but attempts to distinguish the Property on the grounds that the latter "do not account for thousands of acres." Dkt. at 29. Setting aside the fact that the challenged acquisition does not comprise thousands of acres, as discussed above, Interior need not conduct a cumulative impacts analysis.

Regarding road maintenance, the Village commented that it would have to provide road maintenance with reduced funding. The Regional Director considered the Village's comments and found that the three roads identified by the Village do not directly service the Property and are only located "near" one of the Property's parcels. Dkt. 32-4 at 35; *see* Dkt. 33-4 at 8. Nevertheless, the Regional Director concluded that Federal funding available through BIA's Tribal Transportation Program could "partially offset" the Village's road maintenance costs, reducing the burden imposed on the Village. As the Board found, the Regional Director's consideration was sufficient. 69 IBIA at 121. While Plaintiff argues that the Nation, not the Village, receives this funding, that does not change the fact that the Village's road maintenance costs will be reduced by the provision of Federal funds to maintain the roads at issue.

The Record supports the Board's conclusion that the Regional Director adequately considered the Village's comments regarding tax impacts. 69 IBIA at 118-21. Plaintiff's

disagreement with the Regional Director's analysis, including the severity of impact stemming from those losses, fails to demonstrate that that the Decisions are arbitrary or capricious.

2. Section 151.10(f): Jurisdictional Problems and Land Use Conflicts

Section 151.10(f) directs Interior to consider "[j]urisdictional problems and potential conflicts of land use which may arise" from the acquisition of the Property in trust. 25 C.F.R. § 151.10(f). As the Board concluded, 69 IBIA at 122, Interior need not resolve conflicts, just consider whether they warrant denial of an application. *See, e.g.*, *Town of Verona v. Jewell*, No. 6:08-cv-0647, 2015 WL 1400291, at *7 (N.D.N.Y. Mar. 26, 2015) (citing *South Dakota v. U.S. Dep't of Interior*, 401 F. Supp. 2d 1000, 1009 (D.S.D. 2005) (*"South Dakota III*")). Interior fulfills its obligation under § 151.10(f) as long as it "undertake[s] an evaluation of potential [jurisdictional] problems." *South Dakota v. U.S. Dep't of Interior*, 314 F. Supp. 2d 935, 945 (D.S.D. 2004), *aff'd*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 549 U.S. 813 (2006).

Interior did so here. As with § 151.10(e), the Board remanded the 2010 Decisions in part for reconsideration of § 151.10(f). On remand, the Regional Director addressed the errors the Board identified. Dkt. 32-4 at 36-39. The Board properly concluded that such consideration complied with applicable requirements. 69 IBIA at 121-24.

Plaintiff wrongly asserts that Interior inadequately considered the Village's comments on the alleged impairment of stormwater management programs, the creation of "checkerboard zoning," and potential jurisdictional conflicts over the provision of emergency services. Dkt. 57 at 30-33. First, with respect to stormwater management, the Village commented that the acquisition in trust would create a jurisdictional checkerboard and impair its ability to manage stormwater in light of *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 732 F.3d 837, 840 (7th Cir. 2013) ("*Oneida*"), in which the Seventh Circuit found that the Village cannot

impose stormwater management fees on the Nation's trust lands within the Village. Dkt. 32-4 at 38-39. The Regional Director concluded that, because of the Seventh Circuit's decision and the State of Wisconsin's disclaimer of authority to regulate stormwater on Indian lands, jurisdiction is clear: the Village and Nation "implement separate stormwater management programs." *Id.* at 39. While the Village dislikes that stormwater management on Indian lands is regulated separately, practical difficulties do not negate jurisdictional clarity. Plaintiff relies on the Seventh Circuit's decision in *Oneida* as evidence that the acquisitions will create jurisdictional conflict, but as the court acknowledged in that case, a checkerboard pattern of jurisdiction is an "awkward" but "familiar feature of American government [that is] . . . common in Indian country." *Oneida*, 732 F.3d at 839; *see also Cherokee Nation v. Bernhardt,* 936 F.3d 1142, 1161 (10th Cir. 2019) (shared jurisdiction not a barrier to acquisition). The Board correctly found that the Regional Director's analysis was sufficient. 69 IBIA at 123.

Second, the Village takes issue with the potential checkerboard pattern of zoning. Dkt. 57 at 31-32. On remand, the Regional Director "compiled a detailed comparison of the zoning classifications of the [21 parcels comprising the Property]," 69 IBIA at 96, and found that for 18 of them, the Village's and the Nation's zoning classifications are "in concordance." *See id.*; Dkt. 32-4 at 36. For the three parcels with inconsistent zoning, the Regional Director concluded that there was "a low risk for conflicting land use" for two of those three parcels. Dkt. 32-4 at 36. She found that only the Gerbers parcel has "a potential for land use conflict," but that the conflict was not "unique" and that the Village itself had "created the same situation unilaterally by placing agricultural and industrial zoning districts immediately adjacent to one another." *Id.* at 36-37. The Regional Director also concluded that zoning impacts would be minimal because the Nation had not proposed any change in use, and the Village had not raised any material conflict between

existing uses and Village zoning. *Id.* at 37. Again, any awkwardness arising from having two zoning regimes at play does not constitute error. *See Oneida*, 732 F.3d at 842. The Board properly concluded that the Regional Director's consideration was sufficient. 69 IBIA at 123-24.

Finally, the Village commented that the acquisitions would harm its ability to provide emergency services by contributing to a checkerboard jurisdictional pattern. Dkt. 32-4 at 39. The Regional Director concluded that the "most feasible solution to the 'checkerboard' issue is the development of [a] cooperative service agreement," but acknowledged that the "inability of the Village and Nation to execute an intergovernmental service agreement [due to ongoing disputes] contributes to the jurisdictional conflict." *Id.* Neither the unlikelihood of the parties entering into a service agreement or the existence of any conflicts arising due to the lack of such an agreement precludes the Regional Director from exercising her discretion to acquire the Parcels in trust. In sum, the Board correctly concluded that the Regional Director's consideration was sufficient and that she was neither required to resolve any jurisdictional conflicts nor barred from acquiring the land in trust even if doing so would create land use conflicts. 69 IBIA at 123. Plaintiff's disagreement with these findings fails to demonstrate any error in the Decisions.

3. Section 151.10(h): Information Provided for Environmental Compliance

Section 151.10(h) requires that the Regional Director consider "[t]he extent to which the applicant has provided information that allows the Secretary to comply with" the provisions of (1) 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures [NEPA]; and (2) 602 DM 2, Land Acquisitions: Hazardous Substance Determinations." As the Board found, "[t]he Village does not allege, much less prove, that the Regional Director failed to consider the criterion actually set out in § 151.10(h)." 69 IBIA at 132.

Nor does Plaintiff allege here that the Regional Director erred in her consideration of § 151.10(h). This Court's analysis should end here.

That said, the United States briefly addresses Plaintiff's other environmental arguments, which Plaintiff appears to conflate with the Regional Director's obligation under § 151.10(h) to ensure that the Nation submitted adequate information. Dkt. 57 at 33-35.[9] Namely, Plaintiff alleges that the Regional Director failed to comply with the agency's NEPA compliance "regulations"—i.e., Environmental Compliance Memorandum No. ECM 10-2 and the agency's procedures implementing the Council of Environmental Quality ("CEQ") regulations—by relying on allegedly "outdated" categorical exclusions and Phase I environmental site assessments. *Id.* at 34-35. Plaintiff also alleges that Interior erred by not conducting "interviews with 'state and/or Local Agency Officials" as Plaintiff alleges is required by unspecified "BIA regulations," *id.* at 35, and "ASTM standards." This Court should reject both arguments.

Federal agencies may establish categorical exclusions for actions that do not "have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4.[10] BIA has established a categorical exclusion for "[a]pprovals or grants or conveyances and other transfers of interests in land where no change in land use is planned." 516 DM 10.5(I)[11]; *see* 69 IBIA at 128. Plaintiff has abandoned the claim it made before the Board that

[9] Plaintiff complains, without factual or legal support, about the Board's determination that it lacked standing to advance its 151.10(h) arguments. Dkt. 57 at 34. The Board did conclude Plaintiff lacked standing, but ultimately rejected the Village's arguments on the merits, 69 IBIA at 126-27, 129-30, rendering the standing issue moot.

[10] Earlier this year, CEQ issued an interim final rule removing all NEPA implementing regulations. Removal of NEPA Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025).

[11] *See* https://www.doi.gov/document-library/departmental-manual/516-dm-10-managing-nepa-process-bureau-indian-affairs-0 (last visited May 14, 2025).

application of a categorical exclusion was inappropriate. *See id.* at 128-29. Rather, Plaintiff argues that Interior's "reliance on a categorical exclusion" is outdated. Dkt. 57 at 34. But Plaintiff does not allege that, since either the 2010 or the 2017 Decisions, anything has changed that would render categorical exclusion improper. Nor does Plaintiff point to any authority in support of the proposition that an agency applying a categorical exclusion must revisit that determination after the passage of some unspecified amount of time even if it remains the case that no change in land use is anticipated. The Court should reject Plaintiff's claim that the Regional Director's categorical exclusion determination is "outdated."

Plaintiff's contention that the pre-acquisition environmental site assessments ("ESAs") are outdated fares no better. Interior's Departmental Manual mandates that a pre-acquisition ESA "must be completed prior to taking title of the subject property," 602 DM 2.8(C); *see also* ECM 10-2. The Department established guidance on pre-acquisition ESAs for federal land transactions —set forth in ECM 10-2 and 602 DM 2—to ensure compliance with the "all appropriate inquiries" ("AAI") regulations issued pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 40 C.F.R. § 312.20. *See* ECM 10-2 at 1. AAI regulations require completion of a pre-acquisition ESA "within one year prior to the date of acquisition." 40 C.F.R. § 312.20(a). Certain components of the site assessments must be completed or updated within 180 days of acquisition. § 312.20(b). Interior's guidance reflects the same. *See* ECM 10-2 at 4; 602 DM § 2.8(C). The "date of acquisition" is "the date on which a person"—here, the United States—"acquires title to the property." *Id.* § 312.10(b). As Interior explained in its briefing before the Board, at the time the 2017 Decision was issued and during the pendency of the Village's appeal, the United States had not acquired trust title to the Property. Dkt. 35-6 at 61. Therefore, the Village cannot prevail on an argument that the ESAs were "outdated." Interior

simply had not performed new pre-acquisition ESAs at that time because the agency did not know whether the Board would issue a decision affirming the Decisions.

Finally, the Village's argument that Interior erred by failing to interview State or local officials, Dkt. 57 at 35, fails for the same reason. The Departmental Manual and ECM 10 both provide that, in conducting a pre-acquisition ESA, bureaus and offices "should use the most current ASTM standards accepted by the EPA" because EPA determined that those standards are consistent with its AAI regulations. *See* 602 DM 2.3(E); ECM 10-2 at 4-5. As discussed above, to conserve agency resources, Interior did not update the pre-acquisition ESAs at the time of the 2017 Decision or during the subsequent appeal to the Board. Therefore, even if Interior had to interview State and local officials but failed to do so—neither of which the United States concedes—Interior must perform updated pre-acquisition ESAs only prior to acquiring the Property in trust. Interior complied with all regulatory and other administrative requirements, and Plaintiff has failed to demonstrate otherwise.[12]

C. The Decisions Are Not Unconstitutionally Biased

Plaintiff asserts that the 2010 and 2017 Decisions stem from biased decision-making, violating Plaintiff's due process rights, because the MOU between Interior and the Nation allegedly creates conflicts of interest. Dkt. 57 at 11-16. Plaintiff further claims that the Board improperly disregarded record evidence of bias. *Id*. at 16-24. As a preliminary point, this is far

[12] At the time of this filing, six of the eight parcels comprising the Property have been acquired in trust: Buck, Calaway, and Catlin (accepted in trust on December 19, 2024); Cornish and DeRuyter (accepted in trust on December 31, 2024); and Boyea (accepted in trust on April 29, 2025). Interior is still completing the necessary steps to acquire the two remaining parcels, Gerbers and Lahay, in trust. Email from Alex Dyste-Demet, Attorney-Advisor, Twin Cities Regional Solicitor's Office, U.S. Department of the Interior, to Charmayne G. Staloff, Trial Attorney, U.S. Department of Justice (Apr. 29, 2025) (on file with DOJ). In acquiring these lands in trust, Interior complied with all requirements, including title review under 25 C.F.R. § 151.13 and completion of pre-acquisition ESAs. *Id.*

from the first time that plaintiffs opposing trust acquisitions have unsuccessfully insisted—even in the absence of any MOU—that BIA's process for reviewing fee-to-trust applications is biased. As the Board observed, those bias claims have been consistently rejected. *See* 69 IBIA 104 (collecting cases). The Village's effort here to put a new spin on old arguments fares no better.

Interior's decision-making process is "subject to the due process clause and must be unbiased." *South Dakota v. U.S. Dep't of Interior*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005) (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996)). Plaintiff must show an "objective risk of actual bias" that rises to an unconstitutional level, not just the appearance of bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009). Because the presumption of regularity applies to the Decisions, Plaintiff must make a "substantial showing of bias" to meet its burden, requiring "clear evidence" that agency officials have not "discharged their official duties properly." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *South Dakota III,* 401 F. Supp. 2d at 1011. To overcome this presumption and show bias "too high to be constitutionally tolerable," a party "would need to prove that the adjudicator had 'a pecuniary interest in the outcome…[or had] been the target of personal abuse or criticism from the party before him." *Amundsen v. Chi. Park Dist.*, 218 F.3d 712, 716 (7th Cir. 2000); *see also Van Harken v. City of Chicago*, 103 F.3d 1346, 1352-53 (7th Cir. 1997) (holding that the manner of an officer's appointment and the lack of secure tenure is not enough to prove unconstitutional bias).

As discussed below, Plaintiff fails to meet that burden. The MOU is consistent with federal law, and its structure did not create bias in the decision-making process. Further, the Regional Director is independent and made the final decision. Finally, Plaintiff fails to provide the "clear evidence" required to show bias.

1. The MOU Is Consistent with Federal Law

The gravamen of Plaintiff's argument—refuted below—is that the MOU constitutes an unconstitutionally biased process that would render invalid any decision to acquire land in trust processed under it. However, Plaintiff also makes a cursory threshold argument that the MOU is "illegal under Federal law"—namely, ISDEAA, federal ethics law, and appropriations law. Dkt. 57 at 24-25. As to the latter two, Plaintiff does not cite to a single statute, regulation, or other source of law in support of its claims. Any attempt to incorporate by reference arguments Plaintiff presented before the Board is prohibited in district court proceedings that, as here, use "appellate-like" review. *See United States v. Karmo*, 2021 WL 1712669, at *4 n.3 (E.D. Wis. Apr. 30, 2021); *see also Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012). Regardless, Plaintiff's argument is refuted by a 2006 Inspector General Report, discussed below, which incorporated conclusions from a Solicitor's Opinion that found that the MOU structure did not violate federal ethics or appropriations laws. Dkt. 1-5 at 12.

Moreover, Plaintiff's assertion that ISDEAA does not authorize the reallocation of federal funds to be used by BIA, Dkt. 57 at 24,[13] is belied by the statutory text. ISDEAA specifically authorizes agreements such as the MOU by authorizing tribes to enter into self-determination contracts and funding agreements with the federal government to ensure "maximum Indian participation" in the direction of the "plan[ning], conduct, and [administration]" of federal services "so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. §§ 5302, 5321, 5363. This fosters self-determination by allowing tribes

[13] Plaintiff asserts that the IG Report found the MOUs inconsistent with ISDEAA. To the contrary, that report found only that the MOUs "could be seen" to be inconsistent with ISDEAA because they were not conventionally structured, Dkt. 57 at 24, but did not find them inconsistent with the law. Dkt. 1-5 at 12-13.

to direct federal spending, in consultation with BIA, toward federal programs that best support the needs of the tribe. *See* 25 U.S.C. §§ 5321, 5363. This approach reflects a departure from past policies in which BIA provided services paternalistically and ineffectively without tribal input.

ISDEAA funding agreements allow payments "on such conditions as the appropriate Secretary deems necessary to carry out the purposes of [the law]." 25 U.S.C. § 5324(b) (formerly § 450j).[14] Tribes may also enter funding agreements to "redesign or consolidate programs, services, functions, and activities, or portions thereof, and *reallocate* funds for such programs . . . ." 25 U.S.C. § 5363(b)(3) (formerly § 458cc) (emphasis added). Federal regulations specify that TPA funds may be reprogrammed in whole or part for BIA's administration of programs. 25 C.F.R. §§ 1000.2, 1000.101. As the Regional Director concluded, "these provisions authorize the tribes to use tribal funds for many purposes (including the broad category of 'expenditures for the benefit of Indian tribes,' 25 U.S.C. § 123)." 69 IBIA at 114.

Consistent with ISDEAA, the MOU allows the Nation to pool its congressionally apportioned TPA funds with other participating tribes and reprogram those funds to the Division of Fee-to-Trust to ensure sufficient staffing to address the significant backlog of fee-to-trust applications. *See* Dkt. 34-10 at 25; Dkt. 32-4 at 48; Dkt. 35-8 at 211-13. The MOU seeks to increase only the *efficiency* of application processing; any increase in approvals stems from the increased number of applications processed, a proper result given that applications have historically languished with BIA for upwards of three to six years. *See* Dkt. 35-8 at 211-14. Plaintiff's suggestion that the MOU violates 25 U.S.C. § 5363(b)(2) by giving preference to MOU tribes wrongly equates efficiency with preference in approving acquisitions.

[14] Plaintiff appears to assert that 25 U.S.C. § 450j was recodified as 25 U.S.C. § 5324(j). Dkt. 57 at 24. However, 25 U.S.C. 450j was recodified as the entirety of 25 U.S.C. § 5324.

Contrary to Plaintiff's framing, tribes do not directly pay the salaries of such employees. Instead, reprogrammed funding is retained and used by BIA and, in partnership with the agency, the Nation has some input into how limited BIA resources are used. Dkt. 32-4 at 48-49. This process supports more efficient fee-to-trust processing for *all* tribal applicants by funding additional staff for MOU tribes (at the expense of other programmatic funding for those tribes) such that other BIA employees can work with non-MOU tribes.[15] Dkt. 1-5 at 12.

The efficiency of the application process does *not* predetermine an application's outcome or compromise the integrity of review. Employees paid from reprogrammed funds must, like any other BIA employee, evaluate every application in accordance with the criteria set forth in 25 C.F.R. § 151.10. Dkt. 35-8 at 200-01. Consistent with ISDEAA, the employees funded under the MOU do not exercise inherently federal functions. *See* 25 U.S.C. § 5363(k); Dkt. 32-4 at 53. And centrally, the Regional Director, who is not funded with reprogrammed funds, retains final decision-making authority over all trust acquisitions. Dkt. 32-4 at 48; 69 IBIA at 109-10. This ensures that the final decision is based on the merits of the application and adheres to the relevant regulations, irrespective of how particular BIA staff positions may be funded. In sum, the MOU is authorized by, complies with, and supports the purposes of ISDEAA, the IRA, and applicable regulations. To the extent that Plaintiff implies that the statutory mandates supporting the MOU create bias in favor of approving applications, "[f]ollowing Congress's statutory policies does not establish structural bias warranting a reversal of the decision." *South Dakota*

[15] Typically, ISDEAA authorizes even more tribal involvement in government services, authorizing tribes to administer programs themselves. 25 U.S.C. § 5363(b)(1). Plaintiff asserts, based on the IG Report, that bias persists because BIA is carrying out functions that the tribes would otherwise carry out. Dkt. 57 at 14. But the IG Report found only that there was some bias in favor of decisions drafted in the first instance by BIA over those drafted in the first instance by tribes. Plaintiff does not allege that issue is present here.

III, 401 F. Supp. 2d at 1011, *aff'd South Dakota IV*, 487 F.3d 548.

2. The MOU Does Not Constitute Unconstitutional Bias

Notwithstanding the propriety of the MOU arrangement under ISDEAA, Plaintiff insists that the MOU creates an "unconstitutionally biased process." Dkt. 57 at 8. The Board properly "reject[ed] the claim that the Midwest MOU created an unlawful 'structural bias,'" 69 IBIA at 104, and this Court should affirm that conclusion. Plaintiff relies chiefly on 2006 reports by the Government Accountability Office ("GAO Report") and Interior Inspector General ("IG Report") to present a narrative of biased decision-making. Dkt. 57 at 13-15. Both reports were primarily focused on the Pacific Region's MOU. *See* 69 IBIA at 93. Further, Plaintiff's framing obscures that the IG Report found only the "*appearance* of a conflict of interest" and "*questions* about the independence of judgment" under MOUs predating the one at issue here. Dkt. 1-5 at 13. In direct response to the IG Report, Interior implemented structural changes in 2008 to eliminate the potential for the appearance of bias or conflicts of interest. *See* 69 IBIA at 109. The MOU in effect at the time of the 2010 Decisions limited tribes' ability to influence "the selection, performance awards, and duties and responsibility of the federal consortium staff," confirmed statutory personnel rights and obligations were not superseded by the MOU, and limited the role of tribes in hiring BIA staff.[16] *Id*. Any appearance of bias was thus addressed by changes incorporated into the MOU at issue here.

Precedent supports Interior's analysis. The Seventh Circuit has rejected bias claims even where employees have an indirect pecuniary interest in a proceeding through their paycheck. In

[16] Plaintiff notes that the IG Report found the Pacific MOU created "anxiety" for staff who did not know the funding source for their salaries until after they started their employment. Dkt. 57 at 14; *see* Dkt. 1-5 at 8-9. Plaintiff ignores that the IG Report also found that BIA staff under the Midwest MOU would, going forward, be informed of the funding structure upon applying for the job, further reducing any possible conflict of interest. Dkt. 1-5 at 12.

Van Harken v. City of Chicago, the court found that hearing officers' appointment by the Director of Revenue—who had an interest in maximizing affirmative rulings and retained firing authority—did not create bias as long as officers were not paid by the number of hearings resolved, did not have quotas, and had no financial stake in the outcome of cases beyond their paycheck. 103 F.3d at 1352-53. And in *Amundsen v. Chicago Park District*, the court rejected an argument that a Park District hearing officer was inherently biased to rule in favor of his Park District for fear of losing his employment, finding that such bald assertions failed to overcome the presumption of regularity for public officials. 218 F.3d at 716. So too here. MOU employees do not have quotas or a financial stake in the outcome of fee-to-trust applications beyond their employment. Changes to the MOU to lessen the influence of participating tribes on MOU employees further reduced any risk of creating a pecuniary interest or exerting pressure. And as discussed below, the Regional Director is insulated from any potential influence.

This Court has agreed, finding that the MOU on its face "does not give rise to a presumption of bias" because it was revised in response to the IG Report to lessen even the appearance of bias. Dkt. 52 at 9-10. The Court held that the MOU reflects a "widely adopted practice" that did not create biased decision-making "because the MOUs pertain to the salaries of only some staff personnel at BIA and not of the ultimate decision maker—the Regional Director." *Id.* at 10 (citing *Morrison Cnty. v. U.S. Dep't of Interior*, No. 24-cv-23 (D. Minn. Dec. 3, 2024) (emphasis in original)). It should again reject Plaintiff's arguments to the contrary.

Failing to overcome the presumption of regularity, Plaintiff argues under the APA that the Decisions relied on a redacted, incomplete version of the IG report, specifically neglecting an attached Solicitor's Opinion, and that the Solicitor's Opinion conclusions, as summarized in the IG Report, were improperly termed "second-hand" and not fully considered. Dkt. 57 at 23-24.

The Board addressed this argument, noting that the redactions appeared to be mostly employee names and that Plaintiff did not identify how the unredacted material would have helped its arguments.[17] 69 IBIA at 112. As to conclusions deemed "second-hand," the Board made such finding, *id.* at 114, when discussing the Solicitor's Opinion's commentary that the MOUs were not conventionally structured and thus "could be seen" to be inconsistent with ISDEAA, *see* Dkt. 1-5 at 13. But the Board found this point unpersuasive as evidence of arbitrary and capricious decision-making because it was contradicted by that same opinion's conclusion that even the MOUs at issue in the IG report, which predate the 2008–2010 MOU at issue here, were "not directly inconsistent with" ISDEAA. 69 IBIA at 114; Dkt. 1-5 at 12.

What's more, Plaintiff has waived its ability to assert that the Solicitor's Opinion must be added to the record and that it is critical to the Regional Director and Board's review. *See* Dkt. 52 at 5 (arguments not raised before the Board are considered waived). Plaintiff makes this argument for the first time here. Its first appeal argued only that the GAO Report, not the IG Report, demonstrated evidence of bias. Dkt. 33-14 at 329-35, Dkt. 35-8 at 97-100. On remand, after the Board directed BIA to consider both the GAO and IG Reports, 57 IBIA 16, Plaintiff fully supported its second appeal using only the IG Report's summary of the Solicitor's Opinion, Dkt. 35-8 at 97-100. Thus, the Board and the Regional Director reasonably relied on only the conclusions presented in those reports. 69 IBIA at 109 n.22. Plaintiff's attempt to now argue the Decisions were arbitrary and capricious for only considering "the outcome of the IG investigation" and not attachments Plaintiff itself did not need or seek to rely on should be considered waived. Regardless, the Board still considered the summary of the Solicitor's

[17] Plaintiff obtained a less redacted IG Report through FOIA, which confirms that the redacted information includes only names and titles. *Compare* Dkt. 1-5 at 1-13 *with* Dkt. 35-9 at 111-24.

Opinion and found that it in fact supported the legality of the MOU.[18] 69 IBIA at 114.

Plaintiff also asserts that the Board's analysis of the MOU itself was arbitrary and capricious, misreading and disregarding key portions of the Board's analysis. Plaintiff asserts that the Board did not review the impact of the funding structure on MOU-funded employees. Dkt. 57 at 18. But the Board considered this issue, as well as changes to the MOU to remedy conflicts of interest and the fact that employees were not paid per approval. 69 IBIA at 108. The Board found it uncertain whether "the degree and nature of [their] interest would disqualify them from deciding the applications," *id.*, but in any event concluded that final, independent review conducted by the Regional Director acted as a critical safeguard against any potential conflicts of interest. *Id.* at 111. Contrary to Plaintiff's assertion, the Board considered the impact of the funding structure and found it was not determinative.

Plaintiff also argues that the Board purportedly ignored the purpose of the MOU to expedite applications for increased fee-to-trust acquisitions. Dkt. 57 at 18. Mischaracterizing the Board decision and the case it cited, Plaintiff contends the Board found the MOU "committed" BIA to approve applications. Not so. The Board explicitly found nothing in the MOU created such a commitment, 69 IBIA at 105, and Plaintiff merely restates the policies underlying the MOU as contrary evidence. To be sure, the MOU necessarily supports Congress's goals in the IRA and ISDEAA to restore tribal land bases through trust acquisitions and to promote tribal self-determination in the prioritization of BIA programs, *id.* at 104, thus filling the "gap" in fee-to-trust processing that let applications sit unreviewed for years. Increasing the efficiency of the process increases the likelihood of trust acquisitions due to the processing of more applications.

[18] Plaintiff asserts that the Board did not acknowledge the Solicitor's Opinion recommendation that the MOU's be discontinued. Dkt. 57 at 24. But the Board did find that the MOU was consistent with federal law and that bias had been reduced by revisions following the IG report.

The Board reasonably concluded, however, that BIA's commitment to *efficiency* did not equate to pre-approval of such applications.

3. The Regional Director's Independent Review Cures Any Bias

The Board properly held that *even if* the structure of the MOU hypothetically created a conflict of interest for Division employees, the Regional Director's independent review cured that conflict. 69 IBIA at 109-11. Plaintiff wrongly asserts both that the Regional Director is not an independent decision-maker, Dkt. 57 at 17, and that the record does not demonstrate that the Regional Director reviewed the final decision, *id.* at 16-17.

First, the Board properly found that the Regional Director is an independent decision-maker because she oversees, but is not assigned to, the Fee-to-Trust Division; is not funded by the MOU (and therefore not subject to any alleged conflict of interest); and has full authority to review decisions of her subordinates de novo. 69 IBIA at 109-10. Plaintiff's allegations that the Regional Director is "direct[ly] involv[ed]" with the Division are spurious. Naturally, the person occupying the highest position in the Regional Office is "involved" with a division under her supervisory authority. The Village's suggestion that the Regional Director should be artificially walled off from the Fee-to-Trust Division is unreasonable and unwarranted.

Second, the Regional Director's independent review cured any alleged conflict of interest on the part of Division employees. Plaintiff fails to demonstrate otherwise. To begin, Plaintiff's accusation that the Regional Director "rubber stamps" applications, *see* Dkt. 57 at 8, 17 & n.9 is unsupported. Plaintiff cites only to a law student article that claims a "100% [approval] rate" of fee-to-trust applications while omitting that *all* notices of decisions are approvals because Interior is not required to publish notices of denials. *See* 25 C.F.R. § 151.12(c), (d)(2)(ii).[19]

[19] When there is an issue with an application, (*e.g.*, missing documentation), BIA returns the

Further, Plaintiff does not explain its assumption that a lack of denials demonstrates bias.

The Village also contends that there is no evidence in the record of the Regional Director's review and that the Board improperly asked the Village to "prove a negative" by pointing to evidence in the record that the Regional Director did *not* review the Decisions. Dkt. 57 at 16. Plaintiff improperly flips the burden of proof and fails to provide evidence to support its assertion. The Regional Director's signature on the Notice of Decision is proof of her review, *see* Dkt. 32-4 at 53; Dkt.35-3 at 373, and her work is entitled to the presumption that she properly discharged her duties. To the extent Plaintiff argues that Division employees participated in drafting the 2010 or 2017 Decisions, Dkt. 57 at 19-20, that does not undermine the fact that the Regional Director independently reviewed the draft decisions and properly exercised her discretion to acquire the lands in trust.

Lack of further evidence in the record is not enough to dispute this assumption; and drafts and comments shared by the Regional Director were properly excluded as non-record material. *Great Am. Ins. v. United States,* No. 12-CV-9718, 2013 WL 4506929, at *7 (N.D. Ill. Aug. 23, 2013) ("'[N]either the internal deliberative process of the agency nor the mental processes of individual agency members' are proper components of the administrative record."); *id*. at *8-9 (compiling cases). The Board reasonably rejected Plaintiff's argument.

4. The Record Does Not Contain Evidence of Bias

Finally, the Village contends that the record itself contains "examples" of alleged bias in the form of "direct pecuniary interest, impermissible communications, and conflicts of interests

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application to the tribe to remedy the issue. *See* Fee-to-Trust Handbook, step 3 (providing the Regional Director with authority to return incomplete applications and requiring applicants to address deficiencies before further consideration); *Ariz. State Land Dep't v. W. Reg'l Dir.*, 43 IBIA 158, 161, 2006 I.D. LEXIS 56 (IBIA 2006). If the issue cannot be overcome, tribes typically withdraw their applications. Dkt. 1-5 at 11.

within BIA." Dkt. 57 at 17. Much of the argument contained with Section I.D.3 of Plaintiff's brief in fact sets forth the argument, refuted above, that the structure of the MOU creates impermissible bias. As to the Village's arguments that the actual record demonstrates biased decision-making, Plaintiff identifies two categories of record evidence: (1) evidence that the Nation allegedly "directed" Division staff to prioritize the Hobart Parcel acquisitions, Dkt. 57 at 9; and (2) evidence of "substantial amount[s] of communications" between BIA and the Nation, including meetings and emails, Dkt. 57 at 20-22. Neither satisfies Plaintiff's burden.

First, the Village's assertion that the Administrative Record shows that "Division staff were directed by the [Nation] to 'prioritize [the Hobart remand] cases above all of our other[s],'" Dkt. 57 at 19, is a misrepresentation. The documents to which the Village cites demonstrate that a BIA Supervisory Realty Specialist emailed a BIA Environmental Protection Specialist to request prioritization of the Phase I ESA requests for the Property. Dkt. 32-12 at 212. It is unclear how the Village could, in good faith, interpret that email exchange as a request from the Nation to prioritize acquisition of the Property over other trust acquisitions. The email does indicate that "SOL"—i.e., the Solicitor of the Interior, *not* the Nation—hoped to obtain a final draft of the 2017 Decision, but Plaintiff does not allege that prioritization of fee-to-trust acquisitions within the Department of the Interior constitutes biased decision-making. As the Board found, "prioritizing a decision is not the same as prejudging the result of that decision." 69 IBIA at 105.

Second, the Village cites to examples of emails and meetings between BIA and the Nation between 2013 and 2016. Dkt. 57 at 20-22. As the Board explained, 69 IBIA at 107, many of the communications the Village characterizes as evidence of bias were merely status inquiries from the Nation (e.g., Dkt. 33-2 at 200-03; 33-2 at 198-99; 35-9 at 156) or information requests from BIA staff to the Nation (e.g., Dkt. 33-2 at 72; 33-1 at 1-19). Plaintiff does not explain why

such routine correspondence between a tribe applying to have land acquired in trust and the BIA staff processing the tribe's application evinces bias. It does not.

Other examples demonstrate that BIA provided the Nation information regarding the Regional Director's consideration of the Village's bias claim, which the Board required her to undertake on remand. For instance, BIA provided the Nation with a copy of a memorandum from the Regional Director to the Interior Field Solicitor for the Twin Cities Field Office requesting legal advice on responding to the Village's bias claim. Plaintiff does not explain how sharing a memo—which demonstrates that the Regional Director was doing what the Board ordered her to do in *Hobart I*—is evidence of bias. Ultimately, even if some communications "might have been barred if this were a formal adjudication," which Defendants do not concede, in this informal adjudication setting, "nothing the Village cites shows the Regional Director's interactions with the Nation improperly influenced her decision." 69 IBIA at 107; 101-02 (finding "no evidence of . . . impermissible ex parte communications"). That should be the end of the matter.

D. Section 5 of the IRA Is Constitutional

Last, Plaintiff raises two constitutional challenges to Section 5 of the IRA: that it violates the nondelegation doctrine and that it exceeds the scope of congressional power under the Indian Commerce Clause.[20] Dkt. 57 at 35-47. Both arguments lack merit.

1. The IRA Does Not Violate the Nondelegation Doctrine

The nondelegation doctrine holds that, while Congress may not delegate wholesale its legislative powers, *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), it may confer decision-making authority so long as it lays out an intelligible principle that "delineates the

[20] Plaintiff's Complaint raised additional constitutional challenges not briefed in Plaintiff's Motion. Plaintiff waives these arguments. *Miller v. Chi. Transit Auth.*, 20 F.4th 1148, 1155 (7th Cir. 2021) ("[A]rguments not raised in an opening brief are waived.") (citation omitted).

general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Since 1935, the Supreme Court has narrowly construed the nondelegation doctrine and has consistently upheld congressional enactments containing broad conferrals of decision-making authority. *See Whitman,* 531 U.S. at 473-475.

Plaintiff claims that Section 5 of the IRA, 25 U.S.C. § 5108, violates the nondelegation doctrine because the IRA fails to assert an intelligible principle to guide the Secretary's implementation. Dkt. 57 at 37. But the intelligible principle provided by Section 5 is clear. Congress enacted the IRA to promote Indian self-government and economic development and to preserve Indian communities by, among other things, authorizing the Secretary to acquire lands by "purchase, relinquishment, gift, exchange, or assignment . . . for the purpose of providing lands for Indians." 25 U.S.C. § 5108. Through this mechanism, the IRA sought to restore or replace lands, and related economic opportunities, lost to tribes through the allotment policy. *See Mescalero Apache Tribe*, 411 U.S. at 151; *Cnty. of Yakima,* 502 U.S. at 255. The legislative history of the IRA reinforces its clear purpose, as the catalyst behind the IRA was the recognition that Interior could not promote the IRA's goals without the restoration of the tribal land base. *See Brendale v. Confederated Yakima Indian Nation,* 492 U.S. 408, 436, n.1 (1989); *See, e.g.*, H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934); 78 Cong. Rec. 11,727, 11,730, 11,732 (1934) (statements of Rep. Howard). This coincides with broader IRA policies protecting tribal land from involuntary re-alienation to promote tribal political, economic, and cultural wellbeing. *See* 25 U.S.C. § 5101 (ending allotment); 25 U.S.C. § 5102 (continuing trust status indefinitely); 25 U.S.C. § 5103 (restoring tribal ownership over surplus reservation lands).

Applying the *Mistretta* test, Congress sufficiently identified Interior as the "public agency which is to apply" the statute, a "general policy" of promoting Indian self-determination and economic self-sufficiency, and the "boundaries" for implementing this policy as the acquisition of land for Indians as necessary to carry out the self-determination policies of the Act. *See* 488 U.S. at 372-73. This delegation falls well within the caselaw upholding far broader delegations to regulate "for the public interest" or to create "fair and equitable" standards. *See Whitman,* 531 U.S. at 473-475 (cataloguing cases upholding such statutes). Plaintiff offers no argument refuting the context, purpose, or legislative history of the IRA, relying instead on a simplistic reading of Section 5. The Supreme Court has long declined to so narrow nondelegation analyses. *Gundy v. United States*, 588 U.S. 128, 141 (2019) (requiring analyses to include narrow and broad statutory context as well as history and purpose). The Court should do so here.

The Seventh Circuit has twice recognized the Secretary of Interior's "broad authority" to acquire property in trust for Indian Tribes under Section 5. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 653 (7th Cir. 2004); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 943 (7th Cir. 2000). It has also affirmed the overarching goals of the IRA and expressly recognized that trust acquisitions fit within those goals. *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 671 (7th Cir. 2020) (discussing how the IRA "[turned] federal policy toward Indian lands [] 180 degrees," which gave "tribes the opportunity to re-establish their governments and land holdings"). The Western District of Wisconsin has taken up the nondelegation question directly and upheld Section 5, finding persuasive the decisions of the Eighth, First, and Tenth Circuits on the same issue. *Sauk County v. U.S. Dept. of Interior*, No. 07-cv-532, 2008 WL 2225680, at *4 (W.D. Wis. May 29, 2008).

Plaintiff relies on Eighth Circuit precedent it claims ruled in its favor. Dkt. 57 at 38. But that case was vacated by the Supreme Court and predated the Eighth Circuit cases to the contrary.[21] *See South Dakota II*, 423 F.3d at 796-99. On *three* occasions, the Eighth Circuit has upheld Section 5 of the IRA against nondelegation challenges, rejecting Plaintiff's same arguments, and finding the IRA's purpose, text, and legislative history provided meaningful delegative instruction to acquiring land "for the purpose of providing lands for Indians." *South Dakota II*, 423 F.3d at 795-99 (finding Section 5 contains an "intelligible principle"); *Cnty. of Charles Mix v. U.S. Dep't. of Interior*, 674 F.3d 898, 902 (8th Cir. 2012) (declining to reconsider); *South Dakota IV*, 487 F.3d at 551 (same). Other circuits have unanimously held the same. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008); *Carcieri v. Kempthorne*, 497 F.3d 15, 43 (1st Cir. 2007) (en banc), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974 (10th Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 473 (D.D.C. 1978); *accord Confederated Tribes of Siletz Indians of Or. v. United States*, 110 F.3d 688, 694 (9th Cir. 1997).

Plaintiff asserts the Court should disregard the consensus among circuit courts because such cases rely principally on legislative history, which Plaintiff believes carries no weight. Dkt. 57 at 39-41. However, the Supreme Court has long held that nondelegation analyses may draw from "the purpose of the Act, its factual background and the statutory context in which [the

[21] Plaintiff asserts without support that the United States sought to have this decision vacated "to evade review." Dkt. 57 at 38-39. Not so. In response to the Eighth Circuit's decision, which took issue with the United States' position that judicial review was unavailable for fee-to-trust decisions, the United States changed its policy to allow for such judicial review. *Dep't of Interior v. South Dakota*, 519 U.S. 919, 920 (1996) (Scalia, J., dissenting). It was this change only that led the Supreme Court to vacate the Eighth Circuit's decision. *Id.* at 921.

phrases of purpose] appear." *Am. Power & Light Co.*, 329 U.S. at 104. This includes legislative history. *Gundy*, 588 U.S. at 141, 144 (listing cases using legislative history in nondelegation analyses); *see Mistretta*, 488 U.S. at 376 n.10 (engaging legislative history even absent statutory ambiguity). Plaintiff's citations to the contrary concern legislative history in the unrelated context of statutory interpretation and, in any event, do not reject the use of legislative history altogether. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018) (assessing role of legislative history in statutory interpretation context); *Carcieri,* 555 U.S. at 387 (same). Plaintiff also wrongly contends that the Eighth, First, and D.C. Circuits relied *entirely* on legislative history, Dkt. 57 at 40, ignoring that those cases also analyzed the text, purpose, and statutory context of the IRA to conclude Section 5 does not violate the nondelegation doctrine. *See South Dakota II*, 423 F.3d at 797-98; *Carcieri*, 497 F.3d at 42; *Mich. Gambling Opposition*, 525 F.3d at 31-32.

Against the overwhelming consensus among circuit courts, Plaintiff cites to *Consumers' Research v. F.C.C.*, 109 F.4th 743, 759 (5th Cir. 2024), a nondelegation case for which the Supreme Court recently granted certiorari, to argue that the Seventh Circuit should diverge from sister circuit courts. Plaintiff does not explain how the Fifth Circuit's analysis—which was limited to the context of the Telecommunications Act—has any bearing on this Court's analysis of Section 5 of the IRA. *See* Dkt. 57 at 36-37. Plaintiff merely parrots the Fifth Circuit's general policy statements in favor of limiting the nondelegation doctrine, Dkt. 57 at 36, while excluding that court's recognition that "Congress simply cannot do its job absent its ability to delegate under broad general directives," *see Consumers' Rsch.*, 109 F.4th at 763-64. The Court should disregard this nonbinding, irrelevant case.

Finally, Plaintiff asserts that Section 5 of the IRA is an unconstitutional delegation because it allegedly gives the Secretary unfettered discretion to determine whether land should

be taken into trust and change her policy "for any reason and at any time." Dkt. 57 at 41-42. For support, Plaintiff cites *Gundy*, in which the Supreme Court rejected the argument that the Sex Offender Registration and Notification Act ("SORNA") provided the Attorney General with unfettered discretion to apply the law to only some "Pre-Act Offenders" (though it acknowledged that such discretion could pose a nondelegation problem). 588 U.S. at 133-34, 136. Rather, the Court held, based on SORNA's text, purpose, and legislative history, that the law applied to *all* Pre-Act Offenders, and that the Attorney General only had discretion to proscribe procedural flexibility for *when* certain offenders registered, not *if* they registered. *Id.* at 137-39. The Court found the Attorney General's discretion to craft feasible regulatory mechanisms "easily passe[d] muster." *Id.* at 136, 146-48 (acknowledging Congress depends on executive officials' discretion in implementing programs). Plaintiff also cites to *City of Chicago v. Burr*, which addressed a statute that could have provided the Attorney General discretion to deny law enforcement grants based on conflict with *any* federal law, regardless of its relation to the grant, effectively providing discretion to determine "whether a particular federal law will be a precondition to a grant." 961 F.3d 882, 907 (7th Cir. 2020). While declining to decide the issue, the court noted that problems could arise where an agency has discretion over *whether* to apply the law, not simply over the mechanisms of *how* the law is implemented. *Id.*

Plaintiff creates a false equivalency between the Secretary's creation of standards for trust acquisitions under Section 5 (thus implementing congressional policy) and the hypotheticals in *Gundy* and *City of Chicago*, which would have allowed the Attorney General discretion over whether to apply the law in the first instance. As discussed, the text, purpose, and legislative history of the IRA proscribe the Secretary's authority to take land into trust *for Indians* to support *economic development and tribal self-governance*. No part of Section 5 allows the Secretary to

exclude certain Indians[22] (as in *Gundy*), or approve or deny applications for reasons unrelated to the text and purpose of the IRA (as in *City of Chicago*). There is no discretion in *whether* Section 5 applies to a trust application, only in the Secretary's determination of *how* the law is implemented, which she has exercised through promulgating fee-to-trust regulations in accordance with statutory boundaries.[23]

In sum, the text, purpose, and legislative history of Section 5 of the IRA provides an intelligible principle to guide the Secretary's implementation. Plaintiff's simplistic analysis conflicts with Supreme Court precedent, and the case law it relies on to narrow the nondelegation doctrine is irrelevant here. This Court should reject Plaintiff's nondelegation challenge.

2. The IRA is Constitutional Under Congress's Plenary Power

Plaintiff's concluding argument asserts that Section 5 of the IRA is unconstitutional because it exceeds Congress's plenary power under the Indian Commerce Clause, which it believes should be limited to regulating "trade." Dkt. 57 at 43-47. It further asserts that plenary power over Indian Affairs is itself unconstitutional because similar authority does not exist vis-à-vis states or foreign nations under the Commerce Clause. *Id.* Plaintiff's arguments have long been rejected by the Supreme Court.

First, the Supreme Court has conclusively determined that congressional authority over Indian affairs under the Indian Commerce Clause is distinct from congressional authority in

[22] The IRA defines "Indian," in relevant part, as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129.

[23] Plaintiff asserts in passing that taking land into trust unconstitutionally removes state and local jurisdiction, and that the recently promulgated regulations, *see* Land Acquisitions, 88 Fed. Reg. 86,222 (Dec. 12, 2023), are an unlawful "arrogation" of executive authority. Dkt. 57 at 43. Setting aside the questionable merits of that argument, the new regulations do not apply to the challenged Decisions. Any argument regarding the new regulations is therefore irrelevant to the disposition of this case. Further, Plaintiff waived this argument by failing to develop it.

relation to states and foreign nations under the Interstate Commerce Clause. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he Commerce Clause draws a clear distinction between 'States' and 'Indian Tribes.'"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) (holding states, tribes, and foreign nations distinct under the Commerce Clause). This is because the Indian Commerce Clause places "virtually all authority over Indian commerce and Indian tribes" with the federal government, while states retain some authority under the Interstate Commerce Clause to protect free trade in the absence of federal legislation. *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996)). Consistent with the Founders' understanding, and since the earliest days of this Nation, the "federal government enjoyed exclusive constitutional authority over managing relationships with the Indian Tribes." *Id.* at 317 (Gorsuch, J., concurring) (quoting G. Ablasvsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012, 1019 (2015)) (quotations omitted).

Second, the Supreme Court has also held that Congress's plenary power over Indian affairs is "implicit[] in the structure of the Constitution more generally," not just the Indian Commerce Clause, *Mancari*, 417 U.S. at 551-552, and arises out of the Treaty Clause, pre-constitutional powers inherent in the federal government, and the trust relationship between the United States and tribes, *Brackeen*, 599 U.S. at 273-75 (citing precedent upholding each principal). Consistent with this foundation, the Supreme Court has broadly defined Congress's plenary power to concern "not only trade, but 'Indian Affairs,'" including "criminal law, domestic violence, employment, property, [and] tax." *Brackeen*, 599 U.S. at 275, 278 (citing precedent regarding each). Provisions of the IRA itself, related to BIA tribal hiring preferences, have been upheld as a proper exercise of plenary power via the government's trust responsibility to "turn[] over to the Indians a greater control of their own destinies" and reverse years of

"exploitative and destructive" legislation. *See Mancari*, 417 U.S. at 553.[24]

Accordingly, since the early days of the Republic, Congress's plenary power has included the power to create reservations, and acquire, sell, and own Indian land. *See, e.g.*, Treaty with the Oneida, 7 Stat. 566 (1838) (creating the Oneida Reservation); Nonintercourse Act, 1 Stat. 137 (1790) (prohibiting alienation of Indian land without federal approval); General Allotment Act, 24 Stat. 388 (1887) (authorizing allotment in severalty of reservation lands); Indian Gaming and Regulatory Act, 25 U.S.C. § 2719(b)(1)(A) (1988) (authorizing the Secretary to take lands into trust for gaming). This power includes the ability to divest a state of aspects of its jurisdiction when land is acquired. *United States v. John*, 437 U.S. 634, 653 (1978) (limiting state criminal jurisdiction over newly acquired trust land). While plenary power is not absolute, its outer limits remain undefined, and the Supreme Court has explicitly rejected requests to narrow the doctrine where appellants do not grapple with this longstanding precedent. *Brackeen*, 599 U.S. at 279.

Plaintiff does not try to reconcile its arguments with caselaw. Instead, it presents an incorrect and squarely rejected textual interpretation of the Commerce Clause—devoid of the original understanding of the Founders—to equate tribes with states. Plaintiff also cites Justice Thomas's nonbinding dissent from the denial of certiorari in *Upstate Citizens for Equality*, 583 U.S. at 1005. Dkt. 57 at 44-45. Justice Thomas's position that trust acquisitions are not "trade" because "no money or property changes hands," cannot be squared with "founding era usage [which] confirms that the term 'Commerce,' when describing relations with Indians, took on a broader meaning than simple economic exchange." *Brackeen*, 599 U.S. at 320 (Gorsuch, J.,

[24] The Second Circuit has also upheld Section 5 of the IRA against this same argument. *See Upstate Citizens for Equal., Inc. v. United States.*, 841 F.3d 556, 567-70 (2d Cir. 2016), *cert. denied*, 583 U.S. 1004 (2017) (rejecting comparisons to the Interstate Commerce Clause, a narrow definition of trade, and that the IRA infringes on state sovereignty).

concurring). Nor can it be squared with the Supreme Court's modern holdings that the Indian Commerce Clause is not limited to simple commercial transactions. *See Brackeen*, 599 U.S. at 278 (rejecting the argument that a statute must regulate a commodity).

With these arguments precluded, Plaintiff's Motion falls to the hyperbolic policy argument that Section 5 of the IRA could allow the federal government to declare entire states Indian country, stripping states of sovereignty. Dkt. 57 at 46-47 (asserting that 67 million acres—the entirety of federal trust lands—have been removed from state tax rolls and jurisdiction). This argument overstates the impact of trust acquisitions on state sovereignty, as Wisconsin retains criminal jurisdiction over the Oneida Reservation, including trust lands, under Public Law 280, 67 Stat. 588, as well as certain civil regulatory jurisdiction over non-Indians, *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (finding civil jurisdiction where not preempted by federal law or interfering with tribal self-government). It also overstates the magnitude of trust acquisitions under the IRA and the State's purported entitlement to such lands.

Notwithstanding the historic dispossession of tribes from their aboriginal territory, most of today's 67 million acres of federal trust lands were set aside as reservations before statehood or the passage of the IRA. This includes the Oneida Reservation. *See* Treaty with the Oneida, 7 Stat. 566 (1838); Act for Admission of the State of Wisconsin into the Union, 1 Sess. 50 at 233 (1848). And such reservations are modest in size compared to the millions of additional acres of aboriginal territory tribes ceded to the United States in exchange, which allowed for the creation of states like Wisconsin. *See, e.g.*, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 586 U.S. 347, 349, 352 (2019) (describing a tribe's cession of millions land in exchange for the "modest" promise of a permanent reservation homeland). The diminishment and allotment of reservations thereafter created state jurisdiction where it had never before existed.

The magnitude of land lost to allotment and reservation diminishment is also far greater than the land taken back into trust under the IRA. In 1838, the Oneida Reservation contained approximately 65,000 acres in trust. *Oneida Nation*, 968 F.3d at 669-70. At the time of the Regional Director Decision, only 14,000 acres were held in trust, *id.* (describing the "disastrous" history of allotment on the Oneida Reservation that the IRA was designed to remedy). This amounts to 0.04 percent of the state of Wisconsin[25] and only 21.5 percent the Nation's original reservation. This trust acquisition is not the land grab Plaintiff asserts, and its effect on state jurisdiction is simply incomparable to the historic loss of tribal jurisdiction that the IRA seeks to remedy. *See*, *e.g.*, *Upstate Citizens*, 841 F.3d at 570 ("underlying principles of state sovereignty do not impair the federal government's power under the IRA to acquire land on behalf of the Tribe even if, by doing so, [the state's] governmental power over that land is diminished").[26]

Plaintiff's constitutional challenges lack merit and should be rejected.

V. CONCLUSION

For the reasons stated herein, the Court should deny Plaintiff's Motion for Summary Judgment and enter judgment in favor of the United States.

DATED: May 15, 2025.

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[25] The State contains approximately 34.8 million acres of land. *Public Lands*, Wisconsin Legislative Reference Bureau, https://bcpl.wisconsin.gov/bcpl.wisconsin.gov%20Shared%20Documents/Press/LRBPublicLands-June_2010.pdf (last visited Apr. 16, 2025).

[26] Plaintiff's contention that the "Founding Fathers" would not have anticipated trust acquisitions, Dkt. 57 at 47, does not limit the scope of plenary power. To the contrary, broad plenary power was anticipated at the nation's founding and is reflected in early legislation and executive actions. *See*, *e.g.*, *Brackeen*, 599 U.S. at 307-31 (Gorsuch, J., concurring). Justice requires that the doctrine—which was previously used to diminish tribal rights and property—be consistently applied to modern policies that promote tribal self-determination and economic development. *See Mancari*, 417 U.S. at 551-52; *United States v. Lara*, 541 U.S. 193, 202 (2004).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charmayne G. Staloff, hereby certify that on May 15, 2025, I caused the foregoing UNITED STATES' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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