United States Court of Appeals

for the

Seventh Circuit

Case No. 26-1210

VILLAGE OF HOBART, WISCONSIN,

Plaintiff-Appellant,

– v. –

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

Defendants-Appellees,

– and –

ONEIDA NATION,

Intervening Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN IN NO. 1:23-CV-01511-WCG, HONORABLE WILLIAM C. GRIESBACH, DISTRICT COURT JUDGE

BRIEF FOR INTERVENING DEFENDANT-APPELLEE ONEIDA NATION

ARLINDA F. LOCKLEAR
DC Bar No. 962845
4113 Jenifer Street, NW
Washington, DC 20015
(202) 237-0933
alocklearesq@verizon.net

JAMES R. BITTORF
Wis. State Bar No. 1011794
KELLY M. MCANDREWS
Wis. State Bar No. 1051633
KRYSTAL L. JOHN
Wis. State Bar No. 1093818
ONEIDA LAW OFFICE
P.O. Box 109
Oneida, Wisconsin 54155
(920) 869-4327

Counsel for Intervening Defendant-Appellee Oneida Nation

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 26-1210

Short Caption: Village of Hobart, WI v. US DOI, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Intervenor-Appellee Oneida Nation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Von Briesen & Roper, S.C., for appellant
US Department of Justice, for all federal appellees Oneida Law Office, for Intervenor-Appellee Oneida Nation

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

not applicable

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

not applicable

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: Arlinda F Locklear Date: February 13, 2026

Attorney's Printed Name: Arlinda F. Locklear

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 4113 Jenifer Street NW
Washington, DC 20015

Phone Number: 202.237.0933 Fax Number: 202.237.0382

E-Mail Address: alocklearesq@verizon.net

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N/A

Attorney's Signature: s/James R. Bittorf Date: February 12, 2026

Attorney's Printed Name: James R. Bittorf

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

Address: Oneida Law Office, P.O. Box 109, Oneida, Wisconsin 545155

Phone Number: (920) 869-4327 Fax Number: (920) 869-4065

E-Mail Address: jbittorf@oneidanation.org

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Kelly M. McAndrews Date: February 24, 2026

Attorney's Printed Name: Kelly M. McAndrews

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Oneida Law Office, P.O. Box 109, Oneida, WI 54155

Phone Number: 920-869-4327 Fax Number: 920-869-4065

E-Mail Address: kmcandre@oneidanation.org

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Krystal L. John Date: February 24, 2026

Attorney's Printed Name: Krystal L. John

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

Address: Oneida Law Office, P.O. Box 109, Oneida, WI 54155

Phone Number: 920-869-4327 Fax Number: 920-869-4065

E-Mail Address: kjohn4@oneidanation.org

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Appellant Village of Hobart ("Village") is complete and correct. Appellee Oneida Nation ("Nation") accepts the Jurisdictional Statement and Statement of the Issues of the Village and addresses the standard of review regarding each issue on appeal *seriatim*, as does the Village. Appellant's Brief ("App. Br.") at 5, 32, and 52. However, the Village's Statement of the Case is incomplete, and the Nation makes its own. *See* F.R.A.P. 28(b).

STATEMENT OF THE CASE

<u>Location of the Properties at Issue</u>

The eight properties at issue here ("Properties"), totaling roughly 499 acres, are located within the exterior boundaries of the Oneida Reservation ("Reservation"), which was created by the 1838 Treaty with the Oneida, 7 Stat. 566, and has never been diminished or disestablished. A-3. *See Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020). As a result, the Properties are Indian country, regardless of whether they are held in fee or trust. *Id.* at 673 (citing 18 U.S.C. § 1151(a) (Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent…")). [1] The

[1] The Village makes no reference at all to this Court's recent decision holding that the Village lacks regulatory authority over the Nation and its land, both fee and trust, on the intact Oneida Reservation. *See* App. Br. at viii. This is a remarkable omission, given the Village's heavy reliance here upon erroneous claims of State and Village regulatory authority over the Properties allegedly lost as a consequence of the trust decision the Village challenges.

Properties are also located within the boundaries of the Village and Brown County, Wisconsin, and are beyond State and Village jurisdiction, as a general proposition. *Id*. at 668 ("In sum, as a matter of federal law, the entire [Oneida] Reservation as established by the 1838 Treaty remains Indian country. The Village lacks jurisdiction to apply its ordinance to the Nation's on-reservation activities.").

Payment for Services to the Properties

Brown County and other municipalities whose boundaries overlap with the boundaries of the Reservation have intergovernmental agreements with the Nation under which the Nation compensates them for services they provide to trust lands. R. 32-5 at 226-32; 34-4 at 149-50; and 35-3 at 74-81. These agreements generally set out compensation formulas to determine the cost of services provided by the municipality and provide credits for services provided by the Nation, which include health care, elderly services, social services, law enforcement, public works, utilities, public transportation, education, zoning and land use regulation, and more. R. 32-4 at 34-35; 32-5 at 213-25; 35-2 at 34; and 35-03 at 62-73. They also address jurisdictional issues and recognize the Nation's authority to regulate its trust and fee lands and its activities and tribal members' activities on the Reservation. R. 33-14 at 149. The municipalities generally agree not to challenge the Nation's trust applications for land within their boundaries under specified circumstances, e.g., the Nation has held fee title to the land for three years or more, or, prior to the Nation's acquisition, a tax-exempt entity held title to the land for five years or more. R. 33-14 at 151; 34-4 at 151.

Before 2007, the Nation and the Village had an agreement under which the Nation compensated the Village for services it provided to the Nation's trust lands, but the Village refused to renew the agreement upon its expiration.[2] The Village has since opposed all trust applications for land within its boundaries.

Administrative Consideration of the Trust Applications

The Nation applied for trust acquisition of the Properties in 2008 under the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 5101-5129, advising the Properties were used for either residential or agricultural purposes and the Nation intended to continue those uses. R. 1-2 at 2 (*Village of Hobart v. Midwest Regional Director*, 57 IBIA 4, 9 (2013) (*Hobart I*)).[3] The Federal Appellees processed the applications under the terms of a Memorandum of Understanding ("MOU" or "Midwest Region MOU") between a consortium of tribes, including the Nation, and the Midwest Regional Office ("MRO") of the Bureau of Indian Affairs ("BIA") under the Indian Self-Determination and

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[2] The Regional Director found that, "[c]ontrary to the Village's contention, documents provided by the Oneida Nation show that it has made clear that it is open to negotiating new service agreements, which may include payments in lieu of taxes, if the Village were to recognize the Nation as a government pursuant to federal law." R. 32-4 at 34. The Village does not dispute this conclusion on appeal.

[3] At the time of the applications, the governing Federal regulations required the Secretary of the Interior to consider seven criteria in the exercise of his discretionary authority to accept land into trust for a tribe: (1) the existence of statutory authority for the acquisition, (2) the tribe's need for the land, (3) the purposes for which the land will be used, (4) the impact of the proposed acquisition on the local tax base, (5) potential jurisdictional problems and land use conflicts, (6) whether the Bureau of Indian Affairs is equipped to discharge the additional trust responsibilities, and (7) compliance with environmental statutes. 25 C.F.R. § 151.10, (a) - (c) and (e) - (h). Revised regulations became effective on January 11, 2024, after the decision at issue here. *See* 88 Fed. Reg. 86222 (Dec. 12, 2023).

Education Assistance Act ("ISDEAA"), 25 U.S.C §§ 5301-5423. A-50 (*Village of Hobart v. Midwest Regional Director*, 69 IBIA 84, 92 (2023) (*Hobart II*)). The MOU states its purpose as "facilitating the expeditious processing of fee-to-trust applications submitted by participating Division Tribes" and to that end provides for the reprogramming of federal funds for the hiring of additional MRO staff to assist in the processing of trust applications. R. 1-3 at 17-23. The additional staff are federal employees under Title 5 of the United States Code, report directly to the Regional Director ("RD") like all other MRO employees, and are responsible for "assuring that each request for fee-to-trust acquisition shall fulfill completely all the administrative requirements of 25 C.F.R. Part 151." *Id*. at 20.

As required by the Part 151 regulations, the Village, Brown County, and the State of Wisconsin received notice of the proposed acquisitions and were given an opportunity to comment. Neither Brown County nor the State commented or objected. R. 35-2 at 33. The Village objected on multiple grounds.[4] In 2010, the RD issued her decision to accept the Properties into trust and the Village filed its first appeal to the Interior Board of Indian Appeals ("IBIA"). During this appeal, the Village for the first

[4] Over the 19 years of this administrative saga, the Village has raised and abandoned multiple objections, gradually winnowing them down to the handful now before this Court. For example, in *Hobart I*, the Village challenged the Nation's status as "under Federal jurisdiction" under the IRA and, hence, its eligibility for the fee-to-trust process, as well as the RD's review of several regulatory factors (e.g., the Nation's need for the land, the proposed use of the land, alleged conflicts in land uses, and alleged violations of federal environmental laws). R. 1-2 at 4-6 (*Hobart I*, 57 IBIA at 6-8). The Village no longer makes these claims.

time claimed the MOU created bias in the Nation's favor, in violation of the Village's due process rights. In 2013, the IBIA rejected most of the Village's claims but remanded for reconsideration of the Village's claims related to loss of tax revenue and initial consideration of the Village's bias claims. R. 1-2 at 3 (*Hobart I*, 57 IBIA at 5). In 2017, the RD issued her reconsidered decision, in which she addressed the Village's claims in exhaustive detail, rejected them all, and confirmed her initial decision. R. 32-4 at 28-53. The Village then filed a second appeal to the IBIA, raising its bias claim, claims regarding tax losses, and environmental claims. R. 35-8 at 85-6. After painstaking review of the Village's claims, the IBIA rejected them all and affirmed the RD's decision.[5] A-42 – A-91 (*Hobart II*). This litigation followed.

<u>Federal Litigation of the Village's Claims</u>

The Village filed a timely action under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-559 and 701-706, against the Federal Appellees in the Eastern District of Wisconsin to challenge the IBIA's decision in *Hobart II*. R. 1. The Nation moved to intervene, and the district court granted the Nation's motion over the Village's objection. R. 11, 19 and 25. On July 30, 2024, the Federal Appellees lodged the final Administrative Record ("AR"). R. 32, 33, 34 and 35. Soon thereafter, the Village sought and the district court denied extra-record discovery. R. 39 and 52.

[5] In both IBIA proceedings, the Village challenged the constitutionality of the IRA. But the IBIA lacks jurisdiction over such claims and declined to consider them. R. 1-2 at 16 (*Hobart I*, 57 IBIA at 18); A-58 (*Hobart II*, 69 IBIA at 100).

While the parties were briefing the merits, the Village sought an emergency stay of administrative action to place two of the Properties in trust (the other six having already been placed into trust). R. 65. The Village claimed emergency relief was justified because trust acquisition would interfere "with state sovereign interests" and "irreparably interfere with the Village's jurisdictional, regulatory, and taxing authorities…." *Id.* at 3-4. The district court denied emergency relief because the Properties were already beyond the Village's regulatory jurisdiction even before trust acquisition under this Court's decision in *Oneida Nation*. R. 67 at 2-3 ("As a result, the Village lacks regulatory jurisdiction over lands within the Reservation owned in fee by, or held in trust for, the Nation. Because the parcels at issue [sic] not subject to the Village's regulatory jurisdiction even now before they are placed in trust, the acquisition would not irreparably harm the Village's jurisdictional or regulatory interests.").

On December 2, 2025, the district court entered judgment in favor of the Federal Appellees and the Nation and against the Village. A-1. The Village filed a timely notice of appeal.

SUMMARY OF ARGUMENT

The Village's real complaint is against Congress's policy, embodied in section 5 of the IRA, 25 U.S.C. § 5108, in favor of rebuilding tribal land bases, and the application of that remedial policy to the Oneida Nation. Federal employees who process trust applications, and who take steps explicitly authorized by the ISDEAA to expedite that process, merely implement that congressional policy. This Court has already noted the Nation's painful experience with land loss under the allotment policy that pre-dated the IRA, and the entirely legal and appropriate steps the Nation has taken under the IRA to rebuild its land base. *Oneida Nation*, 968 F.3d at 671 (the IRA was intended to "not only stem the loss of Indian land holdings brought on by allotment but also give tribes the opportunity to re-establish their governments and land holdings.... The Oneida Nation made use of this program to re-establish its tribal government and to rebuild its land base."). To do so, the Nation purchases land from willing sellers on the open market in arms-length transactions and applies for trust acquisition, thereby protecting it for all time for the Nation.

The Village prefers an alternate reality, one in which Federal law does not favor rebuilding land bases within reservations, the Reservation does not exist, and land within the Reservation becomes Indian country only if accepted into trust after a formal administrative process. The Federal Appellees reviewed the Village's preferred reality based on the AR exceeding 18,000 pages, rejected it as legally baseless, and the district court affirmed. There is no basis under the APA or the Due Process Clause to reverse the district court's judgment.

ARGUMENT

I. SECTION 5 OF THE IRA IS CONSTITUTIONAL.

Section 5 of the IRA grants the Secretary of the Interior discretionary authority to acquire lands in trust for Indian tribes and individual Indians. 25 U.S.C. § 5108 (previously codified at 25 U.S.C. § 465). The Village claims section 5 is unconstitutional for two reasons: first, it allegedly falls beyond Congress's authority under the Indian Commerce Clause ("ICC"), U.S. CONST., art. I, § 8, cl. 3, App. Br. at 13-19; and second, it supposedly violates the Nondelegation Doctrine as lacking an intelligible principle to guide the Secretary's exercise of discretionary authority. *Id.* at 19-32. As set out below, both claims conflict with substantial bodies of law.[6]

This Court conducts *de novo* review of a district court's grant of summary judgment and of legal issues. *Oneida Nation*, 968 F.3d at 674; *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079 (7th Cir. 2015).

A. Section 5 of the IRA Falls Well Within Congress's Authority under the ICC.

The Village argues the ICC should be narrowly construed to preclude congressional authority to authorize trust acquisition for tribes as unrelated to the regulation of commerce. App. Br. at 13-16. The Village cites *Haaland v. Brackeen*, 599 U.S. 255 (2023), for this proposition. But *Brackeen* says no such thing; to the contrary, *Brackeen*

[6] The Nation adopts the Federal Appellees' more fulsome presentation on these constitutional issues.

and the cases cited favorably in it all indicate section 5 the IRA fits squarely within Congress's authority under the ICC. The Village also insists the allegedly destructive results of the trust acquisition — supposed "wholesale removal of territory from the State's sovereign domain" — compels the conclusion that section 5 exceeds Congress's authority under the ICC. App. Br. at 17. This argument misrepresents the law and the State of Wisconsin's actual position regarding the Oneida Reservation.

1. *Brackeen* supports the constitutionality of the IRA.

In *Brackeen,* the Supreme Court faced a broadside of arguments against the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, based on the same narrow reading of the ICC which the Village urges this Court to adopt. ICWA establishes placement preferences and notification requirements for state court adoption and foster care proceedings involving Indian children. The majority opinion begins with the observation that "[o]ur cases leave little doubt that Congress's power in this field is muscular, superseding both tribal and state authority." *Brackeen*, 599 U.S. at 273. The Court explained that the ICC vests "virtually all authority over Indian commerce and Indian tribes" with the Federal Government. *Id*. (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996)). Thus, it is irrelevant that children are not commodities, to be traded in commerce; congressional authority under the ICC nonetheless comprehends foster care and adoption proceedings of Indian children as part of "Indian affairs." *Id*. at 257 (quoting *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 165, 192

(1984)).[7] The Court catalogued the "wide range of areas" that fall within Congress's authority over Indian affairs — criminal law, domestic violence, employment, property, tax and trade — and concluded Congress can regulate custody of Indian children. *Id.* at 275 (collecting cases and citing *Sunderland v. United States*, 266 U.S. 226 (1924), with respect to Congress's authority to regulate Indian property).

The Court's rationale for the constitutionality of the statute considered in *Sunderland* provides a complete response to the Village's argument against section 5. There, the Court considered a statute authorizing the Secretary of the Interior to dispose of an Indian allottee's trust land and purchase another tract for the allottee. The Secretary acquired the other tract and imposed on it a restriction against alienation. A third party who claimed an interest in the same tract challenged Congress's authority to authorize the purchase and impose the restriction against alienation. The third party insisted "Congress is without power to authorize the imposition of restrictions upon the sale of lands within a State which have passed to private ownership." *Sunderland*, 266 U.S. at 232. The Court held otherwise, concluding "we do not doubt the power of the

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[7] Obviously, ICWA and the IRA address distinct issues. However, there is no question Congress viewed both subjects — custody proceedings over Indian children and rebuilding the land bases of tribes — as equally vital to tribal well-being and, hence, part of managing relations with tribes. In *Brackeen*, the Court said regarding the former, "As Congress put it, 'there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.'" *Id*. at 331 (citing 25 U.S.C. § 1901(3)). And the Court has said regarding the latter, section 5 of the IRA is the cornerstone in Congress's effort "to rehabilitate the Indian's economic life." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 142 (1973)). *See also* Cohen's Handbook of Federal Indian Law § 2.09[2] (Nell Jessup Newton, *et al*., eds., 2024 ed.).

United States to impose such a restraint upon the sale of the lands of its Indian wards, whether acquired by private purchase and generally subject to state control or not." *Id*. at 233. Similarly, Congress can constitutionally authorize the acquisition of trust land for the Nation and render it non-taxable and inalienable, in the exercise of its authority to manage relations with Indian tribes.[8]

The Village largely ignores the *Brackeen* majority opinion and focuses instead on the separate dissents of Justices Thomas and Alito. In addition, the Village cites Justice Thomas' lone dissent from the denial of certiorari in *Upstate Citizens for Equality, Inc. v. United States,* 583 U.S. 1004 (2017). App. Br. at 13-14. Those dissenting opinions may support the Village's cramped construction of the ICC but obviously do not represent the views of the Court. In the words of Judge Griesbach, "the majority of the Supreme Court has not adopted Justice Thomas' view." A-26.

[8] To blunt the clear thrust of the *Brackeen* majority opinion, the Village lifts a snippet out of Justice Gorsuch's concurrence and implies unspecified limits on Congress's authority under the ICC that section 5 supposedly violates. App. Br. at 14. But Justice Gorsuch noted at the outset of his concurrence that he was "pleased to join the Court's opinion in full" and wrote separately to add historical context. *Brackeen*, 599 U.S. at 297. Further, the snippet quoted by the Village appears in the middle of a paragraph addressing the claimed "plenary" authority of Congress to limit *tribal* powers, not *state* authority. Justice Gorsuch concluded by stating, "Nothing in the clause grants Congress the affirmative power to reassign to the federal government *inherent sovereign authorities that belong to the Tribes*." *Id*. at 325 (emphasis supplied). In short, nothing in Justice Gorsuch's concurrence suggests he differed at all with the Court's opinion on the exclusivity of federal power under the ICC vis-a-vis states.

2. The Village's claims regarding the State of Wisconsin's interests do not justify the Village's narrow construction of the ICC.

The Village is wrong that trust acquisition of land within the Reservation "precludes States from asserting fundamental aspects of their sovereignty over that land, which becomes Indian country." App. Br. at 16. The Properties at issue have been Oneida Indian country since 1838 because they are located within the boundaries of the Reservation. *Oneida Nation*, 968 F.3d at 673. But the Village has a related and more fundamental problem with its argument — it lacks standing to make it.

Standing is a part of the common law requirement of a case or controversy sufficient to invoke federal court jurisdiction. It has three elements: (1) injury in fact on the part of the plaintiff, (2) the injury arises from conduct of the defendant, and (3) the injury is redressable by a favorable court decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016); *Dinerstein v. Google, LLC*, 73 F.4th 502, 511 (7th Cir. 2023). The Village falls short on all three. First, the Village cannot claim injury to an interest that belongs to another party, i.e., the State of Wisconsin. *Spokeo*, 578 U.S. at 339. This is black letter law. Second, the claimed injury (limitation of sovereign powers) exists by virtue of the Treaty of 1838, not the trust acquisition of the Properties; as a result, the alleged injury is not traceable to the conduct of the Federal Appellees. Third, a decision in favor of the Village will not alter the Indian country status of the Properties. They will remain Indian country as within the Reservation, even if the Court were to grant the relief sought by the Village. As a result, the Village lacks standing to assert claims based upon the alleged sovereign interests of the State.

Finally, on a more practical level, the State of Wisconsin does not complain of any loss of sovereign authority resulting from either the trust acquisition or Indian country status of the Properties. As noted above, the State was notified of the Nation's application for trust acquisition of the Properties and made no objection. Furthermore, the State appeared as *amicus* in support of the Nation in the Village's legal challenge to the continuing Indian country status of the Reservation. Brief of the State of Wisconsin as Amicus Curiae, *Oneida Nation v. Village of Hobart*, 968 F.3d 664, Dkt. No. 31. Presented with an opportunity to raise for itself the claims asserted by the Village about loss of sovereignty, the State took the opposite view and urged this Court to find that the Reservation remained intact and, hence, Indian country. *Id*. The Village cannot now assert claims on behalf of the State that the State itself declines to make.

B. Section 5 does not Violate the Nondelegation Doctrine.

There is a substantial body of case law holding that section 5 does not violate the Nondelegation Doctrine and literally none supporting the Village's argument to the contrary. Further, there is no factual basis for the Village's dire predictions of the demise of state and local governments, and the Village's hyperbole does not provide a legal basis to invalidate section 5 under the Nondelegation Doctrine.

1. Federal appellate courts have uniformly rejected challenges to section 5 under the Nondelegation Doctrine.

The Village essentially concedes that every appellate court to consider whether section 5 violates the Nondelegation Doctrine has ultimately concluded that it does not. App. Br. at 26-27 (citing *Michigan Gambling Opp'n v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008); *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 379 (2009); *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790 (8th Cir. 2005); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999)). Other courts, including the Supreme Court and this Court, have assumed the constitutionality of section 5, without addressing the issue. *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650 (7th Cir. 2004); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941 (7th Cir. 2000); *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 1125 (9th Cir. 1997); *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C.), *aff'd on other grounds*, 348 F.3d 1020 (D.C. Cir. 2003). Not a single court has ruled to the contrary. [9]

In the face of this overwhelming body of law, the Village's only response is that every court reached the wrong result by inappropriately relying upon legislative history. According to the Village, the Nondelegation Doctrine requires that "intelligible principles" to guide the exercise of discretionary authority must be found in the

[9] The Village cryptically suggests an unstated and untoward purpose behind this case law, describing these courts as "scrambling" to save section 5. App. Br. at 26.

statutory text only, and not in statutory context or legislative history. App. Br. at 26-29. This is not correct. As the Supreme Court has held, the "intelligible principle" standard is not a demanding one. *Gundy v. United States*, 588 U.S. 128, 146 (2019). "The Court has understood that Congress simply cannot do its job absent ability to delegate power under broad general directives. So we have held, time and time again, that a statutory delegation is constitutional so long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id*. a 135 (citation and quotation marks omitted). An intelligible principle can be found in the terms of the provision, the overall statutory context, and the statutory purposes. *Id*. at 136. Further, it can be found in generally stated delegations to protect public health or regulate in the public interest. *FCC v. Consumers' Research*, 606 U.S. 656, 683-84 (2025). The Court has also specifically looked to legislative history to ascertain such general purposes. *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 213-218 (1943). Thus, courts that have upheld the constitutionality of section 5 employed the correct standard in finding the necessary "intelligible principle" to guide the Secretary's discretion.

Even a cursory review confirms section 5 is constitutional. The Supreme Court views the IRA as part of a statutory framework "demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Indeed, section 5 plays a key role in Congress's effort "to rehabilitate the Indian's economic life." *Patchak*, 567 U.S. at 226 (citation and quotation marks omitted). Section 5 itself states the "purpose of providing land for Indians." 25 U.S.C. § 5108. The statutory context confirms the purpose of restoring land to tribes, particularly lands located within Indian reservations. Section 1 of the IRA halts the allotment of lands located within Indian reservations, section 2 indefinitely extends the existing trust period of previously allotted lands, section 3 authorizes the Secretary to restore to tribal ownership the remaining surplus lands on any Indian reservation, and section 4 prohibits the sale or transfer of any restricted Indian land, outside certain specified exceptions. *Id*. at §§ 5101-5103, 5107. Section 5, then, is a part of "a broad effort to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies." *Michigan Gambling Opp'n*, 525 F.3d at 31. This purpose is far more specific than the general goals of other statutes, e.g., to protect public health or to regulate in the public interest, which the Supreme Court has found sufficient to state an intelligible principle. *Consumers' Research*, 606 U.S. at 683. Thus, resort to legislative history is not necessary to find the requisite intelligible principle and, even if the Village were correct that legislative history is not a permissible tool in the inquiry, section 5 does not violate the Nondelegation Doctrine.[10]

[10] The Village mischaracterizes the court's analysis in *Michigan Gambling Opp'n* as relying almost exclusively on legislative history and general purpose, rather than "binding limits in the statutory text." App. Br. at 27. To the contrary, the court relied first and foremost on the terms of

Finally, the Village suggests this Court's decision in *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020), supports the conclusion section 5 violates the Nondelegation Doctrine. App. Br. at 28-29. It does not for three reasons. First, the nature of the state and federal interests were completely different in *City of Chicago*. There, the state had inherent police power to enact and enforce criminal laws within its boundaries, which the United States Attorney General sought to limit. The Court found the Attorney General lacked authority to do so. *Id.* at 898, 929. By contrast, states have no comparable inherent authority regarding Indian affairs that might be impacted by the Secretary's exercise of his discretionary authority under section 5. Second, the Court found the Attorney General lacked authority to select federal statutes for use against the City "as a hammer to further a completely different policy of the executive branch..." *Id*. at 887. The Court noted the Nondelegation Doctrine would be a concern had Congress purported to delegate such authority to the Attorney General, but Congress had not. In other words, the Court did not depend upon or apply the Nondelegation Doctrine at all. Third, the Court distinguished *Gundy*. The question in *City of Chicago* was *whether* the Attorney General could exercise the power he claimed untethered to any statutory language. But the question in *Gundy* was *how* the admitted statutory authority could be exercised. *Id*. at 907. Here, as in *Gundy*, there is a clear statutory grant of authority to the

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section 5 in the context of the other sections of the IRA and referenced the backdrop of the IRA in its conclusion. *Michigan Gambling Opp'n*, 523 F.3d at 31-32. Furthermore, the standard is not "binding limits" in the statute itself, but an "intelligible principle," as discussed above.

Secretary, and the question is *how* the Secretary exercises his authority. Thus, *City of Chicago* does not advance analysis of the Nondelegation Doctrine here.

2. There are no national or statewide concerns that require heightened scrutiny of section 5 under the Nondelegation Doctrine.

Quoting *Consumers' Research*, the Village claims the breadth of the authority granted in section 5 justifies a conclusion that it violates the Nondelegation Doctrine. The Village suggests trust status can "strip the State of almost all sovereign power," "reduce a State to near nonexistence," and "destroy the State's territorial integrity." App. Br. at 29. But the comparison employed by the Supreme Court on this point is an agency decision that "affect[s] the entire national economy" as opposed to an agency decision "that addresses a narrow, technical issue..." *Consumers' Research*, 606 U.S. at 673. The Village fails to establish statewide or national impact from trust acquisitions in general or the Federal Appellees' decision to acquire the Properties in trust in particular.

First, nothing in the trust acquisition of the Properties bears any resemblance to the destruction of the State of Wisconsin envisioned by the Village. This Court has already addressed the boundaries of State, local, and Nation authority over the Reservation in *Oneida Nation*. There, the Village challenged the continuing existence of the Oneida Reservation and the resulting limitation on State and local authority over the Reservation. The Court concluded that "[t]he Oneida Reservation defined by the 1838 Treaty remains intact, so the land within the boundaries of the Reservation is

Indian county under 18 U.S.C. § 1151(a)." *Oneida Nation*, 968 F.3d at 689. As such, all tribal fee and trust land within the Reservation, including the Properties at issue, are already immune from State regulation, absent proof of some exceptional circumstances. *Id*. (nothing merits "departure from the general rule that the state may not assert jurisdiction over Indians on reservations.").[11] Simply stated, the Nation has had jurisdiction over the Reservation since 1838, and the State has concomitantly lacked such jurisdiction (except for that expressly authorized by Congress) since the State's admission into the Union. *See* Act of May 29, 1848, 9 Stat. 233-35 (Act for the Admission of Wisconsin into the Union). [12]

[11] In the district court, the Village erroneously asserted that *Oneida Nation* did not expressly hold that the Village lacks jurisdiction over fee land on the Reservation. R. 74 at n. 2. But this is wrong. The Court specifically noted the Village sought to apply its ordinance regulating special events to both fee and trust land on the Reservation and expressly ruled it could apply the ordinance to neither. 968 F.3d at 689. And nothing in the decision suggests the "general rule" of preemption is somehow limited to special event ordinances. Furthermore, nothing in 25 C.F.R. § 1.4, which the Village refers to in its brief, App. Br. at n. 2, alters any of this analysis, because the preemption of state and local jurisdiction in Indian country arises under federal common law, not the regulation, which is a mere restatement of the common law rule. *Norvell v. Sangre de Cristo Development Co., Inc.*, 519 F.3d 370, 373 (10th Cir. 1975). Moreover, the Village has not raised any grounds for reversal in this Court based on the regulation.

[12] It should be noted Congress granted the State criminal and civil jurisdiction over crimes committed by or against Indians and civil jurisdiction to adjudicate disputes involving Indians in Indian country in Wisconsin, except the Menominee Reservation, in Public Law 280. Act of Aug. 15, 1953, 67 Stat. 588, codified at 18 U.S.C. §1162 and 28 U.S.C. §1360. However, this grant does not authorize state or local regulatory or tax authority. *Bryan v. Itasca County*, 426 U.S. 373 (1976). Nor does it depend upon the trust status of parcels within reservations. The trust acquisition of the Properties, then, has no practical consequences for the Village other than removal of the Properties from the local tax roll. *See* R. 67 at 2-3.

Second, in the proceeding below, the district court reached the same conclusion and denied emergency relief sought by the Village based on claimed jurisdictional consequences, finding that those consequences flowed from the Indian country status of the Reservation, not the acquisition of the Properties in trust. R. 67 at 2-3.[13] The district court also rejected the Village's reliance on the claimed sovereign interests of the State, because "the Village cannot allege harm to a non-party for purposes of establishing irreparable harm." *Id.* at 3. For the same reasons, the Village cannot assert these alleged consequences as rendering section 5 unconstitutional.

Third, the Village points to the success of tribes in applying for land in trust, as a general proposition and under the MOU, as proof that section 5 lacks any intelligible principle to guide the Secretary's exercise of discretion. App. Br. at 30-32.[14] It is not self-evident why this is so. If anything, it would seem to be a mark of the success of the

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[13] In earlier litigation between the Nation and the Village, the district court held the Village had authority to condemn tribal fee land on the Reservation. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008). This holding was based, in part, on the district court's view that the Nation's fee land is not federally protected. *Id*. at 916. As a result, it is doubtful whether it remains good law after this Court's decision in *Oneida Nation* that the entire Reservation is under federal protection as Indian country. If it remains good law, the danger of loss of ownership through condemnation proceedings highlights the importance of protecting the Nation's land through trust acquisition under section 5.

[14] The Village's numbers must be placed into historical context. It claims that 67 million acres of land are held in trust for tribes and individual Indians as of 2023. App. Br. at 18. Of those 67 million acres, 48 million were held in trust at the time the IRA was enacted, which means that approximately 19 million acres have been acquired under the IRA. *Cohen's Handbook* § 2.08[3][b] (Nell Jessup Newton, et al., eds., 2024 ed.). This is a very modest number compared to the 90 million acres lost to tribal ownership as a result of the Dawes Act and related policies. *Id; see also Oneida Nation*, 968 F.3d at 670 (discussing "disastrous" consequences of the Dawes Act on the Reservation and across the country).

federal policy embodied in the IRA, not the absence of an intelligible principle.[15] It is also not self-evident why the MOU impacts the constitutional analysis. After all, the MOU requires full compliance with the same federal regulations as those processed outside the MOU. It makes no sense that section 5 supposedly violates the Nondelegation Doctrine for properties processed under the MOU, but not for those processed otherwise.

In the end, the Village offers this Court neither legal authority nor statewide or national impact to warrant a ruling that section 5 violates the Nondelegation Doctrine.

II. THE VILLAGE'S BIAS CLAIMS LACK MERIT.

The Village concedes that the classic standard of review under section 706 of the APA governs its bias claims regarding the MOU and its other APA claims, with *do novo* consideration by this Court. App. Br. at 32. Under that standard, a presumption of regularity attaches to agency decision-making and the Village fails to overcome this presumption. Without explicitly so stating, the Village relies heavily upon the distinct and higher standard under the Due Process Clause of the Fifth Amendment and sections 554, 556, and 557 of the APA. The Village fails to establish the necessary

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[15] As authority for the purported success of tribes in the process, the Village cites Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251 (2012). This article suffers from the same analytical flaw as the Village's sweeping claims regarding loss of state authority. It claims that trust acquisition transforms the land into Indian country and fails to take into account that land within reservation boundaries, like the Properties at issue here, is already Indian country. *Id*. at 264. Further, the author notes the limitations of her research, the principal one being that it is based on data compiled from the

predicate for the heightened procedures under these separate provisions and fails to overcome the presumption of honesty and integrity that attaches to formal adjudicators under those provisions.[16] As a result, the Village fails on both its APA and Due Process claims.

A. There is No Violation of Section 706 of the APA.

Section 706 inquires whether an agency's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. It is a deferential standard under which a reviewing court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (a reviewing court cannot substitute its own judgment for that of the agency). Instead, the court must ascertain whether the agency considered all relevant factors and whether there has been a clear error of judgment. *Id.*

A particularly significant feature of the APA standard for this case is the presumption of regularity that attaches to an agency's decision, with the party

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Pacific Region of the BIA only, which serves California. *Id.* at 277. Even so, the author does not suggest or argue that section 5 violates the Nondelegation Doctrine.

[16] While both standards presume the honesty and integrity of government officials, they arise under distinct provisions of law and are therefore analytically distinct — the presumption of regularity that attaches to agency decision-making arises under section 706 of the APA, while the presumed honesty and integrity of formal adjudicators, both judicial and administrative, arises under the Due Process Clause and APA sections 554, 556, and 557. The Village blurs the distinction between the two, undermining its analysis of both.

challenging it bearing the burden of proof otherwise.[17] *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1994); *Mississippi Hosp. Ass'n, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983). Thus, an agency's decision is upheld unless the agency relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view. *Motor Vehicle Mfrs.*, 463 U.S. at 43; *Boucher v. U.S. Dep't of Agric.*, 934 F.3d 530, 547 (7th Cir. 2019).

As applied to trust acquisition decisions, section 706 requires that the agency consider all factors identified in 25 C.F.R. § 151.10 for on-reservation trust applications. *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 76-77 (2011). The regulations permit trust acquisition "[w]hen the Secretary determines that the acquisition…is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). Once an application is made, the Secretary is obliged to notify the affected state and local governments and solicit written comments from them. 25 C.F.R. § 151.10. The Secretary must take the comments received into

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[17] The Village disputes the applicability of the presumption to the RD's decision on two bases: first, the RD did not actually review or approve the decision, even though she signed it, because the AR lacks drafts of the decision (and email or other transmissions of the same), and second, even if she did, she shares the same allegedly biased objective stated in the MOU in support of expedited processing of trust applications. App. Br. at 37-38. But drafts are pre-decisional, deliberative documents that are not generally disclosed in civil litigation against an agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975); *Camp. Legal Ctr. v. U.S. DOJ*, 34 F.4th 14, 19 (D.C. Cir. 2022). And of course, the RD shares the policy goal of rebuilding tribal land bases embodied in the MOU; as noted above, she is implementing Congress's will. Thus, her decision is entitled to the usual presumption of regularity.

account in assessing the specified factors, but no particular conclusion is required regarding them. *Hobart I*, 57 IBIA at 13. Instead, the record must reflect that the Secretary considered each factor in the exercise of his discretionary authority to place land into trust. *Id.*; *South Dakota*, 423 F.3d at 800 (8th Cir. 2005). The Secretary or his delagatee issues a written decision on each application which must state the reasons for the decision. 25 C.F.R. § 151.12(a) and (b). The Secretary's decision-making process is informal and requires only the minimal due process requirements of the APA. *Hobart II*, 69 IBIA at 103; *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (informal adjudications lack trial-type proceedings and satisfy the minimal APA requirements of section 706). A party can appeal to the IBIA, which ascertains whether the agency considered all the required factors, but does not substitute its own judgment for that of the agency. *Shawano County*, 53 IBIA at 68.

None of the Village's claims here demonstrates a violation of this standard. *See* App. Br. at 33-50. It is an informal decision-making process, in which communication between the Nation and the agency is entirely appropriate. As required under section 706, the agency considered the impact on the Village's tax base, but the agency was not required to reach a particular decision based upon that factor. *Motor Vehicle Mfrs.*, 463 U.S. at 43. The agency considered the Inspector General ("IG") report but, again, was not obliged to reach a particular decision for that reason. Finally, the claimed bias is nothing more than the agency charged with implementation of the IRA arriving at a decision that is consistent with the terms and policy goals of the IRA. 25 U.S.C. § 1(a) (Secretary of the Interior authorized to delegate duties "[f]or the purpose of facilitating and simplifying the administration of law governing Indian affairs"); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1182 (E.D. Cal. 2015), *vac'd on other grounds*, 698 Fed. Appx. 531 (9th Cir. 2017). The district court correctly held there is no violation of section 706, as that standard has been consistently understood and applied. A-16 – A-17 ("Ultimately, the Village's arguments assume that the IRA requires the Secretary of the Interior to act in an adjudicatory capacity making the essential factual findings needed to support a decision granting or denying the pending application. But that is not the procedure Congress established for land acquisition under the IRA.")[18]

B. The Village is Not Entitled to the Enhanced Due Process Protections It Demands.

The district court noted that to be entitled to enhanced due process protections a plaintiff must first demonstrate the presence of a property interest. A-8 (citing *Hudson v. City of Chicago*, 374 F.3d 554, 559 (7th Cir. 2004)). [19] The Village largely ignores its

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[18] The Village cites two cases involving violations of section 706, but neither supports the Village's claims. The first, *Foster v. Mabus*, 103 F. Supp. 3d 95 (D.D.C. 2015), set aside an agency decision on grounds of bias where the decision-maker "entirely failed to consider" the bias issue. *Id*. at 112. The same cannot be said here. Both the RD and the IBIA considered the Village's bias claims at considerable length. A-50 – A-69. The second, *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1260 (D. Wyo. 2004), found pre-judgment and bias in explicit, on-the-record statements made by the decision-maker in advance of the decision. The Village has not and cannot identify anything of the sort in the AR here.

[19] The district court correctly concluded the Village lacks standing to claim Due Process Clause protections because it is not a person within the meaning of the Fifth Amendment. A-8 (citing *City of East St. Louis v. Circuit Court for the Twentieth Judicial District*, 986 F.2d 1142 (7th

obligation to do so, and this failure alone refutes the Village's due process claims.[20] *See Matthews v. Eldridge*, 424 U.S. 319, 332 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972); *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009) (litigant must first establish deprivation of protected liberty or property interest).

Nevertheless, the Village relies primarily upon cases arising under the Due Process Clause. For example, the recusal standard which the Village invokes, App. Br. at 38-40, 48, is applicable to criminal proceedings with an obvious liberty interest at stake. *See, e.g.*, *Williams v. Pennsylvania*, 579 U.S. 1, 5 (2016) (due process requires recusal of judge who had prior involvement with criminal defendant as a prosecutor); *In re Murchison*, 349 U.S. 133, 134 (1955) (due process violated by one-man-grand-jury proceedings against criminal defendant for failure to appear); *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1371 (7th Cir. 1994) (due process required recusal of judge in criminal proceeding where actual incentive for bias existed).

Cir. 1993)). The district court also correctly concluded that, even if the Village had standing, its claim lacks merit. *Id*.

[20] The Village implies it has a property interest arising from the removal of the Properties from the tax rolls following trust acquisition, without expressly so stating and without reference to any authority. App. Br. at 50 ("there is no question the Village will be impacted negatively"). But state law indicates otherwise. Under Wisconsin law, numerous categories of property use and owners are exempt from real property taxes and no process is afforded to the local taxing authority when one of these exemptions is triggered by a change in use or owner. Wis. Stat. § 70.11. Instead, the property owner simply files a prescribed form and tax-exempt status attaches, without any process or regard for the impact on the local government's tax base. *Id*. Thus, the Village's bare assertion that it will be "impacted negatively" does not rise to the level of protected property interest under the Due Process Clause, and the district court correctly determined the Village has none. A-10.

The Village also relies upon statutory due process protections for property interests in formal adjudicatory proceedings that are unlike the informal decision-making process that took place here. App. Br. at 38-39 (citing *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (formal administrative adjudication regarding Social Security disability benefits); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (formal administrative adjudication on revocation or suspension of registration); and *Small v. Sullivan*, 820 F. Supp. 1098, 1103 (S.D. Ill. 1992) (formal administrative adjudication regarding Social Security disability benefits.) Finally, the Village demands restrictions on agency decision-making processes that are required for formal administrative adjudications under sections 554, 556, and 557 of the APA.[21] But the Village provides no rationale or authority for demanding these statutory protections in the context of the informal decision-making process employed for trust decisions.

C. The MOU is Authorized by the ISDEAA and There is No Evidence of Bias in the Federal Appellees' Decision-making Process.

All the Village's claims for violation of the APA relate, in one way or another, to the MOU — its legality under Federal law, its terms as considered by the Inspector General ("IG"), the alleged bias of the RD, and claimed pre-judgment evidenced in

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[21] *See* 5 U.S.C. § 554 (formal adjudication necessary "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"), construed in *Hummel*, 736 F.2d at 93 (holding that due process requires impartiality of judges in administrative as well as judicial adjudications); 5 U.S.C. § 556 (requirements for formal administrative hearings); and 5 U.S.C. § 557, which contains an "explicit and sweeping proscription against ex parte communications" in formal, adjudicatory proceedings. *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1264 (D.C. Cir. 2004).

MOU's terms and processing. App. Br. at 32-52. These claims all lack merit, under either section 706 of the APA or the higher standard applicable to formal administrative adjudications under the Due Process Clause and the APA.

1. The MOU is explicitly authorized by the ISDEAA.

The ISDEAA, first enacted in 1975, was amended in 1994 to require the Secretary of the Interior to enter into funding agreements with tribes upon request to "plan, conduct, consolidate and administer" programs operated by the BIA. 25 U.S.C. § 5363(a) (self-governance compacts). The self-governance provisions also explicitly authorize the Secretary to treat two or more "eligible Indian tribes as a single Indian tribe for the purpose of participating in Self-Governance." 25 U.S.C. § 5362(b)(1)(B). The Nation administers its federal programs under a self-governance compact authorized by these statutes. R. 35-10 at 25, 28.

Like those of other recognized tribes, the Nation's federal appropriations for the operation of tribal government and services, known generally as Tribal Priority Allocations ("TPA"), are made among eight general categories. R. 32-4 at 48. One of those categories is Trust Services, which includes the processing of fee-to-trust applications. *Id*. As a general proposition, then, the ISDEAA authorizes the Nation to compact for the BIA work in processing fee-to-trust applications and to do so in combination with other tribes.

Nonetheless, the Village now argues that the IRA does not authorize the MOU since the Nation already held fee title to the Properties at the time of the application. App. Br. at 49.[22] Apparently, the Village would limit trust acquisition to land in which the applying tribe has no current interest. This is complete nonsense. First, the IRA authorizes the Secretary to acquire in trust "*any interest* in lands, water rights, or surface rights to lands," without reference to whether that interest is already owned in fee by the applying tribe. 25 U.S.C. § 5108 (emphasis added). And the governing regulations explicitly provide that "land may be acquired for a tribe in trust status...[w]hen the tribe already owns an interest in the land..." 25 C.F.R. § 151.39(a)(2); *see also id*. § 151.4 ("Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status..."). Second, such acquisitions are not a feature of the MOU, which simply requires compliance with the generally applicable Part 151 regulations that explicitly authorize trust acquisition of land already owned in fee by a tribe. Third, the Village cites not a single precedent for its newly minted reading of the IRA, likely because no court has adopted a construction that flies directly in the face of statutory language and the governing regulations.

[22] The Village makes this argument for the first time on appeal, and this Court need not even consider it. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below"); *Myron v. Chicoine*, 678 F.2d 727, 731 (7th Cir. 1982). In any event, the Village's newly proposed construction of the IRA is patently wrong.

Finally, the Village cobbles together another argument for the claimed illegality of the MOU out of apparent frustration with trust acquisition in general. The Village complains of "rubberstamping" by the decision-maker, that no determinative weight has been assigned to any of the relevant regulatory factors, and accumulating impact upon the Village as more land goes into trust. These are the same claims made by the Village as allegedly violating section 706 of the APA, discussed above, and the Village does not explain how these same claims can be reformulated to render the MOU illegal. In the absence of any precedent indicating illegality for these reasons, the Village's recasting of its APA claims should be rejected for the same reasons discussed above.

2. The terms of the Midwest Region MOU do not create bias.

Contrary to the Village's premise, there is nothing in the terms of the Midwest Region MOU to indicate that trust applications from the consortium tribes, including the applications for the Properties at issue here, are processed in a substantively different manner or with greater success than those from tribes not in the consortium. The MOU states its purpose as "facilitating the expeditious processing of fee-to-trust applications submitted by the participating Division Tribes" by providing reprogrammed federal TPA funding for the hiring of additional employees by the BIA to assist in the processing of trust applications; it also makes clear that trust applications processed by the additional employees must comply with the same regulatory provisions that govern all trust acquisitions. The additional staff are federal employees under Title 5 of the United States Code, report directly to the RD (not the member tribes), and are responsible for assuring "that each request for fee-to-trust acquisition shall fulfill completely all of the administrative requirements of 25 C.F.R. Part 151." R. 1-3 at 20. They are also responsible for compiling data on the regulatory factors, handling communications between the applicant tribe and the BIA during the processing, and drafting a letter of determination for the RD's consideration. *Id.*

What is *not* in the Midwest Region MOU is equally telling. There is nothing prohibiting the additional employees from working on trust applications from tribes not in the consortium.[23] The hiring of additional employees is not controlled by the tribes, but by the RD. And the RD supervises the additional employees, not a committee on which the tribes sit. In all these respects, the Midwest Region MOU is different from the Pacific Region MOU that was the subject of the Inspector General ("IG") Report cited by the Village. *See* App. Br. at 40-44; R. 1-5 (titled "California Fee to Trust Consortium MOU"). The Pacific Region MOU contained all these problematic provisions, which resulted in a "patent perception of a conflict of interest" in the IG's view. R. 1-5 at 2. Finally, the Village ignores one other important difference between the

[23] The Village implies the additional employees are prohibited from working on other tribes' applications, like the Pacific Region MOU considered in the IG report. *See* App. Br. at 6 ("'Through funds provided by the Participating Tribes,' BIA 'hire[s] employees/contract staff whose sole duties and responsibilities will be to process Fee-To-Trust applications,' from those tribes."). This misrepresents the actual terms of the Midwest Region MOU. The language 'from those tribes' is added by the Village and does not appear in the MOU. Neither this language,

Midwest Region MOU and the Pacific Region MOU — the Solicitor's Office at the Department of the Interior approved the former but not the latter. R. 35-8 at 207 ("According to staff with the Inspector General's office, the Pacific Region's land in trust consortium agreement was not reviewed or approved by Interior's Office of the Solicitor before BIA entered into it. The staff further stated the Midwest Region's agreement, created several years after the Pacific Region's agreement, did undergo review and approval by the Solicitor's Office.").[24]

There is only one provision in common between the Pacific Region MOU and the MOU here — both fund the salaries of additional employees through reprogrammed federal TPA appropriations. But there is nothing in either that guarantees a particular outcome on any given application or that makes employees' salaries dependent upon a particular number or favorable outcome of trust applications. The Midwest Region MOU specifically subjects the additional employees to civil service law and protections and requires that they comply with all the requirements of 25 CFR Part 151. As a result,

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nor any other precluding additional employees from working on other tribes' applications, appears in the MOU.

[24] The Village complains the RD disregarded "the Solicitor's review of the Midwest Region MOU and recommendation the MOUs be discontinued," and the IBIA's analysis was insufficient because it included "only an incomplete, redacted version of the IG Report." App. Br. at 40. The Village also suggests it was the RD's responsibility to obtain these documents. App. Br. at 41. Neither proposition is correct. As discussed below, internal legal opinions are privileged attorney-client communications and are not publicly available documents. Thus, the RD found she had before her the full record of the IG investigation provided in response to a Freedom of Information Act request. R. 32-4 at 46. The IBIA observed the Village failed to explain how any of the data redacted from the IG report might have altered the RD's analysis and upheld her conclusions regarding the report. A-70 (*Hobart II*, 69 IBIA at 112).

the additional employees process applications in the same way that other BIA employees do — in accordance with federal laws and policy that favor the rebuilding of tribes' land bases. They are simply able to do so more expeditiously because of the added manpower. Unsurprisingly, the RD and the IBIA both found the terms of Midwest Region MOU do not create structural bias. R. at 32-4 at 50; A-51 – A-52 (*Hobart II*, 69 IBIA at 93-94). The district court agreed, concluding that "the [RD] and the IBIA thoroughly explained that the Village had failed to establish bias."[25] A-16.

3. There is no evidence of bias even under the Due Process standard.

Without first establishing a protected interest that justifies heightened due process protections, the Village argues that actual bias need not be shown to set aside an agency decision under the Due Process standard; the appearance of bias alone may suffice. App. Br. at 39. But the Village misstates the authority it cites. So even assuming, *arguendo*, the presence of a protected interest, the Village has failed to show a violation of that standard.

This Court has been clear that analysis of claimed bias begins with presuming "'the honesty and integrity of those serving as adjudicators,'" *Del Vecchio*, 31 F.3d at 1375 (quoting *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975)), even in the context of criminal

[25] The Village's counsel made the same bias claims against the Midwest Region MOU to the United States District Court for the District of Minnesota, and that court was similarly unimpressed. *See* Order on Motions for Summary Judgment at 6, *Morrison County, et al. v. United States Dep't of the Interior, et al.*, Case No. 24-cv-00023 (Nov. 26, 2025), Dkt. 63 ("This MOU does not create an unconstitutional probability of bias.")

proceedings where liberty interest is at its zenith. Further, the Court has gone to some lengths to dispel the notion that appearances alone may require recusal of a decision-maker. *Id.* at 1371-73. Instead, "only a strong, direct interest in the outcome is sufficient to overcome the presumption of even-handedness." *Id*. at 1373. "In short, bad appearances alone do not require disqualification" of a decision-maker. *Id*. at 1372.

Thus, the standard to overcome the presumption of honesty is an "exacting one," requiring an objective examination of circumstances that show possible temptation so severe that there is a substantial incentive to be biased. *Small*, 820 F. Supp. at 1107. This Court has described it as requiring either actual bias "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased." *Pettis v. United States*, 129 F.4th 1057, 1062 (7th Cir. 2025) (citation and quotation marks omitted) (criminal trial in which extensive, *ex parte* communication between the judge and defendant's employer found insufficient to justify recusal). Violations of due process in criminal proceedings based on bias have been found in four sets of circumstances: first, actual bias where evidence showed the judge had determined criminal guilt before trial; second, the judge had significant, personal involvement with the criminal defendant as a prosecutor on a critical issue in the case; third, financial incentive in the outcome of the case; and fourth, the judge had become "personally embroiled" with a litigant through contempt proceedings or otherwise. *United States v. Williams*, 949 F.3d 1056, 1061 (7th Cir. 2020). The Village does not allege any such circumstances here.

There is nothing in the terms of the MOU that requires a particular outcome on a trust application, no pecuniary or other reward for the additional employees tied to recommendations regarding trust applications, and no pecuniary or other benefit to be gained by the RD in "rubberstamping" those recommendations. Even if there were evidence of biased decision making under the Midwest Region MOU terms (which there is not), the Village cannot explain how that alleged bias infected the independent review by the IBIA that produced the final agency action upon which the Village sued. The additional employees and the RD did nothing more than faithfully apply the congressional policy in the IRA which favors the rebuilding and protection of tribal land bases. They complied with the regulations that govern the processing of trust applications and utilized the same decision-making process that is undertaken in the absence of a consortium agreement. In the end, the Village fails to identify any strong, direct interest on the part of the RD or the IBIA that would overcome the presumption of unbiased decision making, even if the Village had a protected interest under the Due Process Clause and were entitled to heightened protections.

4. There is no evidence of pre-judgment under either section 706 or other provisions of the APA.

In one of its more imaginative arguments, the Village insists the administrative process resulting in the trust acquisition of the Properties was infected by "substantial evidence of prejudgment." App. Br. at 44. A cursory examination of the Village's allegations shows nothing of the sort and none of the cases cited by the Village indicates otherwise.

As for the facts, the Village recites details from the AR showing contact between the additional employees and/or the RD and the Nation. These include requests for updates on the status of pending applications, requests for data on numbers and status of pending trust applications, and meetings to discuss proceedings on remand to the agency following *Hobart I*. App. Br. at 44-48. Despite the Village's contrary assertion that "substantial evidence of prejudgment" was "disregarded," the IBIA reviewed these same factual allegations and accurately described them as "assumptions and speculation," showing the RD prioritized rather than prejudged the trust applications for the Properties. A-63 – A-64 (*Hobart II,* 69 IBIA at 105-6). The IBIA concluded that these circumstances fell far below the high standard for prejudgment, either in formal administrative hearings or the informal decision-making process on trust applications, which requires a showing that the agency was "irrevocably closed on the subject" or "committed" to a particular outcome. A-63 (*Hobart II,* 69 IBIA at 105 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (in the context of a formal FTC hearing) and *Stand Up for California! v. U.S. Dept. of the Interior*, 204 F. Supp. 3d 212, 303 (D.D.C. 2018), *aff'd on other grounds*, 879 F.3d 1177 (D.C. Cir. 2016) (in the context of a trust application)). The district court agreed. A-12 (noting the IBIA's explanation that "the BIA's commitment to processing applications more quickly is not evidence that it has prejudged applications and does not equate to pre-approval of applications.").

The Village largely ignores the authority cited by the IBIA.[26] It cites a single case involving review of an informal administrative process under section 706 of the APA — *Int'l Snowmobile Mfrs. Ass'n*. But as noted above, that case involved an explicit, on-the-record statement "directing" the agency to reach a particular result. 340 F. Supp. at 1260. The Village alleges nothing comparable here. The Village also relies on a criminal case in which the Supreme Court held it was impermissible under the Fourteenth Amendment for "a judge to act as a grand jury then try the very persons accused as a result of his investigation." *In re Murchison*, 349 U.S. at 135. App. Br. at 48. This case is inapplicable to the administrative process at issue here.[27] Other cases cited by the Village involved provisions of the APA, other than section 706, that explicitly require or prohibit certain procedures. App. Br. at 48. *See Elec. Pwr. Supply Ass'n*, 391 F.3d at 1258-60 (construing *ex parte* communication ban in 5 U.S.C. §557(d)); *Amos Treat & Co.*, 306 F.2d at 266-67 (construing statute requiring formal administrative hearing and 5 U.S.C.

[26] The Village ignores *Cement Inst.* altogether and references *Stand Up for California!* only on its structural bias argument regarding the MOU, oddly citing it in support of the claim that the BIA was committed by contract to a particular outcome on the trust applications for the Properties. *See* App. Br. at 35. Of course, the MOU contains no such provision.

[27] The Village cites *In re Murchison* to suggest it was improper for the RD to reconsider her initial trust decision upon remand by the IBIA. But this makes no sense in the administrative law context, as remand to the same agency for reconsideration is the relief typically awarded if an agency is found to have violated the APA. *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002). Thus, it was entirely appropriate for the RD to reconsider her own decision on remand from the IBIA.

§1004(c) barring employee investigating facts from serving as decision-maker). These statutory provisions are irrelevant to the informal agency decision-making process here.

Finally, the Village claims that metrics relating to overall performance by the agency — such as tracking completed trust application decisions, and compliance with projected numbers of processed trust applications — show prejudgment. App. Br. at 47. But these are merely measures for administrative goals in the service of congressional policy, as discussed above. And the Village does not tie any of these administrative goals or metrics to a particular outcome regarding the Properties at issue here. In short, the Village does not carry its burden of demonstrating an agency irrevocably closed or committed to a particular determination on the Properties.[28]

In the end, failure to carry its burden of proof dooms all the Village's claims of an APA violation. The Village makes no attempt to prove a property interest entitling it to enhanced due process protections, it fails to rebut the presumption of regularity that attaches to agency decisions and processes under section 706, and it fails to demonstrate bias under the Due Process Clause standard in either the terms of the MOU or the processing of the trust application for the Properties. As a result, all the Village's claims for APA and Due Process Clause violations fall short.

[28] Elsewhere, the Village refers to the recitals in the MOU, not operative terms, as indicating prejudgment. But the MOU recitals are only expository, and courts look to such recitals only to assist in construing ambiguous operative terms. E.J. Leib, T. Kastner, *Recitals and Contract Interpretation*, 54 F.S.U. Law Rev. 1, 8-9 (2026). There are no operative terms of the

III. THE DISTRICT COURT PROPERLY DENIED THE VILLAGE'S DISCOVERY REQUEST.

Unable to show bias from either the terms of the MOU or the processing of the trust applications for the Properties, the Village sought a wide range of discovery.[29] The district court properly denied discovery because the Village failed to make the requisite strong showing of agency bad faith or improper behavior. A-38. As the Village notes, the standard of review for such orders is for abuse of discretion. C*itizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1082 (7th Cir. 2016).[30]

A. The District Court Applied the Correct Legal Standard in Rejecting the Village Request for Discovery.

The district court relied upon the classic formulation of the rule allowing extra-record discovery in APA cases only where the plaintiff can make a "strong showing of bad faith or improper behavior." A-38 (quoting *Dep't of Commerce v. New York*, 588 U.S.

MOU, ambiguous or otherwise, directing acceptance of the Properties into trust, and no need for the Court to look to the recitals.

[29] The Village portrays its discovery request as "narrowly tailored" and "modest." App. Br. at 52. But in fact the Village sought broad discovery, "including requests for admission, interrogatories, requests for production of documents, and depositions of certain agency employees, including the Regional Director, BIA employees involved in the drafting and processing of fee-to-trust applications, and certain employees and/or members of the Tribe who communicated directly with the BIA employees responsible for drafting and processing the Tribe's applications." R. 40 at 14.

[30] The Village also sought an order to supplement the AR with materials relating to the RD's review of the bias claims. These documents were identified in the index to the AR and withheld as privileged in proceedings below. But the Village did not complain about the withholding of these items before the IBIA, which received the privileged documents and specifically noted that it did not consider them. A-69 (*Hobart II* at n. 24). As a result, the district court held that the Village had waived its objection to their exclusion from the AR. A-35 – A-36. The Village does not challenge this determination on appeal and only seeks review of the denial of extra-record discovery for its APA claims. App. Br. at 52.

752, 718 (2019)). This rule originated with *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), and has been faithfully applied since. *Dep't of Comm.; see also Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1279-80 (W.D. Wis. 1997).

The Village erroneously relies upon other authority indicating the bad faith standard does not apply to constitutional claims or to or an incomplete record. It cites *Cook County, Ill. v. Wolf*, 461 F. Supp. 3d 779 (N.D. Ill. 2020) for this proposition, App. Br. at 53, but that case is inapposite. The *Cook County* court had before it two distinct challenges to an immigration rule adopted by the Department of Homeland Security — one challenge based upon the APA and another based upon the equal protection component of the Fifth Amendment specifically alleging racial animus. 461 F. Supp. 3d at 782. The court first analyzed whether the Supreme Court or this Court has articulated rules governing discovery beyond the administrative record "where, as here, a plaintiff brings a substantive constitutional challenge to agency action." *Id*. at 792-94. The court concluded that neither the Supreme Court nor the Seventh Circuit had done so. *Id.* at 794. The court then considered whether the rationale applicable to an APA claim should also apply to constitutional claims and found "[t]hat rationale is a mismatch for an equal protection challenge alleging that an agency adopted a regulation that, while facially race-neutral, is intended to disadvantage certain races and succeeds in doing so." *Id*. In the court's view, racial animus is the "quiet part" that will always reside outside the record; as a result, the plaintiff was entitled to discovery on the claim, "regardless of whether it can satisfy the 'strong showing' standard applicable to APA claims." *Id*. at 795. There are no claims of racial animus here to justify an exception to the classic rule governing discovery in APA cases.

Other cases cited by the Village are similarly distinguishable. *See Manker v. Spencer*, 2019 WL 5846828 (D. Conn. 2019) (course of conduct relevant in certified class action that went beyond the adjudication of class representatives individual claims); *Grill v. Quinn*, 2012 WL 174873 (E.D. Cal. 2012) (a constitutional challenge is reviewed independent of limitations under APA on extra-record discovery);[31] *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) (challenge to agency adjudicatory proceeding as violating First and Fifth Amendment rights of terminated employee).[32] Thus, these cases do not support the Village's claim for discovery in this APA case challenging informal decision-making, not constitutional claims, regarding these specific Properties.[33]

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[31] The *Cook County* court noted that *Grill* is among the cases that favor a rule that the APA limitation on discovery does not apply to constitutional claims. *Cook County*, 461 F. Supp. 3d at 792. But the court declined to adopt that rule, concluding instead that an exception to the APA limitation was necessary in cases alleging racial animus.

[32] The Village claims a parallel between the RD's contractual obligations under the MOU and the issues of "good faith" and "credibility" considered in *Porter*. App. Br. at 54. But as discussed above, there are no contractual obligations on the RD in the MOU other than consultation with tribes in the consortium on work under the MOU and to comply with federal law regarding employees and the processing of trust applications. By contrast, the very supervisors the employee had accused of corruption in *Porter* played a large role in the agency investigation into her termination, which the court concluded undermined the good faith and credibility of the agency decision-making process. *Porter*, 592 F.2d at 783.

[33] It should be noted the Village seeks extra-record discovery for its APA claim only, not its constitutional arguments. App. Br. at 52.

Finally, the Village cites *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982) for the general proposition that discovery is allowable on an APA claim. App. Br. at 56. But that is not what the court held. The question under consideration was the appropriateness of summary judgment. 687 F.2d at 654. The parties disputed whether the administrative record was complete and the court viewed this difference as a factual dispute which precluded summary judgment. "In the present case, the District Court acknowledged that such a [factual] dispute existed, for the plaintiffs claimed that the record presented to the Court was not the full record that had been before the agency." *Id*. Thus, the court held that summary judgment was not appropriate and remanded for consideration of the completeness of the administrative record, with the possibility of "limited discovery to explore whether some portions of the full record were not supplied to the Court." *Id*.

None of these cases supports an exception to the strong showing required to justify discovery in an APA case where there are no allegations of racial animus, there are no non-APA claims for which discovery is claimed, and there is no dispute that the AR is complete.

B. The Village Fails to Meet the "Strong Showing" Standard.

The Village claims three sets of facts appearing on the face of the AR meet the required showing of bad faith or improper conduct: first, the bare terms of the MOU itself; second, evidence of "coordination, prejudgment, and outcome driven conduct";

and third, the RD's contractual obligations under the MOU. App. Br. at 53-54. The district court considered and properly rejected these claims. A-9 – A-10.

As for the terms of the MOU itself, the Village does not identify which specific terms reflect bad faith but complains generally about employees' bias toward a favorable outcome on trust applications for the Properties and in general. The supposed bias of which the Village complains, though, is policy embodied in federal law authorizing trust acquisitions. *See* discussion above. Further, as demonstrated above, the processing of the applications through the mechanism of the MOU, and the trust acquisition of the Properties, are specifically authorized by federal law. This being so, the terms of the MOU alone do not show bad faith or improper behavior on the part of the RD. To the contrary, the MOU and processing under it reflect compliance with federal law and policy.

As for the claimed coordination with the Nation and Nation employees in the processing of the trust applications, this is wholly consistent with the informal decision-making process that takes place on all trust applications. There is nothing in any of these communications that shows the decision-maker's mind was "irrevocably closed," indicating a denial of due process or violation of the APA. *Cement Inst.*, 333 U.S. at 701; *Grill*, 2012 WL 174873 at *3-4 (sufficient basis to conduct discovery from agency's unexplained and sudden reversal of its decision).

As for the RD's claimed contractual obligations under the MOU, again the Village fails to identify specific terms of the MOU or contractual obligations that show the requisite bad faith, and there are none. And it is undisputed that the trust acquisition decisions bear the signature of the RD, not that of the additional employees. The Village offers nothing to rebut the presumption that the RD duly exercised her authority to review the draft decision prepared by her staff and make the final decision.

At this point in this litigation, the Village's demand for discovery on a possible factual basis for its bias and prejudgment claims appears to be a mere fishing expedition, a search for missing facts of actual bias and prejudgment. But the Village's search for missing facts cannot overcome the presumption of regularity that attaches to the decision to place the Properties into trust.

CONCLUSION

For all the foregoing reasons, the judgment of the district court affirming the Federal Appellee's decision to acquire the Properties in trust under section 5 of the IRA should be affirmed.

Respectfully submitted this 16th day of July, 2026.

s/Arlinda F. Locklear
Arlinda F. Locklear+
D.C. Bar No. 962845
4113 Jenifer Street, NW
Washington, DC 20015
alockleresq@verizon.net
(202) 237-0933
Lead Counsel of Record

James R. Bittorf
Wis. State Bar No. 1011794
Kelly M. McAndrews
Wis. State Bar No. 1051633
Krystal L. John
Wis. State Bar No. 1093818
ONEIDA LAW OFFICE
P.O. Box 109
Oneida, Wisconsin 54155
(920) 869-4327

CERTIFICATE OF COMPLIANCE

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Dated: July 16, 2026

s/Arlinda F. Locklear
Arlinda F. Locklear

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I hereby certify that on July 16, 2026 the Brief of Intervening Defendant-Appellee Oneida Nation was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated July 16, 2026

s/Arlinda F. Locklear
Arlinda F. Locklear