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
REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As the Village stated in its initial briefing, the Acting Midwest Regional Director's ("RD") January 19, 2017 decision (the "Remand Decision") (Dkt. 1-4) accepting the eight Properties[1] within the Village into trust, on behalf of the Secretary of Interior (the "Secretary"), for the Oneida Nation (the "Nation"), as well as the Interior Board of Indian Appeals' (the "Board") September 21, 2023 decision (Dkt. 1-1, *Village of Hobart v. Acting Midwest Reg'l Dir.*, 69 IBIA 84 (2023) (*Hobart II*) (the "Decision") (together the "Decisions") must be vacated for at least three reasons:

1. The Decisions were the product of an unconstitutional process that created an actual risk of bias or prejudgment because they were processed and decided pursuant to a Memorandum of Understanding ("MOU") with the BIA Midwest Division Fee-to-Trust ("Division"). (Dkt. 1-3.) This MOU structure and the decision-making by the RD thereunder violated the due process guarantees in administrative actions.

2. 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 because of both the decision-making process under the MOU and the RD's review of the on-reservation criteria under 25 C.F.R. § 151.10.

3. Under the Constitution, 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 authority over Indian tribes.

The Defendants' and Nation's responses misconstrue and ignore the administrative shortcomings and unconstitutional actions taken by both the Board and the RD in their Decisions in violation of the APA. Judgment in favor of the Village is proper.

ARGUMENT

I. THE DECISIONS ARE ADMINISTRATIVELY BIASED AND PREJUDGED IN VIOLATION OF THE APA AND THE DUE PROCESS CLAUSE.

A. The Standard for Unconstitutional Bias Under the Due Process Clause and APA is a Risk of Actual Bias or Prejudgment.

[1] As noted, the properties consist of 21 parcels of approximately 499.022 acres and are known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay properties (the "Properties").

The United States Supreme Court in considering unconstitutional bias has determined the question to be asked 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 v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (citations omitted)). The Defendants acknowledge the Department of Interior's decision-making process is subject to the Due Process Clause and must be unbiased. (Dkt. 20 at 64.) In their response, however, the Defendants (as well as the Nation) misconstrue the standard for evaluating unconstitutional bias at the agency level. Contrary to their suggestions, the Village does not need to prove "actual bias." Moreover, a violation of the Due Process Clause (and thus the APA) is established when other interests or circumstances "besides pecuniary interests" are shown. *See Del Vecchio v. Ill. Dept. of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) (actual bias need not be shown if there are "circumstances that present 'some [actual] incentive to find one way or the other' or 'real possibility of bias[.]'" (quoting *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981)).[2]

While a presumption of integrity does apply to agency decisions, "the 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.

[2] Contrary to the Board's decision, the Village need not show the official had a pecuniary interest in the outcome to demonstrate the RD was biased. *Cf. Hobart II* at 103 (erroneously contending "the Village must either make a substantial showing of bias or it must establish the BIA decisionmaker had a 'pecuniary interest in the outcome' of these applications."). Likewise, the Village does not need to show actual bias. *See United States v. Williams*, 949 F.3d 1056, 1061 (7th Cir. 2020) ("[C]ourts do not ask 'whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias".'" (quoting *Caperton*, 556 U.S. at 881)). The Board's failure to apply the proper standard for evaluating the Village's bias claim was a violation of the APA. *See infra* (citing 5 U.S.C. § 706).

1098, 1108 (S.D. Ill. 1992) ("any type of bias is judicially cognizable to the extent it bears upon the fairness of a hearing.") (citing *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984)). This presumption may be overcome "by showing that the adjudicator had a conflict of interest or that there is some other specific reason for disqualification." *Sanchez ex rel. Sanchez v. Barnhart*, No. 03-C-537-C, 2005 WL 752220, at *10 (W.D. Wis. Mar. 30, 2005), *aff'd sub nom. Sanchez v. Barnhart*, 467 F.3d 1081 (7th Cir. 2006). A "plaintiff may show bias by pointing to remarks or conduct by the adjudicator that 'reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.'" *Id.* (quoting *Liteky v. United States,* 510 U.S. 540, 555 (1994)); *Williams v. Pennsylvania*, 579 U.S. 1, 15 (2016) ("appearance of bias demeans the reputation and integrity of not just one [decision-maker], but the larger institution[.]."). Thus, there are a number of factors that can support a claim for unconstitutional bias of an agency's decision, including the temptation of pecuniary interests that are present under the MOU. *See Del Vecchio*, 31 F.3d at 1373 (citing *Ward v. City of Monroeville, Ohio*, 409 U.S. 57, 60 (1973) (holding a mayor's responsibility for the town's finances "may make him partisan to maintain the high level of contribution from the mayor's court" and therefore violated the due process clause)).[3]

Consequently, the Village need only show "a risk of actual bias or prejudgment" to establish a violation of the APA.[4] *Caperton*, 556 U.S. at 883. As discussed herein and in its initial

[3] The Nation cites *United States v. Gmoser*, 30 F.4th 646 (7th Cir. 2022) and *Pettis v. United States*, 129 F.4th 1057 (7th Cir. 2025). Both cases are distinguishable. In *Gmoser*, there was a "single *ex parte* email" that could be interpreted both as showing "bias requiring a new trial" and there being "no appearance of bias." 30 F.4th at 649. Likewise, in *Pettis*, publicly disclosed *ex parte* communications and the judge's preexisting relationship with members of the U.S. Attorney's Office had already been determined not to impact any of his rulings or advantage either party. 129 F.4th at 1062-63. Here, however, pursuant to the MOU, the RD is driven to the goal of acceptance by the risk of losing the participating tribes' funding. The Record also discloses a joint goal of BIA and the Nation to proceed in a manner adversarial to the Village.

[4] The Defendants and Nation misconstrue the Village's summation of the bias standard. The Village is not contending that appearance alone constitutes unconstitutional bias, but rather whether the appearance poses an actual risk of bias or prejudgment.

brief, the Village meets that burden.

The Nation inexplicably suggests the Due Process Clause does not apply to the Village's bias claims despite acknowledging the "APA standard provides the minimal due process required by the Fifth and Fourteenth Amendments." (Dkt. 63 at 18.) First, the Village's requested relief is a declaration the Village was denied due process, and an order from the Court vacating and remanding the decision to a neutral, independent decisionmaker. (See generally Dkt. 1.) The Village is not requesting an evidentiary hearing as the Nation contends. Second, the APA requires the Court to "hold unlawful and set aside agency action, findings, and conclusions . . . not in accordance with the law . . . contrary to constitutional right, power, privilege, or immunity . . . and without observance of procedure required by law." 5 U.S.C. § 706. For the Nation to suggest the APA does not incorporate the Due Process Clause (including procedural due process) is to ignore Section 706's plain text.

Next, contrary to the Nation's assertion, the Village does have a property interest that makes the Due Process Clause applicable. The Village's interest in maintaining its tax base is harmed when taxes are lost through trust acquisition. The existence of other tax-exempt entities actually exemplifies the loss of a property interest. Moreover, to suggest the Village somehow does not have a property interest ignores the mandatory notice requirements under the Part 151 regulations to state and local governments impacted by the proposed trust acquisition.

B. The Improper Review of the MOU and the IG Report.

The Defendants and the Nation's attempts to downplay the IG Report's findings and the RD's inadequate review of the MOU are not persuasive.

1. The MOU's terms and the desired outcomes were ignored.[5]

The Defendants and the Nation contend the MOU is designed for "*efficiency*," and not acceptance. This ignores the MOU's plain language. It was created because of "[t]he need for increased land base" for tribes and its purpose is to get land "*accepted* into trust." (Dkt. 1-3 at 2.) The MOU even goes as far as to require BIA employees to "assist[s] the Participating Tribes in eliminating or mitigating any of the Solicitors objections . . ." (*Id*. at 5.) And it is beyond debate the IG and Solicitor certainly are not of the opinion the MOUs are of no concern because they are only about efficiency.

The Defendants also ignore other language in the MOU. "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*." (*Id.*) Clearly, preferential treatment if you can afford to pay for it.

The MOU is also about tribal influence. An "Oversight Advisory Council" is formed, which is "composed of the MWRO Regional Director and one representative of each Participating Tribe." (*Id.* at 5.) This Council 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*.) The "specific number and positions" within the Division are

[5] The Defendants suggest there may be an issue concerning what MOU applies for review. However, as the Village stated in its initial brief, the Board referred to the FY 2008 – 2010 MOU (Dkt. 1-3 at 17-23, Dkt. 35-5 at 160-66), but noted 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. Because the Remand Decision was issued while the FY 2014 – FY 2017 MOU was in effect, the Village believes that MOU applies and cites to it herein – though both MOUs are relevant because Division employees were required to process the Nation's applications and draft decisions under both.

determined by the Midwest Regional Office and the Advisory Council through a mutually agreed upon process. (*Id.*) However, this selection does not apply if "tribal or contract staff are used" to process the applications with Division staff. (*Id.*) An executive committee, which also includes tribal representatives, may also be formed for the "purpose of providing more timely input to the Regional Director." (*Id.*) The tribes are deeply embedded.

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.*) Among other duties, Division employees are responsible for "*preparing the Notice of Decision on a requested parcel*" and "*preparing the record for appeal*[.]" (*Id.* at 5-6.) 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.) The Defendants ignore all these terms, and so did the Board and the RD. This improper review violated the standards set forth in the APA, and when properly considered shows the actual risk of bias or prejudgment.

2. The RD and the Board's limited review of the IG Report violated the APA.

The Defendants' contention that the Board properly excused the RD's limited review of the IG Report is without merit. Despite ordering the RD to review the IG Report and then excusing the fact the RD did not obtain a complete copy of the Report, the Board arbitrarily dismissed the IG's findings based on the Solicitor's legal opinion. In response, the Defendants try to excuse this failure by contending "the redactions appeared to be mostly employee names and that Plaintiff did not identify how the unredacted material would have helped its arguments." (Dkt. 64 at 26.) What the Defendants (as well as the Board and the RD) fail to acknowledge is that the IG Report obtained by the RD did not contain certain attachments, including the Solicitor's Opinion—which was why the Board ultimately deemed the Village's arguments as "second-hand" and stripped of reasoning. *Hobart II*, at 109, n.22, 111-12 (concluding "[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."). Through their argument, however, the Defendants actually highlight the arbitrary and capricious decision-making in violation of the APA. The RD's failure to obtain and review a complete IG Report made it impossible for the RD to adequately consider "the Village's allegations of bias as well as the outcome of the IG investigation[.]" *Village of Hobart, Wis. v. Mw. Reg'l Dir.*, BIA, 57 IBIA 4, n.4 (2013) (*Hobart I*) (Dkt. 1-2. at 16.)

Additionally, in their response brief, the Defendants concede the Board and the RD "relied on only the conclusions" of the IG Report. (Dkt. 64 at 26.) Recognizing that the RD and the Board did not consider a complete IG Report (with the Solicitor's Opinion concerning the legality of the consortiums included), the Defendants further argue the Village waived any right to claim the RD should have obtained complete copy. The Village did not and could not waive this argument because it was the Board that ordered the RD to review the IG Report on remand, not the Village.

Critically, the Defendants ignore that 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." (Dkt. 1-5 at 13.) For these reasons, among others, the Solicitor recommended the "BIA discontinue the fee-to-trust consortiums[.]" (*Id.*) A recommendation the BIA and tribes refused to implement, because the benefits to the tribes are too significant to lose.

As a last resort, the Defendants argue that the MOU that was considered in the IG Report was superseded by a subsequent MOU. This ignores the fact the MOU's operative terms in all the agreements are nearly the same. The purpose, structure, funding, interworking with the participating tribes, and even the employee selection and governance are the same. (*Compare* Dkt.

1-3 at 24-30 *with* Dkt. 1-3 at 17-23, *with* Dkt. 1-3 at 10-16, *with* Dkt. 1-3 at 2-9.) Moreover, there are still performance milestones, achievements, and performance plans within the Division that are reported to the participating tribes, (Dkt. 35-9 at 159, 192-94, 209; Dkt. 35-10 at 5-23), which were found similarly problematic in the Pacific MOU. The Defendants and the Nation completely ignore that the appearance of this risk of bias and the structure that prompts bias was not changed in any of the MOUs since 2005.[6] The Defendants (as well as the Nation) cannot, and do not identify or cite any material change in the MOUs from the time the initial decisions were made in 2010 and the RD's Remand Decision in 2017.

The Defendants' reliance upon *Van Harken v. City of Chicago*, 103 F.3d 1346, 1352-53 (7th Cir. 1997) actually reaffirms the Village's claim that the RD's decisions drafted by the Division's employees are biased.[7] In *Van Harken*, the court determined the hearing officers who were deciding parking tickets were not paid by the number of hearings resolved or the portion of fines imposed; there is no quota of fines in relation to job security; and no financial stake in the outcome of cases. *Id.* at 1353. With respect to the Division and the RD's decision-making, there are performance milestones and expectations, and Division employees' salaries and jobs are solely dependent on whether the tribes decide to keep paying. To the extent the "backlog" of fee-to-trust applications are not decided in the participating tribes' favor, then there is no incentive for the tribes to participate. In addition, in *Van Harken*, "[t]he enforcement of the parking laws [wa]s not

[6] The Defendants suggest that the fact Division employees are now "informed of the funding structure upon applying for the job" somehow "reduc[es] any possible conflict of interest." (Dkt. 64 at 24, n.16.) Simply being informed that the tribes are funding the positions only highlights the bias and conflict of interest concerns. Knowing who pays your salary actually increases the risk of actual bias by knowing there is a direct pecuniary interest associated with your role and responsibilities to process and decide fee-to-trust applications for the participating tribes.

[7] The Defendants' citation to this Court's prior statements concerning the MOU concerned an entirely different issue than what is currently before the Court. Previously, the Court made statements concerning the MOU within the Village's request for extra-record discovery, which presented a different procedural and evidentiary burden in the APA context. (*See* Dkt. 52.)

merely a program for raising revenue; it [wa]s also designed to facilitate traffic flow." *Id.* at 1352. On the other hand, the MOU's whole purpose is to have the tribes' applications processed *expeditiously* and for *acceptance* because of a perceived need "for increase land base" - the required outcome for the participating tribes.

Moreover, contrary to the Defendants' contentions, the Board considered this funding structure and found it to be alarming. The Board acknowledged 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 consortium staffs' salaries are dependent." *Hobart II* at 108-09.

C. The Board's Improper Review of the RD's Involvement.

Recognizing the conflict of interest, the Defendants try to excuse the risk of bias and prejudgment by contending the RD "cured" the bias. The Defendants further argue that the Village has not shown the RD did not review her decision, and therefore, the bias stemming from the Division cannot be imputed to the RD.

The Defendants are correct when stating that the RD should be walled off from the Division employees drafting the RD's decision. Indeed, the only true way to ensure there is an independent decision is to wall off any involvement of the RD. Otherwise, the "risk of actual bias" and "prejudgment" are always present—not only in form, but also in practice.

However, it is irrefutable that the RD is entangled with the MOU's workings and outcome. As discussed, the RD oversees the Division and is a leading party to its implementation hand in

hand with the participating tribes.[8] Despite the Board's claim the RD is not a paid Division employee[9] (and therefore, that somehow cures the bias), the MOU's 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. (*See* Dkt. 1-3 at 2-9; Dkt. 35-10 at 12-23.) She also signed the MOU agreeing to its terms on behalf of BIA. (Dkt. 1-3 at 9.) This direct involvement within the Division is substantial evidence of the actual risk of bias under the MOU, and should have "cause[d] the Board to question the impartiality" of the decision. *Hobart II*, at 105.

In contending that the RD's signature demonstrates she "independently" reviewed her decision, the Defendants assert the Village must prove a negative and show there is evidence she did not review the decision. But, if the RD reviewed the decision admittedly not drafted by her, and to such an extent that review cured the risk of bias, such evidence would surely be in the Record. The Board arbitrarily and erroneously disregarded the fact there is zero evidence the RD "independently" reviewed the decision.

The Defendants' argument that the Village seeks non-Record material for establishing the RD's lack of review is also wrong. (Dkt. 64 at 29.) The Village simply points out the obvious; there is no evidence that the RD independently reviewed the decision when allegedly signing it.

Confusingly, the Defendants contend the Village "does not explain its assumption that a

[8] Oddly, the Nation tries to distinguish the Pacific MOU and Midwest MOU by claiming that the Pacific MOU had an oversight committee comprised of tribal representatives only, whereas the Midwest MOU has tribal representatives and the RD. (Dkt. 63 at 33.) This highlights the problem with the Midwest MOU. The BIA individual added to the oversight committee is the official who is purportedly responsible for providing an independent, neutral decision.

[9] That 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 Nation's application. She certainly has an indirect pecuniary benefit from the tribes' payments and has significant responsibilities under the MOU.

lack of denials demonstrate bias." (Dkt. 64 at 29.) The fact there are no denials, however, demonstrates there is only one outcome—*acceptance*. That is the whole issue and problem with the MOU. The Defendants' primary contention when addressing the admitted lack of denials, is to suggest that when there is an issue with an application, the Division sends the applying tribe a warning prior to the RD's review. Whether or not this is true, the problem still stands.[10] Being forewarned of the risk of denial by BIA employees whose salaries you pay, is again inappropriate preferential treatment rather than fair, unbiased processing of an application to its natural conclusion.

D. The Failure of the Board to Consider the Bias Found in the Record.

The Record substantiates the Village's bias claim and that the Decisions violated the APA and the Due Process Clause. Further, the Nation does not even address the evidence from the Record cited by the Village in its response.

1. The Division and the Nation prioritize applications for acceptance, not just certain functions of BIA employees.

The Defendants largely ignore the substance of the communications in the Record, and instead attempt to negatively portray the Village's argument as a misrepresentation. (Dkt. 64 at 28.) While prioritizing a decision standing alone may not be the same as prejudging a decision the mere fact the Nation can dictate, to the BIA, what it must prioritize should set off alarm bells. Also, contrary to the Defendants' suggestion, the prioritization by BIA of the Nation's applications is not limited to Phase I ESAs. The Record demonstrates that the Division and the Nation 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

[10] The Defendants only cite to the BIA Handbook for this type of procedure, not that this actually happens in practice.

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).) The Defendants' argument also omits this prioritization is consistent with the MOU's stated goal of "*facilitating the expeditious processing of fee-to-trust applications . . . submitted by the participating (i.e. paying) Division tribes.*" And that, the MOU was created because "[*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*." (Dkt. 1-3 at 2.)

The Record also confirms the Division employees draft decisions for the outcome of *acceptance*. (Dkt. 35-5 at 206 ("very close to acceptance"); *see also* Dkt. 35-5 at 192-93 (discussing drafting the NODs and the patience by the Nation)). The predetermined outcomes are also confirmed by the boasted accomplishments and milestones under the MOU by Division employees. (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.) Projections for acceptance do not demonstrate a reasoned,

independent, and neutral decision-making process is in play. Rather, it evidences prejudgment and predetermination.

2. The Record evidences the impermissible conflict of interest and favoritism towards the Nation.

The Division's communications with the Nation are not just routine. The Defendants ignore the fact the Record shows the Nation was actually involved in addressing the bias issue. (Dkt. 33-10 at 180-82; 33-2 at 198-203.) The Defendants do not address the meetings between BIA, the RD, and the Nation labeled the "Hobart Bias Meeting" to discuss the remanded cases and the solicitor's review. (Dkt. 32-12 at 192; Dkt. 32-6 at 152-56, 161-65.) Likewise, the Defendants ignore the proof a Division employee informed the Nation'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. A conference the Nation confirmed it would attend. (Dkt. 32-6 at 152-56.) In August 2016 upon the Nation's request, the RD and Division employees scheduled a follow-up meeting with the Nation 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.) The meeting was then scheduled—showing the RD, Division, and the Nation all were coordinating on how to address the Village's bias claim and a draft of the NOD. (*Id.* at 144, 147-48.) These interactions are much more than the Nation "simply" being "allowed to participate in th[e] process with BIA," *Hobart II* at 106, but rather are the types of communications 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).

Even if the Defendants' suggestion that the RD's incomplete review of the IG Report and bias issue was good enough, that does not explain why the Nation was not just kept informed, but directly participated in the BIA's deliberations on the issue. Any presumptions of regularity and

impartiality go out the window when an agency decides to work closely with and in favor of one party, to the exclusion and detriment of another party significantly impacted by the adjudication.

E. The MOU is Illegal Under Federal Law.

Neither the Defendants, nor the Nation is able to identify or cite any statute explicitly authorizing this pay-to-play structure. The Defendants cite to 25 U.S.C. § 5302, but the focus on that statute is education.[11] While there is a reference to "other Federal services" in Section 5302, there is no reference to or explicit authorization for anything like the MOU.

Likewise, 25 U.S.C. § 5321, another statute cited by the Defendants and the Nation, does not reference, nor authorize the MOU structure as an appropriate self-determination contract. None of the programs outlined in that statute concern the Secretary's acquisition of land into trust for a tribe.

Similarly, 25 U.S.C. § 5363, "authorize[s] the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs[.]" But, as the Defendants also appropriately acknowledge (although through an effort to downplay the bias), the Nation does not process the applications or render the decision in the MOU. Moreover, 25 U.S.C. § 5363(k) does not "authorize the Secretary to enter into any agreement . . . with respect to functions that are inherently Federal." Processing and deciding a tribe's fee-to-trust applications is an inherently federal function, otherwise the tribes would just do it themselves.

Simply pointing to and reciting various statutes as alleged authorization is not convincing.

[11] Ironically, while 25 U.S.C. § 5302 focuses on education for Indians, the Nation actually reprograms its scholarship funds from the government to finance the Nation's participation under the MOU—thereby, effectively undercutting the stated "goal of the United States . . . to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life area of their choice[.]" 25 U.S.C. § 5302(c); *see also, e.g.*, Dkt. 35-10 at 34 (noting reprogramming of $282,787 from the Scholarships line item to the BIA to pay for the Tribe's share of the Fee-to-Trust project).

Despite the Nation's contention that the "MOU is explicitly authorized" by the Indian Self-Determination and Education Assistance Act ("ISDEAA"), the Nation does not identify any such provision in any of the statues or sources the Nation relies upon.[12]

> With respect to the ISDEAA, in particular,[13] the Solicitor's Opinion concluded:
>
> By using the funds in the manner intended by the consortium tribes, BIA essentially takes over the function that was intended to be managed by the tribes. Additionally, BIA uses the funds in a way that determines how the work on the fee-to-trust application on the particular consortium tribes will be performed. *This is antithetical to the intent of the Indian Self-Determination Act.*

(Dkt. 1-5 at 13.) The IG Report notes that the Solicitor determined "these consortiums are not structured in the conventional sense and could be seen to be inconsistent with the general intent, if not the letter, of the Indian Self-Determination Act." (*Id.*)

The Defendants also assert that the IG Report, which incorporated conclusions from the Solicitor's Opinion, found the MOU structure did not technically violate federal law.[14] However, as the IG noted the Solicitor's "opinion recognized the patent appearance of a conflict of interest created by the consortiums by pointing out that the consortium's structure and use by the tribes and BIA 'reflects an insufficient separation organizational functions, the possibility of the

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[12] Both the Defendants and the Nation rely upon the Department's Report on Tribal Allocations from July 1999, U.S. Dep't of Interior, Bureau of Indian Affairs, Report on Tribal Allocations 14 (July 1999). But nothing in that report actually supports the Nation's contention that the processing of fee-to-trust applications are part of Trust Services. In fact, as stated, it would be contrary to law to allow the Nation to be involved in the Secretary's determination under 25 U.S.C. § 5108 and its implementing Part 151 regulations of whether land should be acquired into trust.

[13] In a footnote, the Nation seemingly agrees with the Board that the Village's claimed interests fall outside the zone of interests protected by the ISDEAA, and therefore the Village lacks standing to challenge the MOU. (Dkt. 63 at 28.) This rationale, however, completely ignores the fact that the Village clearly has standing to challenge the MOU given the impacts the MOU has on the Village through trust acquisition of fee lands within the Village. Likewise, the Nation's argument (based on the Board's reasoning) presumes the MOU is lawful under the ISDEAA. The MOU cannot be presumed to be lawful, and for the reasons discussed herein, it is not.

[14] The Defendants cannot credibly rely upon a summary of the Solicitor's Opinion to support one of its arguments, but disregard it for others (as discussed *supra*). This is particularly so when the statutes the Defendants rely upon do not explicitly authorize the MOU arrangement.

appearance of unfairness of the fee-to-trust application process, and a concentration within regional BIA offices in a way that favors consortium tribes over other tribes served by the regional offices." (Dkt. 1-5 at 12.) The IG Report specifically included a Memorandum stating that 25 U.S.C. § 123 provided "no authority for BIA to receive funds from tribes – for this, or any other, reason." (Dkt. 1-5 at 22.) The IG determined the MOU provided "preferential treatment to tribes who 'contribute' to BIA[.]" (*Id.*) The Solicitor's Opinion, a full copy of which has never been provided, also included these findings:

> [The MOU] raises serious questions about the independence of judgment expected of BIA employees reviewing fee-to-trust applications submitted by the tribes that have redirected their TPA funds in a way that enabled the employees to be hired by BIA.
>
> We do not believe that BIA has instituted or considered any limits or controls on communication between these employees and the consortium tribes, or other measures that could assure that these employees do not appear beholden or inappropriately connected to the consortium tribes whose applications they are processing.
>
> . . . we do not believe BIA can assure that the final decisions on the consortium fee-to-trust applications are fair and unbiased . . .
>
> . . . the absence of sufficient internal controls creates a potential for bias or the perception of bias in the review of the applications by these employees.

(Dkt. 1-5 at 13.)

Another reason the MOU is illegal is because under the MOU participating tribes are given preference through the unlawful reprogramming of their TPA funds, which non-participating tribes do not receive. In effort to rebut this problematic preference under the MOU, the Nation contends the preference language under 25 U.S.C. § 5363(b)(2) does not apply to programs administered by BIA. That interpretation misconstrues the whole subsection. The portion the Nation omits is that "nothing in this subsection 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, unless such preference is otherwise provided for by law[.]" 25 U.S.C.

§ 5363(b)(2). There is nothing allowing for this type of preference by law. Likewise, in claiming that a preference is allowed because BIA is administering the program, the Nation says the quiet part out loud—the pay-to-play structure implemented by BIA "necessarily provides a benefit to participating tribes." (Dkt. 63 at 30.) That is the Village's whole point (which is also supported by the IG Report). Only those tribes who can afford to participate in the MOU will have their fee-to-trust applications processed (and therefore accepted) quicker than non-participating tribes. This directly harms the Village when those applications are accepted and the lands within the Village are transferred into trust.

Likewise, the Defendants admit the Nation has input on the process that is supposed to be within the Secretary's purview. (Dkt. 64 at 23.) Oddly, the Defendants even go as far to seemingly suggest that the participating tribes could actually process and decide applications themselves. (Dkt. 64 at 23, n. 15.)[15] The Defendants' entire argument demonstrates the conflict of interest and risk of actual bias under the MOU. The MOU tribes clearly gain a preference over non-participating tribes as highlighted in the IG Report.

The Defendants' argument that other BIA employees within the BIA are free to work on non-participating tribes' applications is not supported by the Record. The Nation's argument that nothing in the MOU prohibits them from working on applications from non-participating tribes is belied by the MOU's terms. The MOU employees' "sole duties and responsibilities" are to the participating tribes. The Nation contention Division employees are not paid by the tribes and are otherwise indistinguishable from other BIA employees could not be further from the truth. (*See* Dkt. 63 at 31.) The MOU by its terms demonstrates that Division employees are distinguishable from other BIA employees in many respects and only have jobs because the Participating Tribes

[15] This is also contrary to the Solicitor's conclusion "review and approval of the applications" is "inherently federal . . . always performed by the BIA." (Dkt. 1-5 at 12.)

fund their salaries. The Record even shows that Division employees have a separate, distinct signature block for their emails to signal those employees are part of the Division. (*See, e.g.*, Dkt. 35-10 at 5-6, 9.)

Finally, the employees funded under the Division do exercise inherently federal functions. The employees process applications and draft decisions. It is the Secretary's role to decide applications, not BIA employees funded by the tribes who have input on the processing. That includes the RD who, as already discussed, is far from independent in the process. Any additional suggestion that the MOU is lawful because Division employees are governed by Title 5 also falls flat. Such governance under the MOU relates only to the employees' *personnel* rights as federal employees. (Dkt. 1-3 at 4.)

The Defendants and the Nation cannot demonstrate that the MOU is explicitly authorized under Federal law. Instead, they attempt to rely upon a kitchen-sink variety of self-determination statutes. As the IG Report concluded, the MOU must be discontinued. (Dkt. 1-5 at 13.) The MOU taints the Section 151.10 process with prejudgment, and it was a violation of the Due Process Clause and the APA when the RD and the Board concluded otherwise.

II. CONSIDERATION OF SECTION 151.10 VIOLATED THE APA.

The Board's review and the RD's determination of the 25 C.F.R. § 151.10 criteria were arbitrary and capricious in violation of the APA given both the passage of time since last review and the arbitrary review that was performed. Neither the Defendants, nor the Nation directly respond to the Board's statements that: (1) "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, and (2) 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. In other words all the factors

under 25 C.F.R. § 151.10(a)-(h) could weigh *against* trust acquisition, but the Secretary could still determine acceptance was proper. This type of review violates the APA.

As the Village noted in its opening brief, the Board's arbitrary and capricious statements concerning the outcome of the RD's review, alone, should require the Board's Decision be vacated. The Board explicitly acknowledges that no matter what level of consideration was given by the RD, the Properties could be accepted into trust. When coupled with the MOU and its implementation, the Board's statements demonstrate that factors that must be considered under this regulation by the RD are an inconsequential checklist. It also highlights the prejudgment of acceptance under the MOU. Given those circumstances, the Decisions must be vacated.

A. The Passage of Time.

The Defendants do not address the fact that it has been 15 years since the RD last considered all the Section 151.10 criteria for the Properties. The Defendants also fail to acknowledge that BIA continued to seek updates from the Nation since 2013, but did not seek similar updates from the Village. The Defendants suggest the Village could have provided updates between 2013 and 2017; but there is nothing in the regulations that permit it to do so (nor did BIA ever suggest the Village could continue to supplement the administrative record by providing updates). Rather, the regulations make clear that it is within the Secretary's authority to "request any additional information or justification deemed necessary to reach a decision." 25 C.F.R. § 151.12(a). Here, there was just one solicitation by the Nation, through an improper delegation by the Secretary, for additional comments from the Village after *Hobart I* in 2013. (Dkt. 33-13 at 292-338.) If the RD believed additional information from the Village would assist it in making its decision, it could have requested such information. It did not.

The Defendants cite *John Casey v. Berryhill*. There the Seventh Circuit determined the agency decision was arbitrary and capricious because "[t]he action by the Appeals Council in first

granting and then retroactively denying Casey's good cause request was arbitrary, having the effect of an unfair bureaucratic bait-and-switch. To be sure, the Council had discretion to determine initially whether Casey offered good cause for his late administrative appeal." 853 F.3d 322, 324 (7th Cir. 2017). Similarly, here, BIA, through improper delegation to the Nation, solicited one request for comments from the Village in 2013, and then continued to exchange communications with the Nation for the next four years—resembling the "unfair bureaucratic bait-and-switch" of allowing one party to continue to provide more information than the other based on the initial comments received.

The Defendants and the Nation's attempts to distinguish the Board's prior decision in *Okanogan County v. Acting Portland Area Director*, 30 IBIA 42 (1996) also puts form over substance. The Defendants citing the Board's Decision in this case argues that the RD "actively solicited updated comments from the Village." (Dkt. 64 at 10.) However, the Defendants fail to recognize two important failings of the RD: (1) the request for comments was in 2013, more than four years prior to issuing her 2017 decision and more than 10 years prior to Board's 2023 decision; and (2) the RD did not consider all the factors under 151.10 in 2017. More than 4 years had gone by (and more than 12 years have gone by) since the RD made her initial decision. The Nation suggests this was due to the Village's multiple appeals. (Dkt. 63 at 20, n.15.) That is not the reason. After the remand in *Hobart I*, the RD took almost four years to issue her Remand Decision. (*Cf. Hobart I,* at 4 (identifying May 9, 2013 as Board's decision date) *with Hobart II*, at 92 (identifying RD's Remand Decision date as January 19, 2017).)

Similar to *Okanogan*, due to the passage of time, it was "incumbent upon BIA to update its analysis before proceeding with a trust acquisition." 30 IBIA 42, 44. That update did not occur, and the Village was never provided an opportunity to address additional comments provided by

the Nation for the RD's consideration in making her determination. This Court should vacate the Decisions and remand for an up-to-date consideration of the 151.10 criteria. *See, e.g., Sw. Elec. Pwr. Co. v. U.S. EPA*, 920 F.3d 999, 1030-31 (5th Cir. 2019) (noting time provided an adequate opportunity by EPA to collect data and demand further inquiry). Certainly, the RD had opportunity to consider whether circumstances changed within the 7 years from its initial decisions to her Remand Decision concerning the Section 151.10 criteria.

B. Section 151.10(e) – The Failure to Properly Consider Tax Impacts.

The Defendants admit the RD did not consider the cumulative tax effects of the Nation's fee-to-trust applications and the total amount of land already held in trust for the Nation's benefit. Despite that, the Defendants contend that BIA was not required to consider these impacts because they are largely speculative. But, as the Village stated in its initial brief, these cumulative effects are not speculative. The Defendants also do not address the fact that in 2008 alone, the Nation requested approximately 2,673 acres of land be transferred into trust (which these Properties were part of). (Dkt. 35-1 at 649-673; Dkt. 35-3 at 640; *Hobart I* at 5, n.4.) The RD's failure to consider these circumstances in deciding the tax impacts was arbitrary and capricious; particularly when this information was in the Record for the RD's consideration.[16]

Similarly, the Board acted arbitrarily and capriciously given its inconsistent rationale in its Decision for justifying the RD's failure to consider the cumulative tax impacts. The Board acknowledges that BIA "may be required to consider" the cumulative effects of trust acquisition,

[16] The Defendants cite *County of Charles Mix v. U.S. Dep't of Interior*, 799 F. Supp. 2d 1027 (D.S.D. 2011), *Upstate v. Citizens for Equal., Inc. v. Jewell*, No. 5:08-CV-0633, 2015 WI 1399366 (N.D.N.Y. Mar. 26, 2016), and *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109 (D. Or. 2002) for support that BIA is not required to consider the cumulative effects of trust acquisition under the tax impact analysis of 151.10(e). First, none of these cases are binding on this Court. And, second, the Village's unique position and the evidence in the Record should have been considered by the RD given the Nation's stated goal to reacquire 100% of its original Reservation lands which constitutes all of the Village.

but then states it does not have to in this case. *Hobart II*, at 116-17. Likewise, despite the contention that evaluating cumulative effects would be not based on the Record, the Record in this case has the necessary information to consider these impacts. No speculation is required when the Record contains the very information that was disregarded by the RD.

Moreover, the Defendants and the Nation do not address the fact the Village is unable to increase its tax levy under Wis. Stat. § 66.062 to compensate for the tax loss. This statute limits the amount the Village may increase its taxes each year.

Concerning specific impacts on public services resulting from the tax loss, the Defendants contention is that all the RD is required to do consider and address the comments received. (Dkt. 64 at 12.) With respect to fire protection services, the Defendants merely sidestep the issue by claiming the RD need not engage in a cumulative analysis. The Defendants claim the RD properly considered the fact the Village had to provide these serves to other tax-exempt properties. While that is true, that does not address the fact that the Village will now be obligated to do that for several thousand more acres. The fact of the matter is neither the Board nor the RD considered the fact the Village will be obligated to provide these services with reduced funding and the problem grows with every parcel taken into trust.

Ironically the Defendants engage in their own speculation concerning road maintenance within the Village. The Defendants contend the RD's consideration of Tribal Transportation Program funds as a partial offset for the Village's required maintenance of roads was proper given the Village's road maintenance costs "could" be reduced by the provision of Federal funds to maintain the roads at issue. (Dkt. 64 at 13.) The problem with this rationale, however, is that the Village does not receive the funding. The Defendants concede this point. Therefore, it would be speculative (and, therefore, arbitrary) to conclude that the provision of Federal funds will reduce

the Village's costs.

C. Section 151.10(f) – The Failure to Properly Consider Jurisdictional Problems and Land Use Conflicts.

The Nation's response confirms the jurisdictional problems stemming from these trust applications. In fact, the Nation admits it "submitted applications for trust acquisition of the Parcels in the wake of the collapse of intergovernmental relations between the Nation and the Village." (Dkt. 63 at 11.) Despite that, the Defendants and the Nation try to claim the Village's concerns relating to jurisdictional problems and land use conflicts are merely disagreements. They are not, especially given the Board's prior recognition of the "increasing checkerboard geography of fee and trust land within the Village's boundaries." *Hobart I*, at 30.

The Village in its initial brief raised three concerns under 151.10(f) relating to stormwater management, zoning, and emergency services. With respect to stormwater management, the Village reiterated the Seventh Circuit's recognition of the problems posed by separate management programs on fee land and trust land. The Village noted that the Seventh Circuit believed the jurisdictional conflict and land use problem was so real that the court suggested "an exception of necessity" to deploy its stormwater management on trust land (similar to fire protection). *See Oneida Tribe of Indians of Wis. v. Vill. of Hobart, Wis.*, 732 F.3d 837, 841 (7th Cir. 2013). Despite the problem, the Board and the RD ultimately concluded the issue has been resolved because jurisdiction is now clear. *Hobart II*, at 122-23. It is not (for reasons discussed below), and it was arbitrary and contrary to law to deem jurisdiction is clear when it is not.

The Nation also makes several unsubstantiated claims concerning the Village's stormwater management. (*See* Dkt. 63 at 23.) First, the Nation claims the Village does not explain how two management systems might conflict. But, this exact issue was discussed in *Oneida Tribe of Indians of Wis. v. Vill. of Hobart, Wis.*, 732 F.3d 837, 841 (7th Cir. 2013) in which the Seventh

Circuit reasoned "it's difficult to see how there *can* be separate programs."

Next, the Nation claims that there have been no stormwater management facilities constructed since 2007. But, the Nation provides nothing from the Record for its contention that there has been no construction. Examples of stormwater management include ditches, culverts, retention/detention ponds, as well as curb and gutter, which have been installed since 2007.

Finally, the Nation erroneously claims that the Village does not have the authority to regulate stormwater management with respect to both tribal fee land and trust land. While the Village recognizes that it does not have jurisdiction to regulate trust land in certain cases,[17] the Village does have the authority to regulate stormwater management that impacts fee land. The Nation's reliance on *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) is over generalized based on the issue presented in that case, which concerned a Special Event Ordinance and regulating the Nation's on-Reservation activities. Contrary to the Nation's assertion, the Seventh Circuit did not hold that the Village does not have the authority to regulate the Nation's fee land through local regulation with respect to stormwater management on Village streets and storm sewers. In fact, the Seventh Circuit in *Oneida Nation* stated the opposite: "There may be circumstances in which isolated fee land may be subject to local regulation . . . ." 968 F.3d at 689.

Likewise, the Nation's reliance on Wis. Admin. Code SPS § 360.10(2) and § 361.02(3)(b)(1) do not support its position. Those administrative regulations relate to public buildings and commercial building codes. They do not relate to Village's streets or sewers. *See Oneida Tribe of Indians of Wis.*, 732 F.3d at 841 ("We are told that both the tribe and the Village

[17] The Defendants cite *Cherokee Nation v. Bernhardt*, 936 F.3d 1142 (10th Cir. 2019) for the proposition that shared jurisdiction is not a barrier to trust acquisition. In *Bernhardt*, the Tenth Circuit noted "other instances of tribes sharing jurisdiction over trust lands." 936 F.3d at 1161. Here, the Nation is unwilling to share jurisdiction of their trust lands—thereby increasing the jurisdictional problems and land use conflicts within the Village.

have at least some stormwater runoff facilities in the [V]illage, serving their respective constituencies. It's difficult to visualize that; the Village presumably owns all the streets, and storm sewers run under streets.").

With respect to the zoning checkerboard that is the result of trust acquisition, the Defendants and the Nation ignore the Village's larger concern – the increase of trust land and the Nation's ability to implement its own zoning on that trust land (in which the Nation contends the Village has no jurisdiction pursuant to Federal law). The Defendants and the Nation point to similar zoning and adjacent zoning—but ignore that the Village's example of the Gerbers property. In that situation, as discussed in the Village's initial brief, the Nation will have trust land designated as residential and agriculture, 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.) The Board and the RD arbitrarily ignore this critical difference. It also ignores the Nation's stated goal in its 2033 Land Acquisition Plan to influence its own zoning, land use, and development decisions in conflict with the Village. (*See* Dkt. 57 at 32.)

Finally, with respect to emergency services, the Defendants and the Nation do not quarrel with the Village's concern that the Village's ability to provide emergency services is harmed by the checkerboard jurisdictional pattern. Rather, their response is that since the RD noted that the "most feasible solution" to the Village's concern would be a "cooperative service agreement" and that although that is unlikely, the RD properly considered it when deciding to accept the Properties into trust. (*See* Dkt. 64 at 16 (citing Dkt. 32-4 at 39); *see also Hobart II*, at 124.) This underscores the RD's arbitrary review, however, and it supports the Village's claim that no matter what the harm (and no matter the inability to solve that harm based on the Nation's admission that "a future service agreement is unlikely" (Dkt. 1-4 at 8, n.43), the Secretary may still decide to accept land

into trust. That type of review (and outcome) is not within the spirit of review under the APA.

D. Section 151.10(h) – The Failure to Properly Consider Environmental Considerations.

The Decisions must be vacated due to BIA's failure to properly comply with all environmental requirements under 25 C.F.R. § 151.10(h).[18]

The Defendants and the Nation contend the Phase I ESAs are not outdated, particularly, because pre-acquisition ESAs have been completed prior to the Properties being acquired into trust. (*See* Dkt. 64 at 19, n.12; Dkt. 63 at 25.) But, the Defendants have not supplemented the Record to allow the Village or the Court to confirm updates actually occurred. Instead, the Defendants informed the Village (and the Court) for the first time on appeal, in a footnote of their response brief, that the review occurred during the pendency of this litigation.

The Defendants and the Nation also address the lack of consultation with the Village. The Nation contends the regulations do not require consultation with the Village, but that instead any state or local government may be consulted. (Dkt. 63 at 25.) The Nation argues that its own representatives satisfy these consultation obligations. (*Id.*) For reasons stated in the Village's initial brief, they do not. The Nation fails to acknowledge, let alone even discuss, that the ASTM Standard differentiates "tribe" or "tribal" from federal, state, and local governments. (*See* Dkt. 57 at 35.) In addressing this issue, the Defendants take a different approach and argue that "even if Interior had to interview State and local officials but failed to do so . . . Interior must perform updated pre-acquisition ESAs only prior to acquiring the Property in trust." (Dkt. 64 at 19.) While they do not directly concede the issue, the Defendants do not argue that Interior did in fact interview State and local officials, such as the Village, now or in the past.

[18] The Defendants concede the standing issue is moot because the Board considered the Village's arguments concerning under 151.10(h). (Dkt. 64 at 17.)

Because local government officials were not consulted or interviewed during any of the environmental review, and any updates that may have been performed since 2017 have never been provided, the RD's review was not in accordance with the APA.

III. THE IRA VIOLATES THE NONDELEGATION DOCTRINE.

As an initial matter Defendants and the Nation acknowledge the United States Supreme Court has never upheld a lower court's decision finding Section 5 of the IRA does not violate the nondelegation doctrine. Likewise the Seventh Circuit has never had the opportunity to rule on this issue. This Court is therefore not bound to any precedent and may rule as it sees fit.

In 1995 the Supreme Court did determine that issue was worthy of its consideration. *Department of Interior v. South Dakota*, 519 U.S. 919 (U.S.,1996). Unfortunately the Supreme Court never had to decide the case. *Id*. The Defendants' claim that the Plaintiff's statement the United States sought to evade review of the nondelegation doctrine by the Supreme Court is without support. (Dkt. 64 at 34.) The record confirms otherwise. Following the Eighth Circuit's "sweeping decision," the Department of the Interior modified its regulations. As Justice Scalia noted "[t]he preamble to that regulation recites that it is being adopted '[i]n response to a recent court decision, *State of South Dakota v. U.S. Department of the Interior*, 69 F.3d 878 (8th Cir.1995).'" *Department of Interior v. South Dakota*, 519 U.S. 919, 920 (U.S.,1996) (Scalia, J. dissenting). That is what led Justice Scalia, joined by Justices O'Connor and Thomas, to declare that "[t]he decision today-to grant, vacate, and remand in light of the Government's changed position-is both unprecedented and inexplicable." *Id*. He went on to state that "[b]ut we have never before GVR'd simply because the Government, having *lost* below, wishes to try out a new legal position." *Id*. (Emphasis in original.)

Most recently the Supreme Court concluded review of a Fifth Circuit decision confirming the importance and continued viability of the nondelegation doctrine is appropriate. *Consumers'*

Research v. Federal Communications Commission, 109 F.4th 743, Cert Granted, No. 24-354, -- S.Ct. --, 2024 WL 4864036 (Nov. 22, 2024). [19] The Defendants try and downplay this case and the Supreme Court's review. Although it is true *Consumer Research* did not expressly analyze Section 5 of the IRA it is very instructive in the application of the nondelegation doctrine. Courts "ought not shy away from [their] judicial duty to invalidate unconstitutional delegations." *Id*. at 759.

Similarly, as the Seventh Circuit has recently stated, enforcing the separation of powers is "about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law." *City of Chicago v. Barr*, 961 F.3d 882, 927 (7th Cir. 2020) (internal citations omitted). "[W]e [the courts] must call foul when the constitutional lines are crossed." *Id*. Courts must have the "fortitude . . . to do [our] duty as faithful guardians of the Constitution." *Id*. This is what *Consumers' Research* and *City of Chicago* stand for. These pronouncements apply to all nondelegation challenges.

Defendants also try and downplay *Consumer Research* by noting the Fifth Circuit also recognized Congress has the ability "to delegate under broad general directives." *Consumers' Research*, 109 F.4th at 763-74. First, this confirms "directives" are mandatory when Congress delegates authority to the Secretary. Second, the Fifth Circuit discussed such directives, holding "vague 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).

The Defendants claim that the intelligible principle "provided by Section 5" is clear. (Dkt.

[19] Oral argument in *Consumers' Research*, at the Supreme Court, was held on March 26, 2025.

64 at 32.) However, instead of then citing to anything actually "provided" in Section 5 the Defendants are forced to resort to broad statements not found in the IRA that the IRA was enacted to promote Indian self-governance and economic development and to preserve Indian communities. (*Id.*) Even if that is the general purpose of the IRA, that does not equate to an intelligible principle needed to fulfill that purpose.

The Defendants also question the Plaintiff's citations questioning the use of legislative history, not found within the Act. To the extent the actual wording of Section 5 of the IRA can be ignored, to achieve the goal of excusing the lack of any intelligible principles in the Act itself, other things found outside of the Act must also be considered. Here, only a cursory review of the Secretary's use of Section 5 of the IRA confirms the Secretary has not been provided adequate guidance.

Section 5 of the IRA does not contain any directives. The simple statement of who land may be provided to, "Indians," with absolutely no instructions as to when, for what purpose, how, why, how much, how often, under what conditions, without any consideration for use, or the impact on the states and their sovereignty is no directive at all. The Fifth Circuit in *South Dakota I* was correct when it concluded Section 5 of the IRA creates an "agency fiefdom whose boundaries were never established by Congress" which would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *South Dakota v. United States Department of Interior*, 69 F.3d 878, 882-885 (8th Cir. 1995), *mandate recalled and vacated*, 106 F.3d 247 (*South Dakota I*).

It is the lack of any intelligible principle that has resulted in the rubberstamping of approval of virtually every application. It is the lack of any intelligible principle that made it possible for the extremely problematic fee-to-trust MOUs to come into existence in the first place. The lack

of any intelligible principle is what has emboldened the Board, when reviewing the RD's decision to conclude land may be placed in trust "whatever her conclusion about the criteria" and land can be taken 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." *Hobart II* at 115-116. This runaway freight train of unlimited power is further confirmed by the bureaucrat's recent change in the fee-to-trust regulations which now require the BIA employee who is to "review" the request, to "presume," without any evidence in the record supporting such a presumption, that the impact of placing the property into trust on local governments "will be minimal." 25 C.F.R. § 151.10(c).

It is impossible to reconcile these new regulations with the Supreme Court's conclusion that the placement of land into trust "will seriously burden the administration of state and local governments and will adversely affect landowners neighboring the tribal patches." *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 220 (U.S., 2005). As Justice Thomas has stated, it is totally inappropriate for the BIA to presume all impacts on state-based governments will be minimal when placing land into trust will "stripe the State of almost all sovereign power over [that land.]" *Upstate Citizens for Equality, Inc v. United States*, 583 U.S. 1004 (U.S., 2017).

Stated another way, the lack of any intelligible principle to guide the Secretary has been proven by how the process has evolved. It is no longer necessary to theorize if "for the purpose of providing land for Indians" is adequate. It has been proven not to be. This conclusion is inescapable whether focusing on the Act itself or its legislative history.

The Defendants cite three Seventh Circuit cases in which, according to them, "[t]he Seventh Circuit has . . . recognized the Secretary of Interior's 'broad authority' to acquire property in trust for Indian Tribes under Section 5." (*see* Dkt. 64 at 33, *citing 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) and; *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020).)

In *Lac Courte Oreilles Band*, three tribes advanced a challenge to a provision of the Indian Gaming Regulatory Act (IGRA) that required the Secretary to obtain state Governor's concurrence before allowing gaming on land not owned by a tribe. *Lac Courte Oreilles Band*, 376 F.3d 650, 654. And although in dicta, the court did state the Secretary has discretion to acquire lands in trust pursuant to the IRA the court did not review or in any way analyze the application of the IRA, let alone a nondelegation argument. The case focused only on IGRA and the tribe's argument that in requiring the Governor's approval, Congress failed to adequately constrain the discretion of the Governor. *Id*. at 658. The Seventh Circuit confirmed that "Congress must 'lay down *by legislative act* an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id*. at 658 *quoting J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928) (emphasis added). Thereafter, the court did not consider if IGRA contained an intelligible principle to guide the Governor, instead concluding "that the nondelegation doctrine is not implicated by the provision at issue because § 2719(b)(1)(A) does not delegate any legislative power to the Governors of the 50 States." *Id*. at 659.

Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941 (7th Cir., 2000), similarly provides no help to the Defendants. As noted in that case "[t]he narrow question before us is whether the district court erred when it refused to permit the St. Croix Chippewa Indians of Wisconsin . . to intervene . . ." in an existing lawsuit involving an attempt to obtain approval for another Indian casino. *Id*. at 943. The closest the court got to the IRA was noting the broader authority under the IRA to acquire land into trust was restricted by IGRA when the land was to be acquired for gaming

purposes. *Id*. The court did not analyze the IRA or the nondelegation doctrine in any manner.

Oneida Nation v. Village of Hobart, 968 F.3d 664 (7th Cir. 2020) was a reservation diminishment case and had nothing to do with the IRA or the nondelegation doctrine. The mere fact that court noted the IRA gives tribes the opportunity to reestablish their governments and landholdings, without addressing or touching upon the manner in which that is to be done, is of no help to the Defendants. In this case, at least as far as the nondelegation argument is concerned, a desire to increase tribal self-governance and landholdings as a general principle is not being challenged. If Congress itself made the ultimate decision on fee-to-trust applications or provided an intelligible principle for others to do so, things may be different.

It is also important to note that when the Eighth's Circuit reversed itself and found Section 5 did not violate the nondelegation doctrine it was only because "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. The Eighth Circuit acknowledges then that standing alone the IRA does not provide an intelligible principle for its application. It requires the crutch of historical context and legislative history. The Defendants therefore spend a considerable amount of time arguing legislative history and context can be relied upon. That argument in and of itself is problematic given that the requisite legislative history and historic context needed in order to ensure a statute does not violate the nondelegation doctrine may not find its way into the Congressional act. That is what happened with the IRA. The BIA has absolutely no requirement to limit its rubberstamping of fee-to-trust applications because of something found in legislative history.

The Defendants' attempt to diminish the instructive value of *Gundy v. United States*, 588 U.S. 128, 141 (2019) and *City of Chicago v. Burr*, 961 F.3d 882 (7th Cir. 2020) by claiming "[n]o part of Section 5 allows the Secretary to exclude certain Indians (as in *Gundy*), or approve or deny

applications for reasons unrelated to the text and purpose of the IRA (as in *City of Chicago*)." (Dkt. 64 at 36-37.) The Defendants then attempt to draw an imperceptible distinction between whether Section 5 is applied versus how it is applied. (*Id.*) Here, the Secretary can exclude certain Indians or all Indians on a whim. After all, that section simply states the Secretary "is authorized" to acquire land for Indians. Not required, not encouraged, but simply authorized. No limitations on when or if or for whose benefit that authorization may be used. Similarly, the Secretary can, "in his discretion," decide to exclude certain Indians from benefiting from Section 5, for any reason or no reason at all, by simply denying or refusing to consider an application. The Secretary can approve or deny an application for reasons unrelated to anything found in the IRA or even its legislative history. If applications can be randomly processed or not, accepted or denied, based on the Secretary's sole and unilateral discretion, regardless of the purpose of Section 5, there is a violation of the nondelegation doctrine.

IV. SECTION 5 EXCEEDS CONGRESS'S POWER UNDER THE INDIAN COMMERCE CLAUSE.

Contrary to Defendants' assertions the Federal government still enjoys exclusive constitutional authority over managing all relationship with Indian tribes, less than a year and a half ago, the United States Supreme Court confirmed otherwise.

> [W]e 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 citation omitted).

Ignoring this, Defendants cite cases pre-dating *Brackeen* which they interpret as giving Congress unlimited power over all things relating to Indians. They do not, in any meaningful way, address the Supreme Court's pronouncement in *Brackeen* to the contrary.

Defendants also fail to cite law where the Supreme Court upheld a federal statute, such as the IRA, which contains the power to slowly (but surely) eliminate the very existence of the States. The Supreme Court has never expressly ruled on the constitutionality of Section 5.

The best Defendants' can do is cite *Morton v. Mancari*, 417 U.S. 535 (1974) for the proposition that one provision of the IRA, wholly inapplicable to this case, was found constitutional. In *Mancari*, the Supreme Court held Section 12 of the IRA, which gives Indians preference when it comes to filling vacancies in the BIA, was constitutional. *Id*. at 538. Section 5 was not mentioned.

Defendants also cite case law for the proposition Congress's authority over Indian affairs under the Commerce Clause is different from its authority over states and foreign nations. (Dkt. 64 at 36.) Of course, that contention finds zero support in the Commerce Clause itself.[20] Moreover, the Supreme Court has never ruled that is the case specifically for Section 5.

The Defendants and the Nation also largely ignore the Supreme Court's recognition in *Brackeen*, that its precedent relating to Congress's power over Indian affairs "is unwieldly, because it rarely ties a challenged statute to a specific source of constitutional authority." *Id*. at 275-276. Here the Supreme Court has never expressly tied Section 5 of the IRA to a specific source of constitutional authority, whether it be the Indian Commerce Clause or something else. And unlike what the Defendants claim, according to the Supreme Court, it is hard "to discern the limits on Congress's power" under the Indian Commerce Clause. *Id*.

The Plaintiffs' arguments in this regard are bolstered by the fact that the application of

[20] "The Commerce Clause confers the power to regulate a single object—'Commerce'—that is then cabined by three prepositional phrases: 'with foreign Nations, and among the several States, and with the Indian Tribes.' Art. I, § 8, cl. 3. Accordingly, one would naturally read the term 'Commerce' as having the same meaning with respect to each *type* of 'Commerce' the Clause proceeds to identify." *Brackeen*, 599 U.S. at 352 (Thomas, dissenting.) (internal citations omitted.)

Section 5 of the IRA has evolved into something which would have been completely unrecognizable to the authors of that Act. The text of Section 5 authorizes the Secretary "to acquire, through purchase, relinquishment, gift, exchange, or assignment any interest in lands . . ." for Indians. In this case, the land in question was bought directly by the Nation through its casino revenue and federal subsidies. The Nation simply then asked to have that land, it already owned, placed in trust so it could avoid taxation and whatever jurisdiction the state still possessed. The land was never acquired or purchased by the United States. The land was never relinquished to, gifted to, exchanged, or assigned to the Nation from the federal government. Section 5 was never designed to facilities what has now running rapid across the country which is casino-rich tribes buying large swaths of state land to thereafter have it effectively removed from state and local taxation and jurisdiction.

This is the bridge too far the Supreme Court was referring to when in just June of 2023 it expressly held Congress's authority under the Indian Commerce Clause is not "absolute," is not "unbounded," "has borders," and that "it could not be otherwise – Article I gives Congress a series of enumerated powers, not a series of blank checks." *Haaland v. Brackeen*, 599 U.S. 255, 275-276 (2023). The constitutionality of Section 5 of the IRA which has not yet been specifically ruled upon by the Seventh Circuit or the Supreme Court should now be considered.

CONCLUSION

For these reasons, the Court should grant the Village's Motion and declare the Board's and RD's decisions were arbitrary and capricious, and in violation of the APA. The Court should further rule Section 5 of the IRA violates the nondelegation doctrine or is otherwise unconstitutional.

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CERTIFICATE OF SERVICE

I, Frank W. Kowalkowski, hereby certify that on June 19, 2025, I caused the foregoing Village of Hobart's Reply Brief in Support of its Motion for Summary Judgment to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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