United States Court of Appeals
for the
Eighth Circuit

Case No. 26-1154

MORRISON COUNTY, MINNESOTA; RICHARDSON TOWNSHIP; LEIGH TOWNSHIP,

Plaintiffs-Appellants,

– v. –

UNITED STATES DEPARTMENT OF THE INTERIOR; DEB HAALAND, in her official capacity as United States Secretary of the Interior; BUREAU OF INDIAN AFFAIRS; TAMMIE POITRA, in her official capacity as the Midwest Regional Director, Bureau of Indian Affairs; ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS; INTERIOR BOARD OF INDIAN APPEALS,

Defendants-Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA IN CASE NO. 0:24-CV-00023-NEB HONORABLE NANCY ELLEN BRASEL, U.S. DISTRICT JUDGE

BRIEF FOR PLAINTIFFS-APPELLANTS

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Morrison County, Richardson Township, and Leigh Township of Minnesota challenge the Department of the Interior's decision to take 3,238.81 acres of land across 24 parcels within their governing jurisdictions into trust for the Mille Lac Band of Ojibwe Indians, pursuant to Section 5 of the Indian Reorganization Act of 1934 and its implementing regulations at 25 C.F.R. Part 151. The Department's decision must be vacated as it rests on: (1) an unconstitutional statute, which exceeds Congress's authority under Article 1 of the U.S. Constitution; (2) a biased decision-making process under a Memorandum of Understanding between BIA and the Band, in which the Band pays BIA salaries to process trust requests; (3) an unlawful determination that off-reservation lands were "contiguous" to the Band's disestablished reservation; and (4) an improper evaluation of the Part 151 regulations that violated the Administrative Procedure Act.

Given the destructive effects to the County and Townships from the lands being taken into trust and the constitutional questions raised, 30 minutes of oral argument is requested (15 minutes per side).

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, Morrison County, Minnesota, Richardson Township, and Leigh Township are local governing bodies within Minnesota who sought judicial review of a final agency action by the U.S. Department of the Interior to take lands—within their governing jurisdictions—into trust for the Mille Lacs Band of Ojibwe (the "Band"). (App.11-33, R.Doc.1, at 1-23.) Defendants-Appellees are the U.S. Department of the Interior; Deb Haaland, in her official capacity as Secretary of the Interior; Bureau of Indian Affairs ("BIA"); Tammie Poitra, in her official capacity as Midwest Regional Director, BIA ("RD"); and the Interior Board of Indian Appeals ("IBIA") (collectively, "Department") (App.67-87, R.Doc.11, at 1-21.)

Appellants appeal from the final judgment of the United States District Court for the District of Minnesota, dated November 26, 2025 (Add.19; App.362, R.Doc.64, at 1) (Add.20; App.363, R.Doc.65, at 1), which resulted from its Order on Motions for Summary Judgment, dated November 26, 2025. (Add.1-18; App.344-61, R.Doc.63, at 1-18.) In its Order, the District Court affirmed the IBIA's September 29, 2023 decision, *Morrison County, Mn., et al. v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 69 IBIA 137 (2023) (Add.21-53; App.34-66, R.Doc.1-1, at 1-33), which arose from an appeal of the RD's decision dated March 2, 2017. (App.104-15; R.Doc.17-4, at 17-28.)

The dispute arises under Article I, § 1 and Article I, § 8, cl. 3 of the U.S. Constitution; the Indian Reorganization Act of 1934, 48 Stat. 984 (June 18, 1934), 25 U.S.C. § 5108 ("IRA"); the IRA's implementing regulations, 25 C.F.R. § 151.10 (2017); the Administrative Procedure Act, 5 U.S.C. § 701, *et. seq* ("APA"); and Federal Common Law. The District Court had jurisdiction under 28 U.S.C. § 1331.

All claims were disposed of in their entirety by the final judgment. Appellants filed a timely notice of appeal on January 23, 2026. (App.364, R.Doc.66, at 1.) This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Issue 1: Whether Section 5 of the IRA is unconstitutional because it:

(a) exceeds Congress's authority under the Indian Commerce Clause, Article I, Section 8, Clause 3 of the U.S. Constitution, and

(b) constitutes an unlawful delegation of legislative power in violation of Article I, Section 1 of the U.S. Constitution?

Apposite Authorities: U.S. Const. Art. I, § 1; U.S. Const. Art. I, § 8, cl. 3; Indian Reorganization Act of 1934, 48 Stat. 984, 985 (June 18, 1934), 25 U.S.C. § 5108; *Haaland v. Brackeen*, 599 U.S. 255 (2023); *Fed. Commc'n Comm'n v. Consumers'*

Research, 606 U.S. 656 (2025); *South Dakota v. United States*, 423 F.3d 790 (8th Cir. 2005).

Issue 2: Whether the Department's decision to take land into trust violated the APA because it:

(a) resulted from a biased decision-making process pursuant to a Memorandum of Understanding (MOU) between BIA and the Band;

(b) was not in accordance with the law of Section 5 of the IRA and its implementing regulations;

(c) improperly failed to evaluate off-reservation criteria to parcels that were not contiguous to a disestablished reservation;

(d) was arbitrary and capricious in that it failed to properly evaluate the criteria under 25 C.F.R. § 151.10?

<u>Apposite Authorities</u>: 5 U.S.C. § 706(2)(A); 25 C.F.R. §§ 151.10, 151.11 (2017); *Dep't of Commerce v. New York*, 588 U.S. 752 (2019); *Kisor v. Wilkie*, 588 U.S. 558 (2019); *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010); *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director, BIA*, 47 IBIA 187 (2008).

STATEMENT OF THE CASE

A. Band's Application.

In December 2015, the Band applied for 24 individual tax parcels totaling 3,238.81 acres within Richardson and Leigh Townships in Morrison County, Minnesota, to be taken into trust. (App.223-38, R.Doc.17-6, at 1-16.) The Band described the lands as rural vacant and that no change of use was planned from the current use of hunting, gathering, and other cultural activities. (App.223, R.Doc.17-6, at 1.) The Band identified the lands as consisting of two Tracts consisting of nine legally-described parcels that were purportedly "contiguous" to the reservation, and requested processing under the on-reservation criteria under 25 C.F.R. § 151.10 (2017). (App.223-40, R.Doc.17-6, at 1-16, 144-45; App.154-58, R.Doc.17-4, at 342-46.) If the land was not contiguous, the Band requested review under the off-reservation criteria under 25 C.F.R. § 151.11 (2017). (App.227, R.Doc.17-6, at 5.) Why?—because the lands only touch the reservation at a corner.

B. County and Townships' Objections.

On January 26, 2016, BIA issued a Notice of (Non-Gaming) Land Acquisition Application, which invited State and local governments to submit information concerning the tax impact and jurisdictional concerns, for the Secretary to assess the impact of the removal of the property. (App.130-34, R.Doc.17-4, at 63-67.) The Notice identified the lands as nine legally-described parcels across 24 separate tax parcels. (App.130-34, R.Doc.17-4, at 63-67.) The

County and Townships submitted separate objections to Band's request. The County's objections, including notice and procedural concerns, noted there is no trust land or reservation land in the County, the tax loss, that the Band had not made a showing it needs additional land in trust given its extensive business, casino, and other real estate holdings, and it will create jurisdictional issues and expenses associated with law enforcement. (App.197-200, R.Doc.17-5, at 276-79.) Leigh noted its tax loss would be "8% of its levy" and "[w]ith only 80 households" that are primarily low-income or retired persons, the loss will have a "significant impact." (App.195, R.Doc.17-5, at 266.) Richardson stated the tax loss will burden road and bridge maintenance and fire protection. (App.196, R.Doc.17-5, at 275.) Richardson further noted the parcels within the Township are not attached to any tribal trust lands. (App.196, R.Doc.17-5, at 275.) Promptly upon receipt of these objections, the Band was notified. (App.201-02, R.Doc.17-5, at 280, 284.)

C. Band's Memorandum of Understanding.

"Through funds provided by Participating Tribes," BIA Midwest "hire[s] employees/contract staff whose sole duties and responsibilities will be to process Fee-to-Trust applications" from those tribes, pursuant to a Memorandum of Understanding. (App.241-51, R.Doc.17-9, at 74-84.) The stated purpose of that MOU—getting land "accepted into trust" through "facilitating the expeditious processing of [those] fee-to-trust applications." (App.241, R.Doc.17-9, at 74.)

Per its terms, 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." (App.241, R.Doc.17-9, at 74.) To accomplish its objectives a "Division," defined to include "[t]he Midwest Region[al] Director and group of staff assigned to work on trust acquisition cases," was formed. (App.242, R.Doc.17-9, at 75.) An "Oversight Advisory Council," "composed of the MWRO Regional Director and one representative of each Participating Tribe," was also formed. (App.244, R.Doc.17-9, at 77.) This Council, who "shall meet at least twice a year in a manner determined by the Participating tribes," has "[o]versight" over the Division. (App.244, R.Doc.17-9, at 77.) "Decision making . . . shall be by consensus vote of the attending Participating Tribes[.]" (App.244, R.Doc.17-9, at 77.) An Executive Committee, also comprised of "both tribal and federal members," may be formed for "providing more timely input to the Regional Director." (App.244, R.Doc.17-9, at 77.)

Division employees "necessary to achieve the goals of th[e] Project," are "governed" by the MOU and "report directly to the Regional Director's office." (App.243-44, R.Doc.17-9, at 76-77.) The "specific number and positions" are determined by the Midwest Regional Office and the Advisory Council through a "mutually agreed upon process." (App.244, R.Doc. 17-9, at 77.) Among other duties, the Division's employees—who are paid by the tribes—are "responsible for assuring" that each "acquisition" complies with administrative requirements of 25 C.F.R. Part 151. (App.244, R.Doc. 17-9, at 77.) These same employees—not the RD—are responsible for "preparing the Notice of Decision on a requested parcel" and "preparing the record for appeal[.]" (App.245, R.Doc.17-9, at 78.) The MOU even requires employees to assist the tribes in "developing responses to comments" received from local governments and "eliminating or mitigating any of the Solicitors objections" to the application. (App.245, R.Doc.17-9, at 78.)

To receive this preferential treatment, the Band must pay $215,000 per year. (App.241-52, R.Doc.17-9, at 74-85.) That money—spent on Division employees who: work with the Band and provide updates on when the lands will be taken into trust (App.121, 125-26, 137-39, 142-47, 159-63, R.Doc.17-4, at 53, 57-58, 76-77, 272, 277-81, 310, 354-55, 357-59) (App.174-76, 194, 205, 216-22, R.Doc.17-5, at 31-33, 265, 309, 446-53); draft the notice of decision taking those lands into trust, including how to address "negative comments" from objectors (App.120, 122-24, 128-29, 152-53, R.Doc.17-4 at 52, 54-56, 60-61, 339-40); respond to FOIA requests (subject to the Band's review and approval) (App.164-66, R.Doc.17-4, at 360-62) (App.169-70, 207-15, R.Doc.17-5, at 4-6, 312-15, 348-52); and assemble the administrative record for appeal. (App.120, R.Doc.17-4, at 52) (App.88, R.Doc.17-1, at 1) (App.336-42, R.Doc.17-10, at 80-86.)

D. The GAO and Inspector General's Findings Concerning the MOU.

The Government Accountability Office ("GAO") in 2006 examined these agreements. (App.255-315, R.Doc.17-9, at 89-149.) ("GAO Report"). Critically, the GAO Report found that BIA's criteria for considering fee-to-trust applications are "not specific" and "do not offer clear guidelines" for how BIA should apply them. (App.273, R.Doc.17-9, at 107.) The GAO Report concluded in part there is a need for transparency for State and local governments, including "information on how BIA reaches its decisions." (App.294, R.Doc.17-9, at 128.) The GAO Report further revealed, in late 2005 the Interior Office of Inspector General ("IG") was also investigating the MOU agreements given concerns about their legality and funding. (App.273-78, R.Doc.17-9, at 107-12.)

The investigation was initiated after it received a similar MOU between the Pacific Region BIA and California tribes. (App.316-30, R.Doc.17-9, at 249-63) ("IG Report").[1] The IG reported:

> The MOU describes a process by which the BIA-PRO "re-programs" Tribal Priority Allocation (TPA) funds back to BIA-PRO to hire federal employees dedicated solely to processing Consortium members' fee-to-trust (FTT) applications.

[1] This is a partial, redacted version of the IG Report, which the RD obtained from other litigation in California for its review of bias in *Village of Hobart, Wisconsin v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 69 IBIA 84 (2023) ("*Hobart II*").

> . . . [T]he funding structure of the MOU . . . creates a situation where the tribes are literally paying the salaries of federal employees. The ability of an all-tribal body to influence the selection, performance awards, and duties and responsibilities of the federal consortium staff—coupled with the fact that the tribes control the purse strings from which the consortium staff's salaries are dependent results in a patent perception of a conflict of interest. This investigation has found this appearance of a conflict of interest to be, in fact, real. . . .
>
> Regarding the legality of the consortiums, a recent legal opinion rendered by the Office of the Solicitor (SOL) . . . recommended that BIA discontinue the fee-to-trust consortiums, as they are currently structured.

(App.318, R.Doc.17-9, at 251.)

The IG Report contains 19 attachments including interviews, a Solicitor's review of the Midwest MOU and a Solicitor's legal opinion. (App.330, R.Doc.17-9, at 263.) "Similar to the BIA-PRO's MOU, under the BIA-MRO's MOU, the salaries . . . are dependent upon TPA funding" and these "positions would also similarly be subject to a RIF if the TPA funding for the MOU were to cease." (App.328, R.Doc.17-9, at 261.) Critically, it found the "'*whole purpose*' *is to ensure these applications receive a favorable recommendation*" (i.e., trust acquisition). (App.320, R.Doc.17-9, at 253) (emphasis added.)

In closing, the IG Report noted the Solicitor's legal opinion that the MOU creates "the patent appearance of a conflict of interest," an "insufficient separation of organizational functions," and "the possibility of the appearance of unfairness of the fee-to-trust application process." (App.328, R.Doc.17-9, at 261.) The Solicitor found: (1) the "appearance of unfairness also extends to the approval process itself," because "the functions that would have been performed by the tribes are now performed by BIA employees[,]" and (2) Division employees performing work under the MOU "*raises serious questions about the independence of judgment*" as "fee-to-trust applications are frequently controversial and their review and processing requires the exercise of substantial independent judgment." (App.329, R.Doc.17-9, at 262) (emphasis added.) The Solicitor 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*." (App.329, R.Doc.17-9, at 262.) (emphasis added). For these reasons, among others, the IG Report concluded and the Solicitor recommended "that BIA discontinue the fee-to-trust consortiums[.]" (App.329, R.Doc.17-9, at 262.)

E. Department Proceedings.

On March 2, 2017, the RD issued its Notice of Decision to take the lands into trust for the Band. (App.104-15, R.Doc.17-4, at 17-28.) The County and Townships appealed to the IBIA. (App.96-103, R.Doc.17-4, at 9-16.) The IBIA affirmed, which constituted the final agency action. (Add.52; App.65, R.Doc.1-1, at 32.) As part of the decision, the IBIA concluded the RD had authority and properly considered the regulatory criteria for taking the land into trust for the

Band pursuant to the IRA, but declined to consider the constitutionality of the IRA. (Add.21-22; App.34-35, R.Doc.1-1, at 1-2.) The IBIA further incorporated its decision from *Village of Hobart, Wis. v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 69 IBIA 84 (2023) ("*Hobart II*") for addressing bias concerns. (Add.28; App.41, R.Doc.1-1, at 8.)

F. District Court's Disposition.

The District Court upheld the agency's decision. While the District Court determined the MOU did not create an unconstitutional probability of bias in violation of due process, it did not address whether that biased processing under the MOU is arbitrary and capricious in violation of the APA. (Add.1-18; App.344-61, R.Doc.63, at 1-18.) It further found the agency's consideration under Part 151, including whether it should have been evaluated as off-reservation, did not violate the APA. (Add.7-17; App.350-60, R.Doc.63, at 7-17.) It also held Section 5 of the IRA was not unconstitutional. (Add.17-18; App.360-61, R.Doc.63, at 17-18.)

SUMMARY OF THE ARGUMENT

This case presents a fundamental separation-of-powers violation and administrative law failure. The Department's decision to take lands into trust — affirmed by the District Court—rests on an unconstitutional statute, a biased decision-making process under the MOU, and an erroneous evaluation of off-reservation lands as contiguous to the Band's disestablished reservation and subsequent application of on-reservation criteria under 25 C.F.R. § 151.10.

First, Section 5 exceeds Congress's authority under the Indian Commerce Clause. In effect, the statute allows the federal government to erode state sovereignty parcel-by-parcel. This sweeping intrusion into the federal-state balance lacks any limiting principle and cannot be reconciled with the Constitution's enumerated powers.

Second, Section 5 violates the nondelegation doctrine because it delegates boundless authority to the Secretary of the Interior. The statute allows the Secretary to acquire "any interest in lands" for Indians without specifying when, why, how much, or under what constraints. Supreme Court precedent requires an intelligible principle in the statutory text. Section 5 has none.

Third, the Department's decision was arbitrary and capricious, an abuse of discretion, and not in accordance of the law under the APA. It resulted from a biased process created by the MOU, pursuant to which tribes fund the salaries of the very officials responsible for drafting decisions. The agency ignored substantial evidence of bias, which results in prejudgment and conflict of interests. The agency also failed to properly evaluate the Band's application as off-reservation and failed to evaluate the Part 151 criteria – leading to an arbitrary and capricious evaluation under 25 C.F.R. § 151.10.

Appellants request this Court reverse the District Court, hold Section 5 of the IRA is unconstitutional, and vacate the Department's decision to take lands into trust. Alternatively, this Court should vacate the Department's decision, thereby reversing the District Court, and remand to an independent decision-maker to consider the Band's applications without the MOU's influence.

ARGUMENT

I. Section 5 of the IRA Is Unconstitutional.

A. Standard of Review.

This Court reviews questions of constitutional law under a *de novo* standard. *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 794 (2005) ("*South Dakota II*").

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

The District Court's decision that Section 5 of the IRA is constitutional because the Indian Commerce Clause vests Congress with broad power to legislate in the field of Indian affairs was erroneous. (Add.17; App.360, R.Doc.63, at 17.) While the Constitution grants Congress significant authority over Indian affairs, that authority is not limitless. Because Section 5 exceeds those limits, it is unconstitutional.

1. *Haaland v. Brackeen*, 599 U.S. 255 (2023) confirms Congress's power over Indian affairs has limits.

Congress has the power to "regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Recently, the Supreme Court made unmistakably clear though that Congress's authority over Indian affairs is not limitless. In *Haaland v. Brackeen*, the Court reaffirmed Congress's power over Indians "is not absolute" and "is not unbounded." 599 U.S. 255, 276 (2023). Even where that authority is described as "plenary," the Court emphasized it exists only "within its sphere," and "even a sizeable sphere has borders." *Id*. This is because Article I of the Constitution "gives Congress a series of enumerated powers, not a series of blank checks." *Id*.

The Supreme Court's statements in *Brackeen* reflect longstanding constitutional concerns about the scope of the Indian Commerce Clause. Judge Alito further observed, in his dissenting opinion in *Brackeen*, Congress's power to regulate Indian affairs must be limited if it "'*interfere[s] with the power or authority of any State*.'" *Id*. at 376 (quoting *United States v. Lara*, 541 U.S. 193, 205 (2004)) (emphasis added). That is because "[f]oundational constitutional principles like state sovereign immunity . . . are 'not so ephemeral as to dissipate when the subject of the suit is [in] an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government.'" *Brackeen*, 599 U.S. at 376 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996)). Specifically, Congress's power is limited by "the background principle of state sovereign immunity embodied in the Eleventh Amendment." *Brackeen*, 599 U.S. at 376. That is, the powers retained by the States constitute "residuary and inviolable sovereignty" upon which the federal government cannot intrude. *Printz v. United States*, 521 U.S. 898, 919 (1997).

Congress's limits under Article I with respect to the federal-state balance are also highlighted by Justice Gorsuch's concurrence in *Brackeen*. He noted:

> [T]he Commerce Clause vests in Congress the power to "regulate Commerce with foreign Nations," "among the several States," and "with the Indian Tribes," Art. I, § 8, cl. 3—conferrals of authority with respect to three separate sorts of sovereign entities that *do not entail the power to eliminate any of them*.

599 U.S. at 310 (emphasis added).

Although Supreme Court precedent, including *Brackeen*, has interpreted the Indian Commerce Clause to encompass more than strictly trade, the Supreme Court and individual Justices have cautioned against reading the Clause as a source of general authority untethered from commerce. Justice Gorsuch in *Brackeen* stated "Congress's actions must still bear a valid 'nexus' to Indian Commerce to withstand constitutional challenge." 599 U.S. at 325 (quoting *United States v. Lopez*, 514 U.S. 549, 562 (1995)). Justice Thomas also explained in *Upstate Citizens for Equality, Inc. v. United States*, "[n]either the text nor the original understanding of the [Indian Commerce] Clause supports Congress's claim to such 'plenary' power." 140 S. Ct. 2587, 2588 (2017) (Thomas, J., dissenting from denial of certiorari) (citations omitted). *See also United States v. Kagama*, 118 U.S. 375, 378-79 (1886) ("[I]t would be a very strained construction of this clause that a system of criminal laws for Indians . . . without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”).

The District Court ignored *Brackeen*’s very recent warning about Congressional overreach and failed to do any analysis of Section 5. Instead stating very generally that pursuant to *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) Congress has broad power to legislate in the field of Indian affairs.

The District Court’s holding and overreliance on *Cotton* cannot be reconciled with *Brackeen*, the Constitution’s text, or basic principles of federalism. As the Supreme Court has held, Congress’s Commerce Clause power must be tied to a limiting principle and cannot be converted into a general police power. *Lopez*, 514 U.S. at 564-68; *United States v. Morrison*, 529 U.S. 598, 617-19 (2000). Nor may Congress invoke its enumerated powers to fundamentally restructure the federal-state balance. *NFIB v. Sebelius*, 567 U.S. 519, 552–58 (2012).

2. Section 5 is fundamentally different—and far more intrusive—than any prior exercise of federal authority.

This case is not merely another dispute over the scope of federal power in Indian affairs. It presents a qualitatively different and far more dangerous assertion of authority. Section 5 is uniquely destructive. It does not regulate commerce, facilitate trade, or manage federal-tribal interactions. Instead, it authorizes the systematic erosion of states and local governments through mechanisms far removed from any enumerated power.

Section 5 is most often used, as is the case here, when the Tribe already owns the land. The federal government does not purchase, relinquish, gift, exchange, assign, or, for that matter, meaningfully acquire anything. Instead, the Secretary merely modifies title by holding the land "in trust" for the tribe, without altering the beneficial and substantive ownership of the tribe.

Yet, the consequence is not the mere changing of title. When land is taken into trust, it precludes States from asserting fundamental aspects of their sovereignty over that land, which becomes Indian Country. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). "Land held in trust is generally not subject to (1) state or local taxation, *see* 25 U.S.C. § [5108]; (2) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); or, (3) state criminal and civil jurisdiction" absent tribal consent, *see* 25 U.S.C. §§ 1321(a), 1322(a). *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 85-86 (2d Cir. 2000). The result is not a modest adjustment of authority but instead a wholesale removal of territory from the State's sovereign domain. And, as written, Section 5 is not limited to land previously or currently in or near a reservation. It is not even limited to land for which there is some evidence of prior occupation or use by Indians. Section 5 allows *any* land to be stripped from the State and local governments.

No prior case has upheld a mechanism that carries consequences of this magnitude. The implications of the District Court's ruling that Section 5 falls within a "plenary" authority are profound. If Congress may rely on the Indian Commerce Clause to justify Section 5, then it possesses the power to remove all land from a State—without any meaningful limiting principle. In this sense, Congress could "reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory." *Upstate Citizens*, 140 S. Ct. at 2588 (Thomas, J., dissenting). It amounts to giving Congress the "power to manage relations with a party . . . for annihilating the political existence of" another party. *Brackeen*, 599 U.S. at 325 (Gorsuch, J., concurring) (internal quotations omitted).

This concern is not theoretical. Modern tribal revenues, particularly from gaming, have enabled the large-scale acquisition of additional lands for trust conversion. If the Constitution does not impose a boundary here—where federal action directly strips States and local governments of their authority—then it is difficult to see where such a boundary, confirmed to exist by *Brackeen*, would ever be drawn. The judgment of the District Court should be reversed.

C. Section 5 Violates the Nondelegation Doctrine Because It Gives the Secretary Unbounded Discretion.

The District Court rejected the nondelegation argument correctly indicating it was bound by prior Eighth Circuit precedent. Appellants are aware of this Court's decision in *South Dakota II*, and are challenging Section 5 as unconstitutional under the nondelegation doctrine to preserve that argument for future appeal, including a petition for rehearing *en banc* pursuant to FRAP 40 and 8th Cir.R. 35A. The nondelegation issue is of exceptional importance and the current Eighth Circuit precedent deserves reconsideration.

Congress is vested with "[a]ll legislative Powers." U.S. Const. Art. I, § 1. The Constitution permits delegation of those powers only when Congress supplies an "intelligible principle" to guide the exercise of its delegated authority. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001) (Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform") (citations omitted). The question then is whether Congress has meaningfully constrained the decisionmaker's discretion—what authority is delegated and what limits govern its exercise. *Gundy v. United States*, 588 U.S. 128, 135-36 (2019).

Section 5 provides: "The Secretary . . . is authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108; Add.54-58. This vague delegation provides no meaningful limitation on the Secretary's discretion. It does not specify: (1) when, if ever, land should be acquired, (2) what land should be acquired, (3) why land should be acquired, (4) what factors must be considered, or (5) what limits exist. It imposes no requirement that the Secretary make findings and no direction as to how competing interests—such as those of States and local governments—are to be weighed.

1. Supreme Court precedent establishes the lack of any intelligible principle.

As the Supreme Court recently reaffirmed in *Consumers' Research*, its prior decisions in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) establish the governing boundary. *Fed. Commc'n Comm'n v. Consumers' Research*, 606 U.S. 656, 683 (2025). Those cases "offer object lessons about the amount of latitude Congress can confer." *Id*.

In *Panama Refining*, Congress authorized the President to prohibit the interstate transportation of petroleum. Critically, the President could act only if the petroleum at issue was produced in excess of limits imposed by state law—an express restriction on when the delegated authority could be exercised. 293 U.S. at 405, 408. The President's discretion to act was further limited by the Act's extensive Declaration of Policy. *Id*. at 416-17. Despite these limitations, the Court held the statute unconstitutional because it "does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation," "establishes no criterion to govern the President's course," and "gives to the President an unlimited authority to determine the policy." *Id*. at 415.

In *Schechter Poultry*, Congress permitted the President to approve "codes of fair competition," subject to multiple conditions and policy objectives found in the Act itself. 295 U.S. at 531-34. The President's role was further conditional on a finding the codes "will tend to effectuate the policy of this title," which contained an extensive Declaration of Policy. *Id*. at 535-36. Even with those limitations, the Court held the statute invalid because:

> It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact . . . aside from the statement of the general aims of rehabilitation, correction, and expansion[.]

Id. at 541. The Court concluded the President's discretion is "virtually unfettered." *Id*. at 542.

Analyzing these two cases, the Court in *Consumers' Research* first observed the Act at issue in *Panama Refining* gave the President discretion to act without establishing "whether, when, or how he should do so." 606 U.S. at 683. The Court noted the Act in *Schechter Poultry* was "even worse" as it allowed the President to act with little more than a "'statement of the general aims of rehabilitat[ing], correct[ing,] and expand[ing]' the economy." *Id*. The Court continued that "in examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear *both* 'the general policy' that the agency must pursue and 'the boundaries of [its] delegated authority.'" *Consumers' Research*, 606 U.S. at 673 (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (emphasis added). Section 5 does neither.

Compared to *Panama Refining* and *Schechter Poultry*, Section 5 provides substantially less guidance. In those cases, the statutes included detailed Policy Declarations, conditions, and structural limitations, yet were still found unconstitutional because they lacked operative standards. 293 U.S. at 430; 295 U.S. at 541-42. Section 5 lacks even those minimal constraints.

Nor can the deficiency be cured by resorting to legislative history or generalized statutory purpose. Although the Supreme Court previously considered, when evaluating other Acts of Congress, the purpose of those Acts, their statutory context, and legislative history, it has always done so only after finding the text of the Act in question itself provided the intelligible principle needed to survive a nondelegation challenge. *See Mistretta v. United States*, 488 U.S. 361, 371-72, 376, n.10 (1989); *Gundy*, 588 U.S. at 143; *American Power & Light Co.*, 329 U.S. at 104.

Most recently, the Court indicated the phrase at issue need not be viewed in "isolation" and noted courts have "looked to the broader statutory contexts, which informed their interpretation and supplied the context necessary to satisfy the intelligible-principle test." *Consumers' Research*, 606 U.S. at 684. However, the Court then went directly to the statute—itself—to find that statutory context, which provided limits to the FCC's discretion. *Id*. at 684-85.

Never has the Supreme Court relied primarily or even significantly on words found outside the challenged Act—itself—to conclude a statute did not violate the nondelegation doctrine. By contrast, *South Dakota II* relied almost exclusively on legislative history and generalized purpose to supply limits, neither of which appear in the text of Section 5. *Id*. at 798. That inversion of the Supreme Court's approach is impermissible. The intelligible principle must come from Congress's enacted words, not from post hoc reconstruction. When the statutory text provides no meaningful constraints—as is the case with the IRA—legislative history cannot cure the defect. The Supreme Court has made clear the intelligible principle must be supplied "by legislative act," not legislative history. *Whitman*, 531 U.S. at 472. It is well settled "legislative history is not the law" and therefore cannot impose enforceable limits on discretion. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). A "principle" the Secretary may consider if she wishes, but ignore if she chooses, is no principle at all.

2. The Eighth Circuit's highlight of the IRA's absurdity and the flaw in subsequent Circuits' holdings.

The Eighth Circuit noted in *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878, 882 (8th Cir. 1995) ("*South Dakota I*"), *mandate recalled and vacated*, 106

F.3d 247 (8th Cir. 1996), "[b]y its literal terms, [Section 5] permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls." To highlight Section 5's absurdity, the Eighth Circuit stated "[i]ndeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *South Dakota I* at 882. This is possible, thanks to Section 5's lack of "perceptible boundaries" and "intelligible principles" "within the four corners of the statutory language," and its delegation of "unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians." *Id*. The result, the Eighth Circuit correctly noted, is an "agency fiefdom whose boundaries were never established by Congress," and thus, held the statute to be unconstitutional under the nondelegation doctrine. *Id*. at 885.

The Supreme Court granted a review of *South Dakota I*. To evade review, however, the United States reversed its position on the meaning of Section 5. The United States next requested the Supreme Court not hear the case but instead remand to the Secretary for reconsideration, which the Supreme Court did. *See Dep't of Interior v. South Dakota*, 519 U.S. 919 (1996). That led Justice Scalia, joined by Justices O'Connor and Thomas, to state "[W]e have never before GVR'd simply because the Government, having *lost* below, wishes to try out a new legal position." *Id* at 921.

After the Eighth Circuit's holding that Section 5 was unconstitutional, and a punt by the Supreme Court, the federal circuits began scrambling to save Section 5. In *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), the court relied almost exclusively upon Judge Murphy's dissent in *South Dakota I*, which relied almost exclusively on the legislative history of the IRA, to find an intelligible principle—which, of course, did not make its way into the statutory text of Section 5 or any other section of the IRA.

South Dakota II should be reconsidered because it was based upon its adoption of Judge Murphy's dissent in *South Dakota I*. That dissent and *South Dakota II*'s adoption of its reasoning were flawed for another reason. According to Judge Murphy, a limit on the Secretary's discretion was the fact "[Section 5] authorizes the appropriation of a limited amount of funds with which land could be acquired[.]" *South Dakota I* at 887. However, as the passage of time has confirmed, the $2,000,000 appropriation limitation in Section 5, purportedly placed on the Secretary, in exercising her discretion in acquiring land for Indians, is illusory.

Other courts, as the District Court confirmed, reached the same conclusion as *South Dakota II* and *Roberts*, including the First and D.C. Circuits. *Carcieri v.*

Kempthorne, 497 F.3d 15 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 379 (2009); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).[2] But those courts committed the same error as *Roberts*—relying almost exclusively on legislative history and generalized purpose, rather than identifying binding limits in the statutory text itself. Additionally, those decisions acknowledge the phrase "for the purpose of providing land for Indians" supplies an intelligible principle only when "viewed in the statutory and historical context of the IRA." *South Dakota II* at 799. Consequently, the Eighth Circuit and the Circuits which rely upon its reasoning concede the defect: absent legislative history, Section 5 is, by its own terms, standardless. The nondelegation doctrine does not ask whether a court can infer limits; it asks whether Congress enacted them.

Section 5's contrast with statutes the Supreme Court has upheld is instructive. *Consumers' Research*, 606 U.S. at 684, 687 (finding "determinate standards" in the text of the Act); *Gundy*, 588 U.S. at 136 (ruling Attorney General's discretion limited by the Act itself).

[2] The D.C. Circuit in *Michigan* rested its decision, in part, on the Supreme Court previously endorsing "interstitial lawmaking authority" by executive agencies, and relied on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 525 F.3d at 33. Of course, that rationale no longer holds water—*Chevron* has been overruled by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

Under Section 5, the Secretary has complete discretion, "as she sees fit," to determine "whether" the Act should be implemented. That alone violates the nondelegation doctrine.

3. The breadth of the power conferred by Section 5 heightens the constitutional concern.

As Justice Kagan explained in *Consumers' Research*, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." 606 U.S. at 673. Here, the consequences of the Secretary's power are significant. Justice Thomas observed this authority to place land into trust can "strip the State of almost all sovereign power" and could, in theory, "reduce a State to near nonexistence" and "destroy the State's territorial integrity." *Upstate Citizens*, 140 S. Ct. at 2587-88. The Supreme Court has recognized the reestablishment of Indian sovereign control will "seriously burde[n] 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 (2005).

Section 5 is a delegation of power over core sovereign functions, not ordinary administrative detail. When a statute authorizes the executive to alter the federal-state balance, the need for clear congressional guidance is at its apex. Section 5 provides no—let alone heightened—directives.

4. The Secretary's use of Section 5 confirms the lack of a limiting intelligible principle.

Here, "[t]he proof is in the pudding." *Consumers' Research*, 606 U.S. at 686. The same inquiry the Court in *Consumers' Research* made—how the statute operates in practice—confirms the absence of any intelligible principle here. The lack of any intelligible principle has: (1) resulted in the rubberstamping approval of virtually all applications, Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251, 292 (2012) ("Waples"); (2) allowed the extremely problematic MOUs to come into existence in the first place (App.241-52, R.Doc.17-9, at 74-85); (3) caused the Inspector General and Solicitor to conclude those same MOUs should be discontinued while allowing BIA and the Band to disregard that recommendation (App.329, R.Doc.17-9, at 262); (4) emboldened the IBIA to rule that land may be placed in trust "whatever her [RD's] conclusion about the [25 C.F.R. § 151.10] criteria;" (Add.35; App.48, R.Doc.1-1, at 15); (5) resulted in the IBIA ruling that land may be accepted into trust even if "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" (Add.41; App.54, R.Doc.1-1, at 21); (6) resulted in the IBIA concluding "the factors set forth in Part 151 [and by implication what is stated in the IRA] need not be weighed or balanced in any particular way or exhaustively analyzed" (Add.26; App.39, R.Doc.1-1, at 6); and

(7) allowed the IRA to be used in a way Congress never could have imagined. Rather than the Secretary acquiring land as Section 5 actually states, using specific and limited appropriations, tribes acquire land themselves with extensive gaming revenue, and then request land they already own be taken into trust. The lack of an intelligible principle is not theoretical—it is borne out in practice.

This runaway freight train of unlimited power is further confirmed by the 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) (2024). Emboldened by the lack of action by the Federal Courts and Congress, the Executive Branch is continuously arrogating to itself greater and greater authority in these matters.

In short, Section 5 grants the Secretary the unlimited authority to determine whether, when, how, and how much land to remove from state authority without meaningful guidance from Congress. Because statutes with greater constraints have been found unconstitutional in *Panama Refining* and *Schechter Poultry*, Section 5 must also be found unconstitutional in violation of the nondelegation doctrine.

This Court eventually sitting *en banc*, has the opportunity to prevent this unlawful arrogation of power and return it to Congress. Accordingly, this Court, if not this panel, should follow the rationale set forth in *South Dakota I*, and recognize the Court's obligation to invalidate unconstitutional delegations as just confirmed by *Consumers' Research*, by holding Section 5 of the IRA violates the nondelegation doctrine, and is, therefore, unconstitutional.

II. The Decision Violated the APA Because It Was Arbitrary and Capricious, An Abuse of Discretion, or Otherwise Not in Accordance with Law.

A. Standard of Review.

When reviewing a District Court's decision on whether an agency's decision-making violated the APA, this Court makes "an independent decision on the basis of the same administrative record as that before the district court." *South Dakota II* at 799.

B. Argument.

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's action is arbitrary and capricious if the agency failed to engage in reasoned decision-making that "examine[s] 'the relevant data' and articulate[s] 'a satisfactory explanation' for [its] decision." *Dep't of Commerce v. New York*, 588 U.S. 752, 773 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983)). The agency violated the APA if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency[.]" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. There must be a "rational connection between the facts found and the choice made"—pretextual review that "reveal[s] a significant mismatch between the decision . . . and the rationale" must be set aside. *Dep't of Commerce,* 588 U.S. at 773-74, 783.

The Department's decision violated Section 706(2)(A) of the APA for multiple reasons—each of which on its own demonstrates the decision must be held unlawful and set aside—but, certainly, when all are considered demonstrate the District Court's affirmance should be reversed.

1. The decision was arbitrary and capricious given the biased processing under the MOU.

i. The Department arbitrarily disregarded the MOU's terms and failed to confront the resulting bias.

For affirming the RD's decision to take land into trust for the Band, the IBIA relied upon its decision in *Hobart II* when addressing the County and Townships' concern that the RD's decision was the result of a biased decision-making process under the MOU.

In *Hobart II*, however, the IBIA erroneously concluded the MOU does not suggest prejudgment or bias in favor of the tribes because, among other reasons, the MOU's purpose demonstrates a "commitment to processing applications faster" not necessarily prejudgment. *Hobart II* at 105. That conclusion is contrary to the MOU's terms, the evidence in the Record, and the IBIA's other findings concerning the MOU—i.e., its acknowledgement that the MOU establishes "the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent." *Id.* at 109. Under the auspices of this dependent-funding structure, the stated reason for the MOU is due to a "widening" "gap" between tribes' applications and land "being accepted into trust." (App.241, R.Doc.17-9, at 74.) Acceptance is not just a goal under the MOU's terms—it is the whole purpose.

The goal of acceptance is further evidenced by the MOU's definition of the "Division"—that is, the "Midwest Region Director and a group of staff assigned to work on trust 'acquisition' cases under [the MOU]." (App.242, R.Doc.17-9, at 75.) "Acquisition" in the MOU's context can only mean "acceptance," as land does not get acquired in trust, unless the decision is made to accept that land into trust—which, again, is the tribes' whole purpose for entering into the MOU.

The "processing" occurs pursuant to MOU provisions that obligate Division employees to work collaboratively with tribes to ensure all requirements of 25 C.F.R. Part 151 are satisfied. (App.244, R.Doc.17-9, at 77.) This includes assisting tribes in formulating responses to objections from local governments, such as the County and Townships, and even helping to "eliminate or mitigate any of the

Solicitor's objections" to the application. (App.245, R.Doc.17-9, at 78.) These commitments underscore the process is structured to produce a favorable outcome.

Put differently, under the MOU, the Department has "committed itself by contract to an outcome"—namely, acceptance of fee-to-trust applications—which supports a finding that the Department's decision was arbitrary and capricious. *Cf. Stand Up for Cal.! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 303 (D.D.C. 2016). Unlike actions taken pursuant to a purely procedural statute, the MOU itself functions as a contractual mechanism demonstrating such predetermination and bias for "acceptance" of land into trust in an arbitrary and capricious manner.

This precise concern, that the processing always results in a predetermined outcome, has been recognized. *See* Waples at 292 (noting the GAO found "the process is merely an exercise in rubber-stamping. Strong indications of rubber-stamping . . . include the 100% acceptance rate, the lack of a single factor being found to support denial, meaningless 'filler' considerations, and frequent mention of policy statements capable of negating almost any contrary argument."). In other words, no matter the significance of the problem or concern, the RD still can take the lands into trust. This highlights the problem with the IRA and its implementing regulations, and why the decision was not accordance with the law.

Against this backdrop, the conclusion that the MOU does not reflect prejudgment or bias is untenable and contrary to the evidence—in particular, the

IBIA's own finding that the tribes "control the purse strings" of those involved in processing (and deciding) the applications.

ii. The arbitrary rebuff of the RD's biased involvement and purported "independent" review.

Another reason the decision to take land into trust must be set aside, is the erroneous conclusions regarding the RD's level of involvement and purported "independent review" of the Division's decision. The IBIA (and District Court's) finding that the RD conducted her own independent review and reached her own decision is not supported by the Record. Nor is the conclusion that the RD is an independent, neutral decisionmaker whose alleged review "*cured any potential conflict of interest*" in the processing of the Band's application. (Add.28; App.41, R.Doc.1-1, at 8) (emphasis added.) Those conclusions are contradicted by the MOU's plain terms (discussed *supra*) and find no evidence in the Record to support them.

First, there is nothing in the Record that demonstrates the RD completed her own independent review, let alone cured the acknowledged conflict of interest. There are no transmittal emails that indicate the decision, which was indisputably prepared by Division employees, was ever provided to the RD for a purported "independent review." The conclusion that a signature alone establishes independent review ignores the factual Record.

In reaching a decision that the RD's "signature when issuing her decision establishes that she independently reviewed the materials and reached her own conclusion," the District Court relied upon the deliberative process privilege. (Add.6; App.349, R.Doc.63, at 6) (citing *Missouri Coalition for Environment Foundation v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204 (8th Cir. 2008).) *Missouri Coalition*, though, provides no such support.

Missouri Coalition involved a claim that the governmental agency violated FOIA by failing to produce documentation relating to a study of flood risk and recurrence. 542 F.3d at 1207-08. In this Court's discussion of the deliberative process privilege (and exemption under FOIA), the Court reasoned that nondisclosure is permitted "if the document is both predecisional and deliberative." *Id*. at 1211. A "predecisional document may be virtually any document that contains personal opinions and is designed to assist agency decision-makers in making their decisions." *Id*. A "document is deliberative if its disclosure would expose the decision-making process in such a way that candid discussion within the agency would be discouraged, undermining the agency's ability to perform its functions." *Id*.

Unlike in *Missouri Coalition*, there are no documents or communications in the Record to support a finding that the RD actually reviewed the decision and reached her own conclusion. If there were, such documents reflecting that review would be part of the index "privileged" documents. They are not. Even if those documents existed, certain parts that would contain non-exempt information should be part of the administrative record. *See Missouri Coal.*, 542 F.3d at 1212 (reversing district court because it made no findings on the issue of segregability of information requested). Again, there is nothing.

Likewise, the District Court's finding the MOU does not create bias because it "does not implicate or fund" the RD was wrong. (Add.6; App.349, R.Doc.63, at 6.) The MOU establishes that the RD is directly implicated in the MOU, and therefore, is not independent at all. The RD works with the tribes and Division toward the same objective of accepting land into trust. The MOU expressly provides the RD is a member of the "Division"; serves on the "Oversight Advisory Council," which includes the tribes; participates in determining Division staffing levels in consultation with those tribes; and oversees Division employees responsible for preparing both the administrative record and the decision itself. (App.242-48, R.Doc.17-9, at 75-81.) The RD also signed the MOU on behalf of BIA. (App.248, R.Doc.17-9, at 81.) These provisions confirm the RD is not independent of the MOU, but rather contractually bound to and directly involved in it.

Ignoring this evidence of the overall goal of taking land into trust under the MOU was arbitrary and capricious. It reflects the very bias that should have "cause[d] the Board to question the impartiality" of the decision. *Hobart II* at 105. And, put differently, "tells a story that does not match the explanation," *Dep't of Commerce*, 588 U.S. at 784—that being, the evidence showing the RD is directly involved and contractually bound to the MOU does not match the explanation that the RD is independent from the MOU.

While agency decisionmakers are afforded a presumption of impartiality, that presumption is not absolute. Indeed, "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. 1098, 1108 (S.D. Ill. 1992) (citing *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984)). Actual bias need not be proven where circumstances present "some [actual] incentive to find one way or the other" or a "real possibility of bias[.]" *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994); *see also 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[.]"). Fairness requires not only the absence of actual bias, but also prevention of "even the probability of unfairness." *Fero v. Kerby*, 39 F.3d 1462, 1478 (10th Cir. 1994).

Those circumstances are present here. The MOU's structure, combined with the absence of any evidence of independent review, demonstrates a clear incentive and a real possibility of bias toward acceptance. *Foster v. Mabus*, 103 F. Supp. 3d 95, 112-13 (D.D.C. 2015) (vacating agency's action because it "entirely failed to consider . . . the blatant predisposition and consequent bias in those recommendations[.]").

It is undisputed the Division employees—not the RD—drafted the decision. (App.245, R.Doc.17-9, at 78.) The Record demonstrates Division employees "fact checked" the decision, (App.122-23, R.Doc.17-4, at 54-55) and that those employees—not the RD—reviewed the decision. (App.120-24, R.Doc.17-4, at 52-56.) Rather than address these points, the IBIA and District Court improperly shifted the burden to the County and Townships suggesting they must prove a negative—that the RD did not independently review the decision. But the County and Townships have shown precisely what the law requires—the Record contains no evidence that the RD "independently" reviewed, let alone even read, the decision admittedly drafted by Division employees whose very jobs are dependent upon the tribes' funding. If the RD actually reviewed the decision such evidence would be in the Record. There is nothing; and thus, nothing to suggest the RD "cured" the Division's biased decision-making. Put simply, any presumption of impartiality afforded to the RD does not equate to a presumption of independent review, or for that matter any review whatsoever.

iii. The IBIA relied upon an incomplete review of the IG Report.

Next, the IBIA's reliance on its conclusion in *Hobart II* concerning the IG's findings of bias in the processing of fee-to-trust applications under the MOU was also arbitrary and capricious. In *Hobart II*, the RD reviewed only an incomplete, redacted version of the IG Report, which omitted the most relevant attachments, including those addressing the Solicitor's review of the Midwest MOU and the Solicitor's legal opinion. The consequences in failing to obtain and review the full report is significant. By disregarding the omitted portions of the IG Report, the IBIA ignored critical findings from the Solicitor, including:

> [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, and are also perceived as such.
>
> . . . 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.

(App.329, R.Doc.17-9, at 262.)

Most critical, the IBIA failed to acknowledge these findings led to a recommendation to *discontinue* the MOUs—a recommendation that included the Midwest MOU. (App.329, R.Doc.17-9, at 262.)

The District Court reasoned that the reliance on the GAO Report and IG Report expressed concerns over MOUs that predated the one at issue and that they "differ substantively." (Add.7; App.360, R.Doc.63, at 7, n.7.) Not so.[3] While the MOUs discussed in the IG Report expired and the renewals were slightly revised, the core features remained unchanged—including the same funding structure and the RD's level of involvement. The operative terms also remained substantially the same in purpose, structure, funding, tribal involvement, employee responsibilities, and employee governance. (App.241-48, R.Doc.17-9, at 74-81.)

An agency cannot base its decision on an incomplete record, ignore critical evidence, and then dismiss arguments because the missing evidence was not considered. This is the very definition of arbitrary and capricious decision-making under the APA. *See Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194-96 (D.C. Cir. 2010) (setting aside Secretary's decision to take tribe's land into trust).

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[3] In *Hobart II*, the IBIA reviewed the FY2008-FY2010 MOU and noted the terms "do not differ materially" from the FY2014-FY2017 MOU. *Hobart II* at 101, n.19.

iv. There is compelling evidence of prejudgment in the Record.

The IBIA's decision (and consequently, the District Court's judgment) cannot stand for another reason—substantial evidence of prejudgment and impermissible conflicts of interest in the Record. Communications in the Record, which the District Court ignored, reveal evidence of BIA's prejudgment and bias. For example, the Record reveals BIA recommended the Band submit a tribal council resolution "before the decision is issued" as "it will save a bit of time." (App.163, R.Doc.17-4, at 359.) Even though the decision had not been issued, the Division already predetermined that a favorable decision would be the outcome. This was confirmed when the Band contacted BIA again "hoping [the acquisition] was moving along." (App.160-62, R.Doc.17-4, at 355-58.) BIA replied that it was a "priority project." (App.147, R.Doc.17-4, at 310.)

As the Band grew impatient more communications followed. (App.142-46, R.Doc.17-4, at 277-81.) The Band asked for updates, as the Band had hoped to include, what was presumed to be a favorable decision of acceptance, in its general announcement to its members. (App.137-38, R.Doc.17-4, at 76-77.) After BIA's response, the Band replied "it'll look great next year, too!" (App.138, R.Doc.17-4, at 77.) When these communications are reviewed in their totality with the MOU's terms, the only reasonable conclusion is everyone knew the application would be approved because denial is not a "great" outcome. *See Int'l Snowmobile Mfrs.*

Ass'n v. Norton, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004) (statements made prior to decision demonstrated prejudged conclusion).

Likewise, the Record reveals the impermissible conflicts of interest in the communications between BIA and the Band. The Record establishes BIA's communications—which the District Court characterized as "routine"—are far from that. For example, at one point, the Band inquired whether the County and Townships submitted comments to the proposed acquisition. BIA responded with a copy of those comments that BIA deemed "negative," (App.152-53, R.Doc.17-4, at 339-40), and allowed the Band to submit a response—without the Band or BIA informing County and Townships this occurred. (App.194-202, R.Doc.17-5, at 265-81, 284.) Even more troubling is the County had to submit a FOIA request to obtain the Band's application and comments, which was responded to only after the Band first screened and approved it. (App.169-73, R.Doc.17-5, at 4-30.)

Likewise, with respect to BIA's processing, the Band expressed gratitude for "expediting th[e] file!" (App.193, R.Doc.17-5, at 256.) And, for BIA's assistance with ensuring the Band's future applications had all the information before processing. (App.174-76, R.Doc.17-5, at 31-33.) These types of communications confirm BIA's goal of not only ensuring approval, but also to do it as fast as possible pursuant to BIA's stated commitments under the MOU. These are the kinds of communications that "possibl[y] . . . could affect" agency decision-making, which require the decision be set-aside. *Elec. Pwr. Supply Ass'n v. F.E.R.C.*, 391 F.3d 1255, 1259 (D.C. Cir. 2004).

The Record confirms BIA's allegiance to the Band—not BIA's "independence." This type of self-serving and biased review is not permitted by agencies. *In re Murchison,* 349 U.S. 133, 136 (1955)) ("no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *Amos Treat & Co. v. S.E.C.*, 306 F.2d 260, 266-67 (D.C. Cir. 1962) (reasoning such review "would be tantamount to that denial of administrative due process"). The prejudgment and coordinated efforts to guarantee acceptance pursuant to the MOU violates the APA's arbitrary and capricious standard.

2. The Department's decision was not in accordance with the IRA because it does not authorize acquisition under the MOU.

Under the IRA, only the Secretary, not the tribes, is authorized to "acquire lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108; Add.54-58. The IRA provides "*for the acquisition* of such lands . . . there is hereby authorized to be appropriated a sum *not to exceed* $2,000,000 in any one fiscal year . . . funds in the Treasury." *Id*. (emphasis added.) The limited annual Congressional appropriations is the only conceivable restriction or guideline as to how the Secretary's acquisition is to occur. *Id*. Nothing in the IRA allows tribes to acquire the land themselves and then, pursuant to the non-discretionary, pay-to-process agreement under the MOU, simply ask for a change in title to have it be in trust.

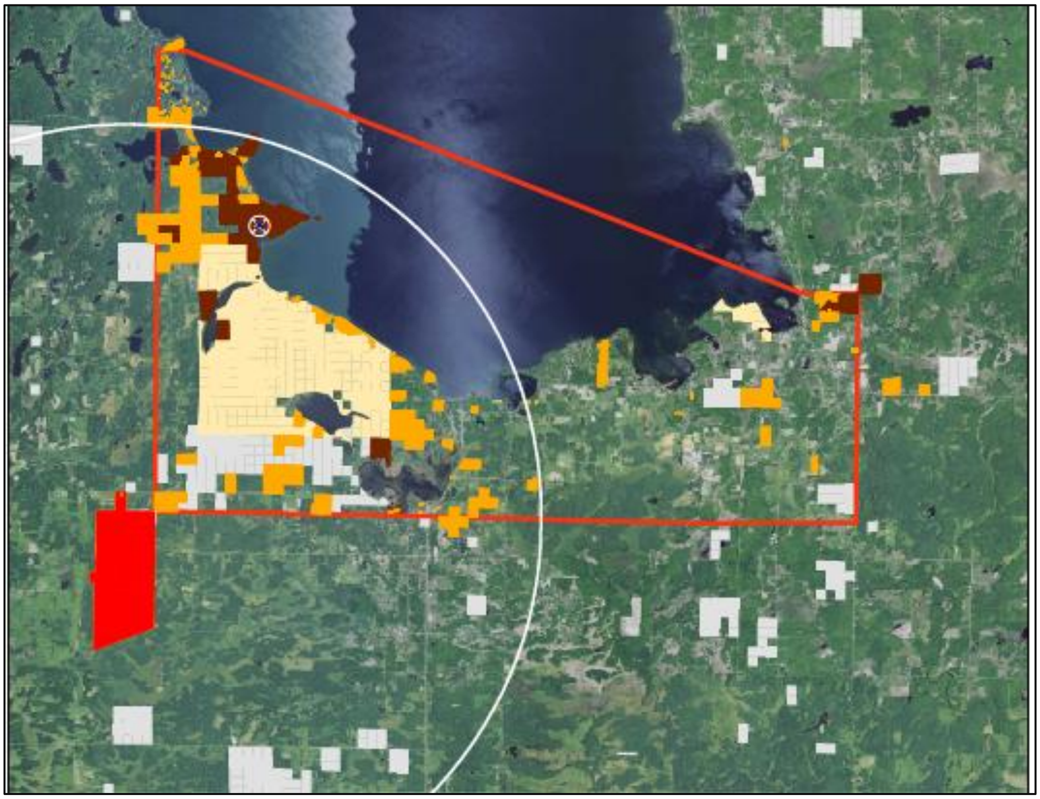
The IBIA confirmed this requirement—that land may only be taken into trust by the Secretary under the IRA by "using authorized funds[.]" (Add.34; App.47, R.Doc.1-1, at 14.) (citing *South Dakota II*, 423 F.3d at 797.) Here, the Record demonstrates the Band acquired the lands—not the Secretary. Accordingly, "authorized funds" were not used by the Secretary to acquire the lands, as required by Section 5.[4] Therefore, the Department's actions were not in accordance with the law.

3. The agency's interpretation of "contiguous" conflicts with the structure and purpose of Part 151 and is not entitled to deference.

The Department's decision was not in accordance with the law for another reason—it failed to consider the off-reservation criteria under 25 C.F.R. § 151.11 (2017.) Despite this acquisition comprising 3,238.81 acres and 24 separate tax parcels, all of which are undisputedly outside the reservation and some of which are miles from it, the RD processed everything as on-reservation. (App.118-19,

[4] Assuming for sake of argument, though, that the IRA's express requirement of Congressional appropriations is not required to take land into trust under the IRA, then that arrangement highlights the lack of any intelligible principle in the IRA because there are no limits on the Secretary's ability to take land into trust.

R.Doc.17-4, at 31-32.) The map below shows just how far removed the lands (shown in red) really are from the reservation:



(App.139-41, R.Doc.17-4, at 272.)

The IBIA upheld the RD's decision concluding lands that touch at a point are contiguous. (Add.32; App.45, R.Doc.1-1, at 12.) Based on that infinitesimal pinpoint contact of one of the 24 parcels, the Department therefore avoided the heightened scrutiny required for off-reservation acquisitions under Section 151.11.

The District Court did not directly accept the Department's position, but instead concluded the term "contiguous" was ambiguous and then deferred to the Department's definition under *Kisor v. Wilkie*, 588 U.S. 558 (2019). The District

Court erred because it relied primarily on competing dictionary definitions while failing to properly apply *Kisor's* limiting requirements, the structure and purpose of Part 151, and the longstanding departmental authorities recognizing that cornering parcels are not contiguous. Properly interpreted, "contiguous" in Part 151 requires meaningful territorial adjacency, not merely point contact.

i. The word "contiguous" is not genuinely ambiguous in the public land law context once traditional interpretive tools are applied.

First, a court may not afford any deference to an agency's interpretation of a regulation unless the regulation is genuinely ambiguous. *Kisor*, 558 U.S. at 574. And under *Kisor* context matters, structure matters, and regulatory purpose matters. *Id*. at 575.

The regulation here establishes two distinct frameworks. One for "when the land is located contiguous to an Indian reservation" and one for "when the land is located outside of and noncontiguous to an Indian reservation." 25 C.F.R. §§ 151.10, 151.11 (2017). The terms "contiguous" and "noncontiguous" are not defined in 25 C.F.R. Part 151.

However, Section 151.11 exists precisely because off-reservation acquisitions raise heightened concerns involving jurisdiction, taxation, land-use conflicts, and impacts on state and local governments. See 25 C.F.R. § 151.11(b) (2017). That is why the structure of Section 151.11 itself focuses on practical and jurisdictional realities rather than geometry. Section 151.11(b) provides that off-reservation lands require greater scrutiny to the tribe's justification of anticipated benefits from the acquisition, and the "Secretary shall give great weight" to the concerns raised by state-based governments about "the acquisition's potential impact on regulatory jurisdiction, real property taxes, and special assessments." 25 C.F.R. §§ 151.11(b), 151.11(c) (2017).

Corner point contact does not create any meaningful physical or functional integration with a reservation. An infinitesimal touching point does not permit road access, utility extension, vehicular travel, or other governmental connection between a reservation and a proposed acquisition. Reading "contiguous" to include a single corner point collapses the distinction between Sections 151.10 and 151.11 and permits substantial off-reservation acquisitions to evade the heightened scrutiny expressly required by the regulation.

The IBIA has previously provided significant guidance on how "contiguous" must be defined as used in Part 151. In *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director, BIA*, 47 IBIA 187 (2008), a county argued the director errored by failing to consider the off-reservation criteria because the property was not contiguous. Finding no cases on point, the IBIA did an in-depth analysis of the word "contiguous" to determine how it must apply that term in the Part 151 regulations. The IBIA held, according to "Department precedent:"

> [T]he word [contiguous] . . . used in relation to public land laws . . . means directly adjoining or abutting. *Thus, it has been held repeatedly by the Department that lands which merely corner each other are not contiguous.*

Id. at 205 (internal citations omitted) (emphasis added).

Jefferson County went on to observe:

> In adopting this definition as precedent for the public lands, our sister Board, the Interior Board of Land Appeals (IBLA), quoted this citation and other Departmental precedent establishing *that parcels that touch at a corner are not contiguous.*

Id. (emphasis added).[5]

The IBIA in this case generally agrees, conceding:

> Our sister Board, the Interior Board of Land Appeals (IBLA), has held, in other contexts, that cornering lands are not contiguous. *The Kemmerer Coal Co.*, 5 IBLA 319, 322 n.6 (1972) (noting that "[e]ven cornering lands are not regarded as contiguous" under the Mineral Leasing Act of February 25, 1920, 30 U.S.C. § 203). The Department of the Interior has reached the same conclusion regarding the use of the term "contiguous" in homestead acts. *See, e.g., Henry Petz*, 62 I.D. 33, 33 (1955) (concluding that contiguous did not include cornering under section 2455 of the Revised Statutes); *Hugh Miller*, 5 I.D. 683, 683 (1887) (concluding that contiguous did

[5] In *Jefferson County* the IBIA reversed the decision the land was contiguous, ruling land across a river is not contiguous even though "in extremely close proximity" to the reservation—it did not specifically decide if parcels touching at a corner are contiguous because it did not need to. 47 IBIA at 205-06.

> not include cornering parcels “within the meaning and intent of the last clause of Section 2289 of the Revised Statutes”).

(Add.30-31; App.43-44, R.Doc.1-1, at 10-11.)

Municipal boundary and annexation jurisprudence follows the same principle, recognizing that governmental contiguity requires meaningful shared boundaries rather than nominal contact. *Town of Mt. Pleasant, Racine Cnty. v. City of Racine, Racine Cnty.*, 24 Wis. 2d 41, 127 N.W.2d 757 (1964) (narrow strip of land insufficiently contiguous); *People ex rel. Adamowski v. Vill. of Streamwood*, 15 Ill. 2d 595, 155 N.E.2d 635 (1959) (“contiguous” requires roads to be adjacent to and parallel to existing municipal limits); *State ex rel. Danielson v. Vill. of Mound*, 234 Minn. 531, 545-46, 48 N.W.2d 855 (1951) (property consisting of an elongated “stem or isthmus” used as a railroad right-of-way lacked a natural connection and a community of interest and therefore annexation not reasonable); *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 358-59, 699 N.W.2d 352 (2005) (territory sought to be annexed comprising only of a strip or corridor found not to be contiguous).

“In order to be considered contiguous the tracts of land in the territory must touch or adjoin one another in a reasonably substantial physical sense.” McQuillin Mun. Corp § 3:31 (3d ed.), *Territorial requirements – Character of territory – Contiguity*. “Territory is not contiguous where the only connection between two tracts is a point at a corner where the boundary lines intersect.” *Id*.

The recent modifications to the regulations also confirm that when the RD reached its decision "contiguous" did not include mere point contact. The new regulation was specifically designed to eliminate the IBIA's previously restrictive understanding of that word. The regulation now states "contiguous means two or more parcels of land having a common boundary notwithstanding the existence of non-navigable waters or public road or right-of-way and includes parcels that touch at a point. 25 C.F.R. § 151.2 (2024). The expansion of the previous understanding of "contiguous" by needing to use of the words "notwithstanding" and "and" confirms the prior definition was known to be much more restrictive. It did not include property divided by a river, divided by a road, or touching only at a point.

Despite the above, the IBIA in this case held touching at a corner is all that is needed—largely relying upon selected dictionary definitions of "contiguous" to mean "touching along a boundary or at a point" to affirm the RD's decision that "cornering" means "contiguous."[6] (Add.30; App.43, R.Doc.1-1, at 10.) That conclusion is arbitrary and not in accordance with the law. It does not consider the regulation as being applied in the context of drastically impacting competing governments' boundaries. Even the Band recognized the concern. The Band

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[6] The RD did not analyze "contiguous" or consider the IBIA's previous findings in *Jefferson County*—instead it relied entirely on its self-serving Fee-To-Trust Handbook which altered the actual regulation and defined "contiguous" to include touching at a point. (Add.29; App.42, R.Doc.1-1, at 9.)

requested "the Bureau also consider [the additional criteria under 25 C.F.R. § 151.11]." (App.227, R.Doc.17-6 at 5.)

The District Court concluded the term "contiguous" was ambiguous and could include touching at a point also relying upon competing dictionary definitions. But *Kisor* requires more. Courts must determine the "best reading" of the regulation by examining text, structure, context, precedent, history, and regulatory purpose. 588 U.S. at 575. Once all of these traditional interpretive tools are properly considered, the better reading of Part 151 is that a single corner touch does not constitute contiguity. Because the regulation is not genuinely ambiguous, there is no *Kisor* deference and the decision must be vacated.

ii. The agency's interpretation is not reasonable under *Kisor*.

Even if ambiguity existed, *Kisor* permits deference only to reasonable agency interpretations. 588 U.S. at 576. The Department's interpretation is not reasonable because it defeats the very purpose of Part 151. Under the Department's interpretation, thousands of acres of otherwise off-reservation territory may avoid Section 151.11 scrutiny solely because of one pinpoint. This interpretation permits the exact type of regulatory circumvention Section 151.11 was enacted to prevent.

The IBIA acknowledges Section 151.11 was designed to address and "ameliorat[e] the damage done" to local governments and "the regulations struck that balance by requiring increased scrutiny of off-reservation acquisitions[.]"

(Add.31; App.44, R.Doc.1-1, at 11.) However, the IBIA then disregards the need to consider and avoid undue harm to state-based governments by concluding that "[e]xcluding cornering lands from the meaning of 'contiguous' would complicate the agency's ability to achieve the goals of the IRA without doing much to protect the interests of local governments." (Add.31 App.44, R.Doc.1-1, at 11.) That illustrates the unreasonable nature of the IBIA's decision. Just because applying the law might be complicated (it is not) does not mean the IBIA can ignore it. Otherwise, what the IBIA and RD have effectively done is eliminate these additional, mandatory criteria for mere convenience. One only need look at the map to see how unreasonable the IBIA's decision was in this case.

iii. The Department lacked a consistent and authoritative interpretation.

Kisor further requires the interpretation reflect the agency's authoritative and consistent position. 588 U.S. at 577. That requirement is not satisfied here.

The Department's own authorities repeatedly recognized the opposite rule. *Jefferson County* stated the Department had "repeatedly" held cornering lands are not contiguous. *Kemmerer* stated "[e]ven cornering lands are not regarded as contiguous." *Henry Petz* and *Hugh Miller* likewise rejected point contiguity. Those authorities are incompatible with any claim the Department historically maintained a settled interpretation treating point-touching parcels as contiguous.

Moreover, rather than demonstrating longstanding consistency, the recent regulatory amendment, adding for the first time ever that contiguous includes touching at a point, demonstrates that the agency previously lacked a clear and authoritative interpretation. Accordingly, the third *Kisor* requirement is not satisfied and no deference is warranted.

iv. The issue does not involve specialized agency expertise.

Kisor also limits deference to interpretations implicating an agency's substantive expertise. 588 U.S. at 578. The District Court concluded this requirement was met because the Department routinely evaluates fee-to-trust applications.

But the issue here is not a technical matter uniquely within BIA expertise. The question is whether a single geometric point constitutes meaningful territorial adjacency. That question involves weighing legal interpretation, governmental-boundary principles, jurisdictional structure, public land law, and other property-law concepts. Those are traditional judicial functions.

Indeed, the authorities most relevant to the issue arise not from technical agency expertise but from public lands law, annexation law, and governmental-boundary jurisprudence.

v. The Department's interpretation does not reflect fair and considered judgment.

Finally, a court may not defer to a new interpretation that creates unfair surprise or reflects merely convenient litigating positions. *Kisor*, 588 U.S. at 579.

The agency interpretation here does just that. Neither the statute nor the regulation adopted point contiguity before 2023; Departmental authorities repeatedly recognized the opposite rule; public land law and annexation law requires a meaningful shared boundary; and the whole purpose of Section 151.11 was to give greater weight to the jurisdictional concerns when the property is off-reservation. For local governments and affected communities such acquisitions function entirely as off-reservation resulting in substantial loss of tax base and jurisdiction over lands never even remotely considered to be part of a reservation. The IBIA's decision fundamentally alters the operation of the regulatory scheme and therefore does not reflect fair and considered agency judgment.

Because 25 C.F.R. §§ 151.10 and 151.11 are not genuinely ambiguous when considering their purpose and none of the *Kisor* deference requirements are satisfied, this Court should conclude that land touching a reservation only at a corner point is not "contiguous" within the meaning of Part 151.

4. The RD arbitrarily and capriciously considered the Section 151.10 criteria.

Prior to taking lands into trust the Secretary requires evaluation of the criteria under 25 C.F.R. § 151.10(a)-(h) (2017) for on-reservation acquisitions. The Department must "respond to [a] concern, explain why it was not warranted, or otherwise address it" in the context of its evaluation. *Jefferson*, 47 IBIA at 200. As the IBIA acknowledged in this case, the Department must "'insure that conflicting interests are *evaluated* before land is acquired in trust status.'" (Add.35; App.48, R.Doc.1-1, at 15) (quoting 45 Fed. Reg. 62035 (Sept. 18, 1980)). Here, the Department's decision does not rise to the level required by Section 151.10—and certainly was not the "detailed analysis" that the District Court purportedly found. (Add.16-17; App.359-60, R.Doc.63, at 16-17.)

Under 25 C.F.R. § 151.10(e), the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" must be evaluated. Nothing requires local governments to provide detailed information about particular programs or services in their comments —which is something the Department erroneously contended was required in this case in order to avoid evaluating the impact. The Notice only asks the local governments to submit "the annual amount of property taxes," "any special assessments, and amounts," "any governmental services that are currently provided," and "how the intended use is consistent or inconsistent with the zoning." (App.130-33, R.Doc.17-4, at 63-66.)

Within this context, the County and Townships noted the permanent removal and that lost tax revenue will have effects on the ability to provide road and bridge services, fire protection and law enforcement. (App.195-200, R.Doc.17-5, at 266, 275-79.) Given the permanent removal, the County and Townships noted the loss increases tax burdens on residents to maintain the same level of services. (App.195-200, R.Doc.17-5, at 266, 275-79.) For example, Leigh, "comprised of a population of retired persons or low income households," noted acquisition will cause an astonishing loss of 8% of its levy. (App.191,195, R.Doc.17-5, at 77, 266.) Richardson—a Township in which none of the parcels are contiguous to the Band's reservation, noted the loss to them will also be permanent. (App.196, R.Doc.17-5, at 275.)

While the IBIA claimed the RD did not have to consider the severity of how the tax losses impacts the County and Townships, it also acknowledged the RD under this factor "must consider the impacts of the tax loss." (Add.39-40; App.52-53, R.Doc.1-1, at 19-20.) Simply noting the loss is not an evaluation. Without requiring evaluation of the specific concerns before the RD, the IBIA arbitrarily decided the RD was not prohibited from taking the lands into trust—even if doing so would have "significant impacts"—like, the staggering 8% loss. (Add.39; App.52, R.Doc.1-1, at 19.) The Department's arbitrary and capricious reasoning is further highlighted when the RD stated it cannot speculate as to the loss, but then did exactly that when considering the purported promise the Band is "willing and prepared" to provide a payment to Leigh once the lands are accepted into trust. (App.111, R.Doc.17-4, at 24.)

Despite permanent tax loss, including 8% to Leigh, the IBIA simply concluded "all trust acquisitions have some such effect." (Add.40; App.53, R.Doc.1-1, at 20.) Although true, the regulation's clear requirement that the RD consider "the impact on the state and its political subdivisions" resulting from that tax loss and its effects cannot be disregarded on claims that enough specificity was not provided. All this does is evidence BIA's one-sided approach to ensure land is taken into trust, regardless of the impacts on local governments.

Likewise, "[j]urisdictional problems and potential conflicts of land use which may arise" under 25 C.F.R. § 151.10(f) must be evaluated. Here, the RD failed to evaluate the County's expressed concerns that there is no trust or reservation land in Morrison. (App.198-200, R.Doc.17-5, at 277-79.) In particular, the County commented that it will incur additional expenses to coordinate for the first time ever law enforcement with the Band if the lands are taken into trust. (App.198-200, R.Doc.17-5, at 277-79.) The Department dismissed this jurisdictional issue. Such anticipated efforts will create jurisdictional conflict, which is only highlighted by the Department's admission that there is no intergovernmental law enforcement agreement between the County and the Band.

(Add.41; App.54, R.Doc.1-1, at 21.) Accordingly, the Department's explanation was directly at odds with the facts, and failed to address an important aspect of the problem.

Where the Department merely acknowledges local governments' objections, an *actual* evaluation is not performed. Here, the lack of the RD's *actual* evaluation of criteria under Section 151.10 is highlighted by IBIA's acknowledgement that "nothing in the Act or the regulations prohibits the Regional Director from taking land into trust whatever her conclusions about these criteria." (Add.35; App.48, R.Doc.1-1, at 15.) Meaning, in practice, when processed under the MOU, the conclusions will never weigh against the tribe. Not only does this highlight the lack of intelligible principle in the IRA for how taking land into trust must be done, it also demonstrates the arbitrary and capricious manner in which the Band's application was processed and considered in this case—thereby, requiring the decision be vacated.

CONCLUSION

This District Court's judgment should be vacated, and the Department's decision to take lands into trust be set aside as unlawful under the APA and the U.S. Constitution.

Dated this 18th day of May, 2026.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, TYPE-STYLE REQUIREMENTS, & ANTI-VIRUS SCANNING REQUIREMENTS

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and 8th Cir. R. 28A(h) because this brief contains 12,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman and 14 point size.

I further certify that the electronic version of this brief was scanned for viruses using Microsoft Word 2019 and is free of viruses pursuant to Eighth Circuit Rule 28A(h).

Dated: May 18, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2026, I electronically filed the foregoing Appellant's Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished via the CM/ECF system.

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