No. 26-1154

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MORRISON COUNTY, MINNESOTA, *et al.*,

Plaintiffs-Appellants

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

RESPONSE BRIEF FOR DEFENDANTS-APPELLEES

ADAM R.F. GUSTAFSON
Principal Deputy Assistant Attorney General

ROBERT N. STANDER
Deputy Assistant Attorney General

JASON LEE
Attorney
Department of Justice
Environment and Natural Resources Division
Appellate Section
P.O. Box 7415
Washington, D.C. 20044
(202) 598-3394

## SUMMARY OF THE CASE

In 2017, the Bureau of Indian Affairs, acting through a Regional Director, approved an application from the Mille Lacs Band of Ojibwe Indians of the Minnesota Chippewa Tribe to take a tract of land owned by the Band into trust for its benefit. The Regional Director relied on delegated authority from the Secretary of the Interior under Section 5 of the Indian Reorganization Act. Plaintiffs challenged the Regional Director's decision under the Administrative Procedure Act, arguing that Section 5 is unconstitutional, and that the agency's action was arbitrary, capricious, and contrary to agency regulations. The district court rejected these arguments and entered summary judgment in defendants' favor. This appeal followed.

Because this case predominantly raises straightforward legal issues, oral argument is unnecessary and the parties' arguments may be resolved on the briefs. If, however, the Court believes that oral argument would be helpful, defendants respectfully submit that 10 minutes of argument per side would be sufficient.

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**PAGE**

## STATUTES

## RULES



## REGULATIONS

## Other Authorities

## INTRODUCTION

In 2017, the Acting Regional Director (Regional Director) of the Bureau of Indian Affairs' Midwest Regional Office approved an application by the Mille Lacs Band of Ojibwe Indians (Band) of the Minnesota Chippewa Tribe to take a tract of land into trust for the Band's benefit. The land is adjacent to the Band's reservation, touching it at a corner point. In taking the land into trust, the Regional Director exercised authority under Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 5108, which authorizes the Secretary of the Interior (Secretary), and the Regional Director by delegation, to obtain and hold in trust "any interest in lands . . . for the purpose of providing land for Indians."

Morrison County, Richardson Township, and Leigh Township (collectively, plaintiffs) challenged the Regional Director's decision in an appeal to the Interior Board of Indian Appeals (IBIA), which affirmed. Plaintiffs then filed this suit in federal district court under the Administrative Procedure Act (APA). Plaintiffs argued that (1) Section 5 is unconstitutional because it exceeds Congress's powers under Article I, and because it improperly delegates legislative authority; (2) the

Bureau of Indian Affairs' adjudication of the Band's application was biased; and (3) the Bureau acted arbitrarily, capriciously, and contrary to law by treating the land at issue as "contiguous" to the Band's reservation under the agency's regulations, and by applying those regulations. The district court rejected all of plaintiffs' arguments.

This Court should do the same. Plaintiffs' constitutional challenges to Section 5 fail because, as the Supreme Court has long recognized, Congress possesses broad constitutional authority under the Indian Commerce Clause and other provisions to regulate Indian affairs, and because binding circuit precedent forecloses plaintiffs' non-delegation claim. Plaintiffs cannot demonstrate that any aspect of the agency's review and approval of the Band's application was biased. And plaintiffs fail to show that the Bureau of Indian Affairs' regulatory analysis was arbitrary, capricious, or contrary to law.

## STATEMENT OF JURISDICTION

Plaintiffs challenged the IBIA's decision under the APA. The district court had jurisdiction under 28 U.S.C. 1331. On November 26, 2025, the court granted defendants' motion for summary judgment and entered judgment in their favor. Add.18; App.361; R.Doc.63, at 18.[1] Plaintiffs appealed on January 23, 2026. App.364; R.Doc.66. This Court has jurisdiction under 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court correctly held that IRA Section 5 falls within Congress's broad powers to regulate Indian affairs and contains an intelligible principle under the nondelegation doctrine.

*Haaland v. Brackeen*, 599 U.S. 255 (2023)

*South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005)

2. Whether the district court correctly rejected plaintiffs' arguments about alleged bias and other deficiencies in the agency's processing of the Band's application, the Regional Director's independent review of that application, and the IBIA's analysis of the Regional Director's decision.

*Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178 (8th Cir. 2001)

---

[1] "Add.__" refers to the page number of plaintiffs' addendum. "App.__" refers to the page number of plaintiffs' appendix. "R.Doc.__, at __" refers to the docket entry and page number of documents filed on the district court's docket. "Br.__" refers to the page number of plaintiffs' opening brief.

*Missouri v. Department of Interior*, 73 F.4th 570 (8th Cir. 2023)

*Village of Hobart v. Acting Midwest Regional Director*, 69 IBIA 84 (2023)

3. Whether the district court correctly concluded that the Bureau of Indian Affairs and the IBIA did not act arbitrarily, capriciously, or contrary to law by treating the land at issue as "contiguous" to the Band's reservation under agency regulations, and by otherwise applying the regulatory criteria.

*Kisor v. Wilkie*, 588 U.S. 558 (2019)

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

## STATEMENT OF THE CASE

### A. Factual And Statutory Background

During the early 1800s, the Chippewa Indians were "one of the larger Indian tribes in the northerly part of the United States," occupying lands "reaching from Lake Huron on the east to and beyond Lake Superior on the west." *Chippewa Indians of Minn. v. United States*, 301 U.S. 358, 360-361 (1937). Early treaties "dealt with [the Chippewa Indians] as a single tribe," but later treaties involved "distinct bands" of the Chippewa Nation and recognized their possession of specific lands "independent[] of other bands and of the Chippewas as a whole." *Id.* at 361. In 1855, the Band and others signed a treaty that ceded significant lands in Minnesota to the United States in exchange for, among other things, establishment of a 61,000-acre reservation for the Band. *Mille Lacs Band of Ojibwe v. Madore*, 128 F.4th 929, 934 (8th Cir. 2025).

Decades later, Congress embarked on "a policy of carving recognized reservations into allotments and assigning land parcels to individual tribal members." *Chase v. Andeavor Logistics, LP*, 165 F.4th 1102, 1113 (8th Cir. 2026). The goals of this policy "were simple and clear cut": help "extinguish tribal sovereignty" and "force the assimilation of Indians into the society at large." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The policy proved "disastrous for Indians," *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 669 (7th Cir. 2020), with "many Indians los[ing] their allotted lands in unfair or fraudulent transactions," *Chase*, 165 F.4th at 1113. *See also Yankton Sioux Tribe* *v. Podhradsky*, 606 F.3d 994, 1000 (8th Cir. 2010) (recounting how the allotment policy "left many Indians landless").

After "the consequences of the allotment and assimilation policies became acutely obvious," Congress adopted a "fundamental[ly]" different approach through enactment of the IRA in 1934. *Yankton Sioux Tribe*, 606 F.3d at 1001. The IRA marked a "return[] to the principles of tribal self-determination and self-governance," *Chase*, 165 F.4th at 1113 (citation omitted), by establishing mechanisms to "restore to tribes, or replace, the lands and related economic opportunities that had been lost to them under" the allotment policy, *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 561 (2d Cir. 2016).

As relevant here, IRA Section 5 helps to foster tribal self-reliance and independence by authorizing the Secretary to acquire land "within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. 5108. The United States takes title to such land "in trust for the Indian tribe or individual Indian for which the land is acquired," thus rendering it "exempt from State and local taxation." *Ibid.* Other parts of the IRA similarly advance Congress's goal of facilitating the reacquisition of tribal homelands and reconstitution of tribal governments. *See*, *e.g.*, 25 U.S.C. 5101 (prohibiting further allotment of lands); *id.* § 5110 (authorizing the Secretary to proclaim new Indian reservations and expand existing reservations); *id.* § 5123 (establishing a federal process for tribes to adopt constitutions or bylaws).

The Bureau of Indian Affairs promulgated regulations for processing tribal applications to take lands into trust. *See* 25 C.F.R. 151.1, 151.9.[2] Section 151.10 identifies criteria the agency will consider when evaluating fee-to-trust applications for land "located within or contiguous to an Indian reservation."[3] 25 C.F.R. 151.10. The agency considers additional regulatory criteria for applications involving land

---

[2] Interior amended 25 C.F.R. Part 151 in 2023. *See* 88 Fed. Reg. 86,249 (Dec. 12, 2023). Unless otherwise stated, all citations to 25 C.F.R. Part 151 refer to the 2017 versions of those regulations, which the Bureau of Indian Affairs and the IBIA applied in their decisions. The 2023 version of those regulations retain the distinction between contiguous and noncontiguous lands, but differ in how they codify the criteria to be considered.

[3] "Fee-to-trust" refers to the process by which land held in private, fee simple ownership by an Indian tribe or member of an Indian tribe is transferred to the United States to hold in trust, generally for the benefit of the transferor.

"located outside of and noncontiguous to the tribe's reservation." 25 C.F.R. 151.11.

### B. Procedural History

#### 1. Administrative Proceedings

**a.** Through two transactions in 1994 and 2001, the Band purchased the Willmus Property, a 3,239-acre tract of land in Morrison County, Minnesota. Add.23; App.36; R.Doc.17-8, at 263. The tract spans two townships—Richardson and Leigh Township—in Morrison County. Add.2; App.345; R.Doc.63, at 2. The property is "rural and undeveloped": "no one lives or works there, and there are no buildings or structures on it." Add.23; App.36; R.Doc.17-8, at 263. The northeast corner of the tract touches the southwest corner of the Band's reservation. Add.23; App.36; R.Doc.17-8, at 263. Since purchasing the tract, the Band has used it for hunting and gathering. Add.23; App.36; R.Doc.17-8, at 263.

In 2015, the Band submitted a fee-to-trust application requesting that the United States acquire the Willmus Property and hold it in trust for the Band. Add.23; App.36; R.Doc.17-8, at 263. Consistent with agency regulations, *see* 25 C.F.R. 151.10, the Bureau of Indian

Affairs notified state and local governments about the application and received comments from the State of Minnesota, Morrison County, Richardson Township, and Leigh Township. Add.24; App.37; R.Doc.17-8, at 264. Minnesota did not oppose the application, requesting only that the tract be made subject to an existing highway right-of-way. Add.24; App.37; R.Doc.17-8, at 264. Morrison County, Richardson Township, and Leigh Township objected based on, among other things, anticipated losses of tax revenue. Add.24; App.37; R.Doc.17-8, at 264.

The Bureau of Indian Affairs reviewed the Band's application under a 2014-2017 Memorandum of Understanding (MOU) between the agency's Midwest Regional Office and the Band. Add.28; App.41; R.Doc.17-8, at 268; *see also* R.Doc.1-2. The MOU did not alter the procedures and criteria set out in the agency's regulations for reviewing trust applications. Rather, under the MOU, the Band "reprogram[ed]" some of its "Tribal Priority Allocation funds"—*i.e.*, federal funds made available to tribes for tribal government operations and services under the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203 (1975)—and allocated those funds to the Bureau of Indian Affairs' Division of Fee-to-Trust (the Division).

R.Doc.1-2, at 2-5; *see also* Add.28; App.41; R.Doc.17-8, at 268. The Division uses those funds to support staff positions focused on processing fee-to-trust applications from Indian tribes that reside within the Bureau of Indian Affairs' Midwest Region and are covered by a MOU. R.Doc.1-2, at 4-5. The MOU's objective is to expedite the processing of applications and reduce "backlog[s]." R.Doc.1-2, at 1.[4]

**b.** On March 2, 2017, the Regional Director approved the Band's application. Add.24; App.37; R.Doc.17-8, at 264. Because the corners of the tract and the Band's reservation touch "at a point," the Regional Director determined that the lands are "contiguous" for purposes of the agency's land-into-trust regulations and applied the regulatory criteria in 25 C.F.R. 151.10. Add.24; App.37; R.Doc.17-8, at 264; *see also* R.Doc.17-4, at 40-45. Considering those criteria, the Regional Director concluded that taking the Willmus Property into trust would help "reverse the damage" from Congress's prior allotment policy and

[4] The ISDEAA permits tribes to enter into self-determination contracts and funding agreements with the federal government to ensure "maximum Indian participation" in directing the "plan[ning], conduct, and administ[ration]" of federal services so that such services are "more responsive to the needs and desires of those communities." 25 U.S.C. 5302(a), 5321(a)(1); *see also id.* § 5363(b)(3).

"ensur[e] that the Band has sufficient land base for future generations." App.109; R.Doc.17-4, at 22.

Plaintiffs appealed the Regional Director's decision to the IBIA, arguing that (1) the agency's decision-making process was "biased" and violated their "right to due process"; (2) the agency erred by applying the criteria for "contiguous" lands under Section 151.10, instead of the criteria for "noncontiguous" lands under Section 151.11; and (3) IRA Section 5 is unconstitutional. Add.26, 28-30, 51-52; App.39, 41-43, 64-65; R.Doc.17-8, at 266, 268-270, 291-292.

The IBIA affirmed. Add.52; App.65; R.Doc.17-8, at 292. As to plaintiffs' bias claims, the IBIA explained that it had "recently heard and rejected fundamentally the same claims" in *Village of Hobart v. Acting Midwest Regional Director*, 69 IBIA 84 (2023) (*Village of Hobart II*). Add.28; App.41; R.Doc.17-8, at 268. There, the IBIA considered an earlier version of the MOU and nearly identical factual allegations, and it found "no evidence of institutional bias," no "prejudgment," and no denial of "due process." Add.28; App.41; R.Doc.17-8, at 268. The IBIA further held in *Village of Hobart II* that even if staff positions funded through the MOU had faced a conflict of interest, the Regional

Director's "independent review" of the application would have "cured" that conflict. Add.28; App.41; R.Doc.17-8, at 268. Because plaintiffs' arguments here were "essentially the same as" those in *Village of Hobart II*, the IBIA rebuffed them "for the same reasons" and incorporated its *Village of Hobart II* analysis by reference. Add.28; App.41; R.Doc.17-8, at 268.[5]

The IBIA also rejected plaintiffs' argument that cornering lands are not contiguous under 25 C.F.R. 151.10. Neither the IRA nor its implementing regulations defined the term "contiguous." Add.30; App.43; R.Doc.17-8, at 270. But "in th[at] specific context," the IBIA concluded that cornering lands qualify as such. Add.31; App.44; R.Doc.17-8, at 271. The IBIA reasoned that aspects of Section 151.11's analysis—like the enhanced scrutiny of an application as the distance between the tribe's reservation and the land at issue increases—would make little sense applied to cornering lands because "there is no distance between cornering lands and the reservation." Add.31; App.44;

[5] The district court's opinion in *Village of Hobart II* affirming the IBIA's order is currently on appeal before the Seventh Circuit. *See* No. 26-1210 (7th Cir. docketed Feb. 2, 2026).

R.Doc.17-8, at 271. Consequently, the IBIA held that the Regional Director correctly reviewed the Band's application under Section 151.10, and not Section 151.11. Add.34; App.47; R.Doc.17-8, at 274.

As for plaintiffs' challenge to the constitutionality of IRA Section 5, the IBIA held that it lacked jurisdiction to adjudicate that claim. Add.51-52; App.64-65; R.Doc.17-8, at 291-292.

### 2. District Court Proceedings

Plaintiffs filed suit in district court, reiterating the claims they raised before the IBIA. Add.1; App.344; R.Doc.63, at 1. The parties cross-moved for summary judgment. The court denied plaintiffs' motion and entered summary judgment in defendants' favor. Add.18, 20; App.361, 363; R.Doc.63, at 18; R.Doc.66.

**a.** The district court held that "binding caselaw" precluded both of plaintiffs' constitutional challenges to IRA Section 5. Add.17; App.360; R.Doc.63, at 17. The court concluded that plaintiffs' Article I argument failed in light of the Supreme Court's "repeated[]" recognition "that the Indian Commerce Clause vests Congress with broad 'power to legislate in the field of Indian affairs.'" Add.17 (citation omitted); App.360; R.Doc.63, at 17. The court also found plaintiffs' non-delegation arguments foreclosed by a prior decision of this Court, which rejected an analogous challenge to Section 5. Add.17 (citing *South Dakota v. Department of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) (*South Dakota II*)); App.360; R.Doc.63, at 17.

**b.** The district court also rejected plaintiffs' argument that the MOU had "biased the Regional Director's decision" and thus "violated due process." Add.4; App.347; R.Doc.63, at 4. Reviewing plaintiffs' arguments under the Due Process Clause, the court explained that "the MOU does not implicate or fund the Regional Director"—indeed, she "receive[s] no money from the Band" and her decisions on fee-to-trust applications "d[o] not impact her financially at all." Add.6; App.349; R.Doc.63, at 6. As for plaintiffs' contention that the administrative record lacked evidence showing that the Regional Director had independently reviewed the Band's application, the court pointed out that records relating to the Regional Director's decision-making process are privileged, the Regional Director's signature "establishe[d] that she independently reviewed the materials and reached her own conclusion," and no evidence "suggest[ed] otherwise." Add.6-7; App.349-350; R.Doc.63, at 6-7. The court concluded that plaintiffs' remaining arguments about bias did not implicate the kinds of "extreme facts that the Supreme Court has held violate due process." Add.7 n.7; App.350 n.7; R.Doc.63, at 7 n.7.

**c.** The district court also rejected plaintiffs' claim that the Regional Director erred by considering the criteria in Section 151.10 when reviewing the Band's application. Add.8; App.351; R.Doc.63, at 8. Finding the term "contiguous" to be ambiguous, the court deferred to the IBIA's interpretation that connecting corners are sufficient to establish contiguity under Section 151.10. Add.12; App.355; R.Doc.63, at 12. The court deemed this interpretation reasonable, found that the IBIA's decision represented an authoritative position on the issue, confirmed that it derived from the agency's substantive expertise, and held that the interpretation was a fair and considered reading of the regulation. Add.12 (citing *Kisor v. Wilkie*, 588 U.S. 558, 575, 577-579 (2019)); App.355; R.Doc.63, at 12.

Finally, the court rejected plaintiffs' challenges to the Regional Director's consideration of the Section 151.10 criteria. Add.16-17; App.359-360; R.Doc.63, at 16-17. Even though the Regional Director was not "obligated to 'exhaustively analyze every factor,'" she nonetheless "provided a detailed analysis" of the criteria, and the court "agree[d]" with her assessments. Add.17; App.360; R.Doc.63, at 17. Accordingly, the court held that the IBIA's decision affirming the Regional Director's approval was not arbitrary or capricious. Add.17; App.360; R.Doc.63, at 17.

**d.** Plaintiffs appealed. App.364; R.Doc.66.

## SUMMARY OF ARGUMENT

I. Congress enacted IRA Section 5 under its plenary constitutional authority to regulate Indian affairs.

A. Congress's power over Indian affairs derives from, among other constitutional and pre-constitutional sources, the Indian Commerce Clause, the Treaty Clause, and the United States' trust relationship with Indian tribes and their members. These provisions supplied sufficient authority for adoption of Section 5.

Plaintiffs take a contrary view, arguing that Section 5 exceeds Congress's prerogatives. They fail, however, to reckon with the full extent of Congress's power to regulate Indian affairs, addressing only the Indian Commerce Clause. Regardless, plaintiffs' Indian Commerce Clause arguments are meritless. Plaintiffs cite no precedent supporting their position, relying on stray lines from Supreme Court concurrences and dissents. They ignore Section 5's meaningful limitations on the Secretary's ability to take land into trust. And they overstate Section 5's impact on states and localities, relying on far-fetched hypotheticals that bear no similarity to the facts here.

B. Nor does Section 5 violate the non-delegation doctrine. Like every court of appeals to have decided the issue, this Court has confirmed that Section 5 contains an intelligible principle that sufficiently guides the Secretary's exercise of authority under the statute. *See South Dakota II*, 423 F.3d 790, 799 (8th Cir. 2005). That decision is binding here and forecloses plaintiffs' non-delegation challenge.

II. The IBIA's order affirming the Regional Director's decision was not arbitrary, capricious, or contrary to law.

A. Plaintiffs did not raise below, and consequently have waived on appeal, their argument that the agency's review and approval of the Band's fee-to-trust application was biased and therefore arbitrary and capricious. Even if the Court considered plaintiffs' bias arguments under the APA, they fail on their merits. Plaintiffs identify no biased agency action under the agency's MOU with the Band, or in the review process that occurred here. Their contention that the Regional Director did not independently review the Band's application relies on an improper inversion of the burden of proof and cannot overcome the presumption of regularity afforded to agency action. And plaintiffs cannot demonstrate that the analysis in *Village of Hobart II*, 69 IBIA 84 (2023), was so flawed that the IBIA's reliance on that opinion here rendered its decision arbitrary or capricious.

C. The IBIA correctly held, consistent with agency regulations, that a Regional Director simply needs to "consider" applicable 25 C.F.R. Part 151 criteria and may approve a fee-to-trust application, even if the change in land status adversely affects state and local governments.

D. The IBIA correctly determined that lands connected to a reservation at a corner are "contiguous" for purposes of the agency's land-into-trust regulations, and therefore, the Regional Director correctly applied the regulatory criteria in 25 C.F.R. 151.10. Regulatory text, other comparable agency regulations, and the agency's regulatory scheme support such a conclusion. Alternatively, the Court should defer to the agency's interpretation of its own regulation. All of the relevant factors militate in favor of deference, and plaintiffs' arguments to the contrary are unpersuasive.

E. The IBIA properly deemed the Regional Director's analyses under 25 C.F.R. 151.10(e) and (f) sufficient. The Regional Director considered the relevant, nonspeculative points plaintiffs raised in their comments on the Band's fee-to-trust application, and plaintiffs' arguments on appeal lack support in the record and are otherwise unpersuasive.

## ARGUMENT

## I. Section 5 of the IRA is constitutional.

The district court correctly held that IRA Section 5 is a permissible exercise of Congress's plenary power over Indian affairs, and that binding circuit precedent forecloses plaintiffs' nondelegation challenge.

### A. Standard Of Review

This Court reviews de novo a constitutional challenge to a federal statute. *See United States v. Eagle Chasing*, 965 F.3d 647, 650 (8th Cir. 2020).

### B. Congress enacted Section 5 pursuant to its broad authority over Indian affairs.

Congress's plenary power to regulate in the field of Indian affairs supplied sufficient constitutional authority to enact Section 5.

#### 1. Congress's plenary power derives from multiple constitutional sources.

In a "long line" of cases dating back to the 19th century, the Supreme Court has emphasized that "Congress's power to legislate with respect to the Indian tribes [is] 'plenary and exclusive.'" *Haaland v. Brackeen*, 599 U.S. 255, 272 (2023) (citation omitted). This authority derives "both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974). For centuries, federal law has "recognized Indian tribes as 'distinct, independent political communities'" that "exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (citation omitted). Congress's authority to manage "Indian affairs" thus draws on "military and foreign policy" aspects of "preconstitutional powers necessarily inherent in any Federal Government." *Brackeen*, 599 U.S. at 274. The Indian Commerce Clause and the Treaty Clause also provide "source[s] of power" for Congress to regulate Indian affairs. *Ibid.*; *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (citing a treatise's identification of the Property Clause as an additional source of authority). Additionally, the United States' trust relationship with the Indian people "informs the exercise of legislative power." *Brackeen*, 599 U.S. at 274.

With these multiple bases for its constitutional authority, Congress has "well established and broad" legislative powers in Indian affairs. *Brackeen*, 599 U.S. at 275. This extends to "property" issues, as well as matters relating to "criminal law, domestic violence, employment . . . tax, and trade." *Ibid.* Indeed, the Supreme Court has "only rarely concluded that a challenged statute exceeded Congress's power to regulate Indian affairs." *Ibid.*

Against this backdrop, enactment of Section 5 fell comfortably within Congress's power over Indian affairs. For centuries, regulation of property and land has been a core part of Congress's Indian-affairs authority, as evidenced by myriad Founding-era statutes and treaties. Among other things, that authority empowers Congress to establish reservations; acquire, sell, and own land in trust for Indians and tribes;

and facilitate tribal self-government and economic development. *See* Treaty with the Chippewa, 7 Stat. 536 (1855) (setting land aside for the Band's reservation); Treaty with the Chippewas, 7 Stat. 536 (1837); *see also, e.g.*, Nonintercourse Act, 1 Stat. 137 § 4 (1790) (prohibiting alienation of Indian land without federal approval); Indian Gaming and Regulatory Act, 25 U.S.C. 2701 *et seq*. (establishing a regulatory scheme for gaming on eligible Indian lands). Section 5 authorizes similar action. It permits the Secretary to "acquire" land—whether through "purchase, relinquishment, gift, exchange, or assignment"—and take it into trust "for the purpose of providing land for Indians." 25 U.S.C. 5108. Unsurprisingly, then, the only court of appeals to directly address the issue has held that Section 5 is constitutional under Congress's "plenary authority to regulate Indian affairs." *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007) (en banc), *rev'd on other grounds*, 555 U.S. 379 (2009).

The Supreme Court's decision in *Morton v. Mancari* confirms Congress's power to enact Section 5. *Morton* considered an equal-protection challenge to IRA Section 12, which affords a hiring preference to qualified Indians applying for vacancies at, among other places, the Bureau of Indian Affairs. *See* 25 U.S.C. 5116. When explaining why the equal-protection challenge failed, the Court recounted Congress's enactment of Section 12 pursuant to its "plenary power" over Indian affairs under the Indian Commerce Clause, the Treaty Clause, and the United States' trust relationship with the Indian people. *Morton*, 417 U.S. at 551-552.

The same constitutional authority underlies Section 5. As the Court described, Section 12 "further[s] the cause of Indian self-government" and advances the IRA's over-arching objective of vesting tribes with "greater control of their own destinies." *Morton*, 417 U.S. at 553-554. As discussed in greater detail below, Section 5 also advances these goals through its fee-to-trust mechanism. *See* p. 33, *infra*. Accordingly, the same congressional powers to regulate Indian affairs undergird Section 5's constitutionality, as well.

#### 2. Plaintiffs understate Congress's authority and overstate Section 5's impact on states and localities.

Plaintiffs' arguments to the contrary are meritless.

**a.** Plaintiffs identify no case law holding that Section 5 exceeds the wide berth Congress enjoys when regulating Indian affairs. The snippets from Supreme Court concurrences and dissents they cite (Br.14-15) underscore the lack of precedential authority supporting their position. *Cf. United States v. Freeman*, 964 F.3d 774, 780 n.4 (8th Cir. 2020) ("[W]e are not bound by a Supreme Court concurrence when it accompanies a majority opinion."). Moreover, despite the multiple constitutional sources for Congress's "muscular" authority in this area of law, *Brackeen*, 599 U.S. at 273, plaintiffs assert only that Section 5 oversteps Congress's Indian Commerce Clause powers (Br.13-18). Plaintiffs cannot show that Section 5 transgresses Congress's constitutional authority without grappling with the full scope of that power.

Regardless, plaintiffs' arguments are unavailing. Plaintiffs suggest that legislation under the Indian Commerce Clause must be "[]tethered [to] commerce" in some way. Br.15. Case law refutes this proposition. *See, e.g.*, *Brackeen*, 599 U.S. at 278 ("[O]ur precedent states that Congress's power under the Indian Commerce Clause encompasses not only trade but also 'Indian affairs.'" (citation omitted)); *Upstate Citizens*, 841 F.3d at 568 (rejecting the argument that the Clause requires "regulat[ion] [of] commerce" (alterations in original)).

Even if such a connection were required, plaintiffs cannot explain why Section 5 lacks a sufficient "'nexus' to Indian Commerce." Br.15 (quoting *Brackeen*, 599 U.S. at 325 (Gorsuch, J., concurring)). Rather, Section 5's exemption of trust lands from state and local taxation, *see* 25 U.S.C. 5108, supplies an obvious nexus to commerce. *See Brackeen*, 599 U.S. at 332 (Gorsuch, J., concurring) (explaining that "commerce" has a "special usage" under the Indian Commerce Clause, and restrictions on how states "may engage with Indians . . . fall[] in the heartland of Congress's constitutional authority").

**b.** Contrary to plaintiffs' suggestion (Br.18), the district court's determination that Section 5 falls within Congress's Indian Commerce Clause powers does not leave the Clause unconstrained by "any meaningful limiting principle." The court quoted *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and cited *Brackeen* for the proposition that Congress's power to regulate Indian affairs is "broad." Add.17-18; App.360-361; R.Doc.63, at 17-18. No aspect of the court's ruling portrays that authority as "limitless." Br.14.

In suggesting otherwise, Plaintiffs exaggerate the "magnitude" of the Secretary's discretion under Section 5. Br.18. The Secretary may only acquire land in trust for "Indians," 25 U.S.C. 5108, as limited by the definition in Section 19, *id.* § 5129, and may do so only "through purchase, relinquishment, gift, exchange, or assignment," *id.* § 5108. These conditions require the Secretary to acquire land through voluntary transactions and not, for example, through eminent domain. Section 5 also limits trust acquisitions via purchase by imposing an annual appropriations cap of $2 million. *See* 25 U.S.C. 5108.

**c.** Plaintiffs also suggest that Section 5 unconstitutionally infringes on states' rights. For example, quoting *Printz v. United States*, 521 U.S. 898 (1997), plaintiffs suggest that Section 5 "intrude[s]" on states' "residuary and inviolable sovereignty." Br.14-15.

Not so. *Printz* addressed examples of residual state sovereignty embodied in specific constitutional provisions, like the Tenth Amendment, the Guarantee Clause, and Article V's process for constitutional amendment. 521 U.S. at 919. In contrast, this case implicates the Indian Commerce Clause and the Treaty Clause, which make Congress's authority over Indian affairs "plenary and exclusive." *Brackeen*, 599 U.S. at 272 (citation omitted). Those Clauses "erect [no] firewall around," and include no "constitutional carveout" for, state- or local-government-regulated lands that are owned in fee simple by a tribe or tribal member, and then acquired and held in trust by the United States. *Id* at 277. Because states retain no authority under the Constitution to regulate Indian affairs—power that resides exclusively with Congress—"principles of state sovereignty do not impair the federal government's power under the IRA to acquire land on behalf of [a tribe]," even if it diminishes a state's "governmental power over that land." *Upstate Citizens*, 841 F.3d at 570.

Plaintiffs also err (Br.16) in relying on *NFIB v. Sebelius*, 567 U.S. 519 (2012), for the proposition that Section 5 "fundamentally" and improperly "restructure[d] the federal-state balance." *NFIB* held that Congress lacked authority under the Commerce Clause to enact the individual mandate in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119. *See* 567 U.S. at 552-558; *see also* Br.16 (citing other Commerce Clause cases). Beyond the obvious factual distinctions between the federal actions challenged in *NFIB* and here, the Supreme Court has clarified that principles applicable to the Commerce Clause are "not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum*, 490 U.S. at 192. While the Commerce Clause seeks to "maintain[] free trade among the States even in the absence of implementing federal legislation," the Indian Commerce Clause vests "Congress with plenary power to legislate in the field of Indian affairs." *Ibid.* Accordingly, the two Clauses have "very different applications." *Ibid.* *NFIB* thus lends no support to plaintiffs' argument that enactment of Section 5 fell outside Congress's power under, among other provisions, the Indian Commerce Clause.

**d.** To the extent relevant, plaintiffs' policy arguments fare no better. They urge against a reading of Section 5 that would "preclude[] States from asserting fundamental aspects of their sovereignty over" land taken into trust, citing potential impacts on, among other things, criminal and civil enforcement and state and local tax revenue. Br.17.

This argument overstates the impact of trust acquisitions on state sovereignty and derivative municipal authority. As the IBIA explained, the Regional Director's decision to take the Willmus Property into trust means that "the Band will gain law enforcement authority over th[e] land, but Morrison County will keep concurrent [criminal] jurisdiction." Add.41; App.54; R.Doc.17-8, at 281; *see also* 18 U.S.C. 1162(a) (vesting Minnesota with jurisdiction over criminal offenses committed by or against Indians on "[a]ll Indian country within the State, except the Red Lake Reservation"). Moreover, nothing in the administrative record suggested that the tract had "any significant law enforcement needs." Add.41 (explaining that the tract lacks any businesses, buildings, or public roads); App.54; R.Doc.17-8, at 281.

As for the State's civil jurisdiction and derivative municipal authority, while aspects of that jurisdiction may be constrained in some instances by the land's trust status—for example, displacing state taxation and land-use regulations—that is a consequence of federal preemption under the Supremacy Clause. *See*, *e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-344 (1983); *Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655, 658-659 (9th Cir. 1975). In other instances, the State retains civil regulatory jurisdiction over non-Indians. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-145 (1980) (explaining that a state may retain civil jurisdiction when its laws are not preempted by federal law and do not impede tribal self-government). Thus, as the Second Circuit explained, state jurisdiction is "only reduced, and not eliminated, when the federal government takes land into trust for a tribe" under Section 5. *Upstate*

*Citizens*, 841 F.3d at 572. This reduction "does not run afoul of general principles of state sovereignty," *id.* at 577, because states retain no authority over Indian affairs under the Constitution.

Plaintiffs nonetheless protest that Section 5 could permit "any land to be stripped from" state and local governments. Br.18. But Congress codified such discretion in the statute, permitting the Secretary to acquire land "within or without [an] existing reservation[]." 25 U.S.C. 5108. Plaintiffs identify no constitutional constraint on Congress's ability to confer such authority.

Plaintiffs warn, however, that the Secretary could exercise this authority to "remove all land from a State." Br.18. Such alarm is unfounded. Plaintiffs' hypothetical bears no relation to the facts here, which involve a 3,239-acre tract of "rural and undeveloped" land purchased by the Band two-and-a-half decades ago. Add.23; App.36; R.Doc.17-8, at 263; p. 8, *supra*. Nor is it plausible the Secretary could or would use Section 5 to remove all land from a state given the constraints Congress included in Section 5. As explained above, the Secretary may only acquire land that the United States purchases, subject to an annual appropriations cap, or that is voluntarily conveyed to the government. 25 U.S.C. 5108. Moreover, as discussed below, taking land into trust must further Indian self-determination and self-government. *See* p. 33, *infra*. There is no reason this could or would entail reduction of a state "to nonexistence by taking all land within its borders." Br.18 (citation omitted).[6]

Finally, plaintiffs argue that tribal revenues from gaming have "enabled the large-scale acquisition of additional lands for trust conversion." Br.18. Though they characterize this concern as "not theoretical" (Br.18), plaintiffs cite no evidence to corroborate it. Even if plaintiffs' speculation about the quantity of lands that may someday be the subject of fee-to-trust applications were relevant to the

[6] Plaintiffs quote Justice Gorsuch's concurrence in *Brackeen*, 599 U.S. at 325, to argue that Congress's Indian Commerce Clause authority cannot facilitate "annihilat[ion]" of a state's political existence. Br.18. In that quote, however, Justice Gorsuch was discussing the Clause's solicitude towards *Indian tribes*, not states. Specifically, Justice Gorsuch was explaining why the Indian Commerce Clause does not permit Congress to "reassign to the federal government inherent sovereign authorities that belong to [Indian] Tribes." *Brackeen*, 599 U.S. at 325 (Gorsuch, J., concurring). Such a reading could empower Congress to "dives[t] [tribes] of the right to self-government," thus "annihilating the[ir] political existence." *Ibid.* Interpreting the Clause to permit this result, Justice Gorsuch explained, was "inconceivable." *Ibid.* (citation omitted).

constitutional question before the Court, such requests would still be subject to administrative review and approval by the Secretary or her designee. This would include consideration of the regulatory factors listed at 25 C.F.R. 151.10, and also Section 151.11 for lands "noncontiguous to an Indian reservation." 25 C.F.R. 151.11(a). Trust conversion, therefore, would be far from guaranteed.

### C. Circuit precedent forecloses plaintiffs' non-delegation challenge to Section 5.

Article I of the Constitution allocates "[a]ll legislative Powers" to Congress. U.S. Const., Art. I, § 1. Although these legislative powers "belong[] to the legislative branch," Congress may "'seek[] assistance' from its coordinate branches to secure the 'effect intended by its acts of legislation.'" *FCC v. Consumers' Rsch.*, 606 U.S. 656, 672 (2025) (citation omitted). Thus, to distinguish between a permissible vesting of authority in an agency to implement a statute and an impermissible delegation of legislative power, the nondelegation doctrine "ask[s] whether Congress has set out an 'intelligible principle' to guide what it has given the agency to do." *Id.* at 673 (citation omitted).

As the district court correctly recognized (Add.17; App.360; R.Doc.63, at 17), plaintiffs' argument that IRA Section 5 does not contain an "intelligible principle" to guide the Secretary's land-into-trust decisions has already been rejected by this Court, *see South Dakota II*, 423 F.3d 790, 799 (8th Cir. 2005). In *South Dakota II*, this Court concluded—like every court of appeals that has decided the issue—that the statutory text authorizing the Secretary to acquire land in trust "for the purpose of providing land for Indians" provides an "intelligible principle" when "viewed in the statutory and historical context of the IRA." 423 F.3d at 799 (internal quotation marks omitted); *see also ibid.* (explaining that Section 5's intelligible principle directs the Secretary to exercise her statutory authority to help "enable Indians to achieve self-support" and "sufficiently narrow[s] the discretionary authority granted to [Interior]"); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008); *Carcieri v. Kempthorne*, 497 F.3d 15, 43 (1st Cir. 2007) (en banc); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999).

Plaintiffs acknowledge that the district court was bound by *South Dakota II*. Br.19. They argue only that *South Dakota II* was wrongly decided and may be reversed by the full court sitting en banc. Br.29-30. Plaintiffs failed, however, to request an initial hearing en banc under

Federal Rule of Appellate Procedure 40(g). Accordingly, their argument is improper at this time.

Regardless of what may occur at a later procedural stage, this Court is still bound by *South Dakota II*. It is hornbook law that "one panel of this court has no authority to overrule an earlier decision of another panel." *Bates v. Richardson*, 97 F.4th 582, 586 (8th Cir. 2024) (citation omitted). Indeed, two prior panels have emphasized this point and declined to entertain nondelegation challenges to Section 5 based on the Court's resolution of that issue in *South Dakota II*. *See County of Charles Mix v. Department of Interior*, 674 F.3d 898, 902 (8th Cir. 2012) ("[W]e decline the county's invitation to revisit the court's decision in *South Dakota II*."); *South Dakota v. Department of Interior*, 487 F.3d 548, 551 (8th Cir. 2007) (turning down a request to reconsider *South Dakota II* because the panel "[could] not overrule another panel's decision"). The same response is warranted here.

## II. The IBIA did not act arbitrarily, capriciously, or contrary to law by affirming the Regional Director's land-into trust decision.

### A. Standard Of Review

This Court reviews de novo a district court's ruling under the APA. *Friends of the Norbeck v. Forest Serv.*, 661 F.3d 969, 975 (8th Cir. 2011). A court may set aside agency action under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). An agency acts arbitrarily and capriciously only if it "relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, [or] offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Friends of the Norbeck*, 661 F.3d at 975-976 (citation omitted). This is "a highly deferential standard of review." *Adventist Health Sys./SunBelt, Inc. v. HHS*, 17 F.4th 793, 803 (8th Cir. 2021). "A 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).

### B. Plaintiffs' allegations of bias in the agency's review and approval process provide no basis for reversal.

In challenging the Regional Director's land-into-trust decision, plaintiffs argued that her approval of the Band's application was fatally prejudiced by the Division's MOU with the Band. Consistent with plaintiffs' characterization of this claim in their complaint and summary-judgment briefing, the district court construed this argument as raising a constitutional due-process claim and held that plaintiffs had failed to show any violation of their due-process rights. *See* Add.4-7 (holding that "[t]he MOU does not create an unconstitutional probability of bias" and "none of Plaintiffs' other arguments concern the types of extreme facts that the Supreme Court has held violate due process"); App.347-350; R.Doc.63, at 4-7; *see also* App.28-29 (plaintiffs' complaint describing their bias claim as stating a "Due Process Clause violation[]"); R.Doc.1, at 18-19; R.Doc.42, at 2 (plaintiffs' motion for summary judgment seeking a declaration that "Defendants' decisions denied Plaintiffs' due process and are the product of an unconstitutionally biased process and structure"); R.Doc.44, at 11-13 (plaintiffs' memorandum in support of summary judgment invoking due process standards and principles).

Plaintiffs do not challenge the district court's due-process determinations on appeal. Instead, they shift gears and attempt to argue that the agency's allegedly biased review and approval of the Band's fee-to-trust application was arbitrary and capricious under the APA. *See* Br.12, 31. Because plaintiffs did not proffer this theory of relief before the district court, it is waived on appeal. *See, e.g.*, *Blake Marine Grp. v. CarVal Invs. LLC*, 829 F.3d 592, 597 (8th Cir. 2016). Regardless, even if the Court considered plaintiffs' bias arguments under the APA, they fail on their merits.

**1. The MOU**

Plaintiffs challenge the MOU's review and approval process for fee-to-trust applications, arguing that it is biased in favor of acceptance. Br.31-34. Parsing the MOU's language, plaintiffs point to the MOU's definition of "Division"—which includes staff "assigned to work on trust acquisition cases" (App.242; R.Doc.17-9, at 75)—and assert that "'[a]cquisition' . . . can only mean 'acceptance'" (Br.32). The MOU makes clear, however, that "trust acquisition" simply references the fee-to-trust applications that such staff handle. *See* App.244; R.Doc.17-9, at 77 (describing staff review of "request[s] for fee-to-trust acquisition").

Plaintiffs also point to Division staff's role in assisting tribes (when requested) with mitigating potential Field Solicitor objections to fee-to-trust applications or formulating responses to comments on an application. Br.32-33; App.245; R.Doc.17-9, at 78. Such assistance is consistent with and reflective of Division staff's broader responsibilities to liaise between the Midwest Regional Office, Interior's Office of the Solicitor, and tribes, and to help identify "any deficiencies" in a fee-to-trust application. App.245; R.Doc.17-9, at 78. But in any event, plaintiffs do not contend that such assistance was requested and provided here—much less in a way that amounted to bias violative of the APA. Nor do plaintiffs appear to dispute that such assistance could inure to a local government's *benefit*—for example, by alerting a tribe to potential "[j]urisdictional problems" or "potential conflicts of land use" raised by its application. 25 C.F.R. 151.10(f).

Plaintiffs further assert that "[a]cceptance" of fee-to-trust applications is "the whole purpose" of the MOU. Br.32. As the IBIA explained in *Village of Hobart II*, 69 IBIA 84 (2023), the MOU itself belies this contention. The MOU was originally adopted "to address the growing backlog of fee-to-trust applications caused by limited [agency] funding." *Id.* at 93; *see also* Add.28; App.41; R.Doc.17-8, at 268. Accordingly, the stated goal of the MOU is to "facilitat[e] the expeditious processing of fee-to-trust applications." App.241; R.Doc.17-9, at 74. As the IBIA explained, "processing applications faster is not evidence that [the agency] has prejudged those applications"; rather, "consistent with the Midwest MOU," the agency "could still deny the applications." *Village of Hobart*, 69 IBIA at 105.

Plaintiffs nonetheless contend that bias results from the fact that, under the MOU, reprogrammed Tribal Priority Allocation funds are used to pay the salaries of Division staff responsible for processing fee-to-trust applications. Br.32. Even if such a conflict of interest existed, the Regional Director's independent review and approval of applications would "cure[] that conflict of interest" because she is the "final decision[maker]" on all applications and "her position [is] not funded by the" MOU. *Village of Hobart*, 69 IBIA at 109-110.

### 2. The Division's Review Process

As purported "evidence of prejudgment" in the Division's review process, plaintiffs point to various communications between Division staff and the Band about its fee-to-trust application. Br.41. None of those communications evince bias, much less prejudgment that would render the Regional Director's independent approval of the application arbitrary or capricious.

For example, as was the case in *Village of Hobart II*, many of the cited communications merely reflect "inquiries" by the Band "about the status of [its] application[]." 69 IBIA at 107; *see, e.g.*, Br.41 ("[t]he Band asked for updates"), 42 ("the Band inquired" about comments on the application). Such anodyne inquiries do not reflect impermissible bias. *See Village of Hobart*, 69 IBIA at 107. Other communications discuss the Division's "priorit[ization]" of the Band's application and efforts to expeditiously issue a decision. App.147; R.Doc.17-4, at 310; *see also* Br.41-42; App.160-163, 193; R.Doc.17-4, at 355-359; R.Doc.17-5, at 256. The agency has made no secret of its goal to issue decisions more quickly. As the IBIA has rightly explained, "prioritizing a decision is not the same as prejudging the result of that decision." *Village of Hobart*, 69 IBIA at 105. But regardless, even if plaintiffs had unearthed improper communications between Division staff and the Band, plaintiffs' APA claim would still fail because *the Regional Director* made the final decision to approve the Band's application.

Plaintiffs cannot establish and provide no evidence that any of "the Regional Director's interactions with the Nation improperly influenced her decision." *Id.* at 107.

Plaintiffs also complain that the Division sent the Band copies of "negative" comments received on the fee-to-trust application and permitted the Band to respond. Br.42 (citation omitted). Those comments (submitted by plaintiffs) were indeed "negative": they opposed the application and recommended "disapproval." App.195-200, R.Doc.17-5, at 266, 275-279. As required under 25 C.F.R. 151.10(d), the Division sent the Band copies of those comments and provided it "a reasonable time in which to reply and/or request that the Secretary issue a decision." Plaintiffs protest that the Division did not notify them before it took such action. Br.42. But Section 151.10 does not require such notice because Subsection (d) itself outlines the agency's next steps after it receives comments on an application.

#### 3. The Regional Director's Independent Review

Next, plaintiffs take aim at the Regional Director, arguing that her review of the Band's application could not have "cured" any conflict of interest for Division staff because "there is nothing in the [r]ecord" establishing that she conducted an independent review. Br.34, 38. As the IBIA explained, however, this argument improperly "tries to reverse the burden of proof." *Village of Hobart*, 69 IBIA at 110. It is *plaintiffs'* burden under the APA to "show th[at] [agency] action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Missouri v. Department of Interior*, 73 F.4th 570, 576 (8th Cir. 2023). They therefore had to come forward with affirmative evidence showing that "the Regional Director failed to conduct an independent review." *Village of Hobart*, 69 IBIA at 111. They cannot rely on an alleged *absence* of evidence on the issue to carry their evidentiary burden.

Moreover, under "the presumption of regularity accorded agency action," this Court presumes that the Regional Director independently reviewed the Band's application. *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1187 n.3 (8th Cir. 2001); *see also FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 577 (2025); *Village of Hobart*, 69 IBIA at 111 (invoking the presumption of regularity). Plaintiffs made no "strong showing of bad faith or improper behavior" sufficient to overcome this presumption. *Friends of Richards-Gebaur Airport*, 251

F.3d at 1187 n.3. To the contrary, as the district court reasoned, the Director's signature on the Notice of Decision (App.114; R.Doc.17-4, at 27) bolsters the conclusion "that she independently reviewed the materials and reached her own conclusion" (Add.6; App.349; R.Doc.63, at 6). At a minimum, it is consistent with her having done so.

Plaintiffs also assert that the administrative record contains no "transmittal emails that indicate the decision . . . was ever provided to the [Regional Director] for a purported 'independent review.'" Br.34. That is incorrect. An email from a Bureau of Indian Affairs Realty Specialist sent on February 16, 2017, states that he sent the Regional Director a "final draft" of the decision for her "review." App.125; R.Doc.17-4, at 57. The Regional Director signed the final Notice of Decision two weeks later. App.104, 114; R.Doc.17-4, at 17, 27.

Plaintiffs argue that if the Regional Director had "actually reviewed the decision and reached her own conclusion," documents reflecting her review would have been identified in the government's privilege log. Br.35-36, 38; *see also* Add.6 (explaining that "the Regional Director's deliberative process is privileged"); App.349; R.Doc.63, at 6.

Again, this argument relies on an alleged paucity of evidence and thus improperly attempts to invert the burden of proof.

But regardless, there is no basis for presuming that conducting an independent review necessarily entails the creation of separate records. Moreover, "deliberative materials are generally not part of the [administrative record] absent impropriety or bad faith by the agency." *Blue Mountains Biodiversity Project v. Jeffries*, 99 F.4th 438, 444 (9th Cir. 2024); *see also Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 82-83 (D.D.C. 2018) (explaining that courts in the District of Columbia Circuit "have long held that materials that fall within the scope of the deliberative process privilege are not part of the administrative record"). A "corollary" to this principle is that agencies "need not provide a privilege log of the documents withheld pursuant to the [deliberative-process] privilege." *American Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013). Accordingly, if privileged materials relating to the Regional Director's deliberative process existed, they would not necessarily be included in the government's privilege log.

Plaintiffs further suggest that the Regional Director cannot act "independent[ly]" because she partakes in activities governed by the MOU. Br.36. But the MOU provisions that plaintiffs cite (Br.36) simply establish that the Director supervises and works with Division staff, and also serves on an Oversight Advisory Council established by the MOU. None of these functions is inconsistent with the Regional Director independently reviewing applications submitted for her consideration. Plaintiffs' suggestion that the Regional Director should be somehow walled off from the Fee-to-Trust Division she oversees is unreasonable and unwarranted.

Finally, plaintiffs assert that bias can be presumed based on the Regional Director's history of not denying fee-to-trust applications, as reflected in public notices. Br.33. However, the Bureau of Indian Affairs is not required to publish public notices of denials. *See* 25 C.F.R. 151.12(d)(1) (only requiring that notices of denials be sent to applicants). And as the IBIA explained, tribes often "withdraw applications that are not likely to be approved, rather than risk[] denial." *Village of Hobart*, 69 IBIA at 105. Moreover, a high approval rate is not, by itself, indicative of bias.

#### 4. The IG Report

Plaintiffs argue (Br.39-40) that the IBIA's decision below was arbitrary and capricious because it relied on the IBIA's decision in *Village of Hobart II*. That case is currently on appeal before the Seventh Circuit. *See* p. 12 n.5, *supra*. Nothing about the IBIA's ruling in that separate proceeding rendered the decision here infirm.

**a.** During an earlier stage of *Village of Hobart II*'s administrative proceedings and in response to bias-related arguments raised there for the first time, the IBIA remanded to the Regional Director to review "the outcome" of an investigation conducted by Interior's Office of Inspector General (IG) into two MOUs between the Bureau of Indian Affairs' Pacific and Midwest Regional Offices, respectfully, and various Indian tribes. *Village of Hobart v. Acting Midwest Regional Director*, 57 IBIA 4, 16 (2013) (*Village of Hobart I*). Following remand, the Regional Director identified multiple reasons why the IG's investigation and report had "no bearing" on the Village of Hobart's allegations of bias. *Village of Hobart II*, 69 IBIA at 105 (citation omitted). First, the IG had found that "neither the Pacific MOU nor the Midwest MOU was unlawful or inconsistent with Government ethics rules." *Ibid.* Second, the IG had found "no instances of actual bias under either MOU." *Ibid.* Third, the version of the Midwest Regional Office's MOU that the IG reviewed had since "expired and been replaced by [a] restructured MOU[]." *Id.* at 112 (citation omitted).

The Village of Hobart appealed to the IBIA, arguing that the Regional Director had "failed to complete the remand" because she had not reviewed the attachments to the IG's report. *Village of Hobart II*, 69 IBIA at 112. In its decision—which the IBIA below relied upon and incorporated—the IBIA rejected the Village's argument because the remand order had instructed the Regional Director "to review 'the *outcome* of the IG investigation,' not the documents on which it was based." *Ibid.* (emphasis added).

**b.** Plaintiffs point to three alleged deficiencies in *Village of Hobart II* that supposedly rendered the IBIA's reliance on that decision arbitrary and capricious. First, plaintiffs argue that the IBIA in *Village of Hobart II* did not consider "critical findings" in a legal opinion issued by Interior's Office of the Solicitor (SOL), which had been included as an attachment to the IG report. Br.39. SOL's legal opinion concluded that the MOUs' funding structure raised "serious questions about the independence of judgment expected of [Division] employees" and "create[d] a potential for bias." Br.39 (citation omitted). However, the IBIA in *Village of Hobart II* addressed this precise concern in its opinion. The IBIA explained that even if there had been a conflict of interest for Division staff, the Regional Director's independent review of fee-to-trust applications would have "cured" that conflict because she "is not an employee of the Division, and her position was not funded by the Midwest MOU." *Village of Hobart II*, 69 IBIA at 110.

Second, plaintiffs criticize the IBIA for not specifically addressing SOL's "recommendation to discontinue the MOUs." Br.40 (emphasis omitted). But the Regional Director considered essentially the same recommendation by the IG in his report, which advised that "the [Midwest Regional Office] MOU as then structured be discontinued." R.Doc.17-9, at 306-307. As the Regional Director explained, the MOU had since been "revised and replaced" with a new version that incorporated changes designed to "ensure[] against the appearance of bias or conflict of interest"—among those changes, the revised MOU makes clear that MOU-funded positions are supervised by agency personnel outside the Division, and only agency officials vested with delegated authority exercise inherent federal functions. R.Doc.17-9, at 310-311; *see also Village of Hobart II*, 69 IBIA at 93-94, 109. The district court below concurred in this reasoning, pointing out that the MOUs reviewed in the IG report "predate[d] the MOU here by over six years and differ substantively." Add.7 n.7; App.350 n.7; R.Doc.63, at 7, n.7.

Plaintiffs contest the significance of the MOU's revisions, arguing that the core features—among them, the MOU's "funding structure" and the Regional Director's "level of involvement"—remain the same. Br.40. But for the reasons discussed above, none of those features biased the agency's review and approval process.

Third, plaintiffs complain that the Regional Director in *Village of Hobart II* reviewed a "redacted version of the IG Report." Br.39. But as the IBIA explained, the names of "interviewed employees" were redacted in the report to protect their privacy, and it is unlikely "that information (or any other redacted information) would have made any difference to the Regional Director's analysis." *Village of Hobart II*, 69 IBIA at 112. Accordingly, none of plaintiffs' arguments shows that the proceedings in *Village of Hobart II* were so infirm that the IBIA here acted arbitrarily or capriciously in relying on that decision.

### C. The IBIA correctly held that the Regional Director simply needed to consider the applicable 25 C.F.R. Part 151 criteria.

**1.** Plaintiffs briefly argue that the IBIA's order was not in accordance with law because it permits the agency to take land into trust, even if a Regional Director's review of the 25 C.F.R. Part 151 criteria—specifically, those in Sections 151.10 and 151.11—identifies a significant "problem or concern." Br.33. This argument lacks merit.

Longstanding IBIA case law holds that a Regional Director only needs to "consider" the applicable Part 151 criteria and may approve a fee-to-trust application even if taking land into trust may adversely affect a state or locality. *Village of Hobart II*, 69 IBIA at 115; *see also Roberts Cnty. v. Acting Great Plains Regional Director*, 51 IBIA 35, 46 (2009) (explaining that "[t]he standard of review in trust acquisition cases is well established" and collecting cases). The agency's interpretation of what Part 151 requires is entitled to deference. *See County of Charles Mix v. Department of Interior*, 674 F.3d 898, 904 (8th Cir. 2012) (deferring to the Secretary's interpretation of Section 151.10).

The IBIA's standard derives from the regulatory text, which directs a Regional Director to "consider" specified criteria. 25 C.F.R. 151.10, 151.11. The Supreme Court and this Court have previously described a Regional Director's obligation using this regulatory language. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005) (explaining that "the Secretary must consider" the Section 151.10 criteria); *County of Charles Mix v. Department of Interior*, 674 F.3d 898, 904 (8th Cir. 2012) ("the Secretary thoroughly considered all of the necessary factors"); *South Dakota v. Department of Interior*, 487 F.3d 548, 551 (8th Cir. 2007) ("our focus is whether the Secretary considered the relevant factors").

Plaintiffs cite no authority establishing that the IBIA's approach was contrary to law. Instead, they argue that mere consideration of the Part 151 criteria should not suffice when a fee-to-trust application raises a "significan[t] . . . problem or concern." Br.33. Plaintiffs might prefer that Part 151 require something more than a Regional Director's "consider[ation]." 25 C.F.R. 151.10. But disagreement over how the IRA's regulatory regime should operate does not establish an APA violation. *See Prometheus Radio Project*, 592 U.S. at 423.

**2.** Plaintiffs also argue that the Regional Director's approval was contrary to law because Section 5 does not permit a Regional Director to take land into trust when it was previously acquired by an Indian tribe. Br.43-44. In plaintiffs' view, fee-to-trust conversion is limited to lands the Secretary purchases using funds authorized under the statute. Br.43-44. Plaintiffs failed to raise this argument below and have waived it on appeal. *See* R.Doc.44, at 11-18; *Pederson v. SEC*, 153 F.4th 624, 634 n.1 (8th Cir. 2025).

Regardless, the argument fails. Section 5 authorizes the Secretary to acquire land in a variety of ways—including through "relinquishment," "gift," or "assignment"—regardless of who the prior owner might be. 25 U.S.C. 5108; *see also Chase v. McMasters*, 573 F.2d 1011, 1015-1016 (8th Cir. 1978) (holding that Section 5 permits fee-to-trust conversion of lands conveyed by an individual Indian).

### D. The IBIA correctly concluded that the Willmus Property is contiguous with the Band's reservation.

#### 1. Under agency regulations applicable at the time of the Regional Director's decision, cornering lands were contiguous.

As discussed above, a Regional Director must consider the criteria in 25 C.F.R. 151.10 if a fee-to-trust application concerns land that is "located within or contiguous to an Indian reservation, and the acquisition is not mandated." For land "located outside of and noncontiguous to the tribe's reservation," the Regional Director need not evaluate Section 151.10(d) but must consider additional criteria listed at Section 151.11(b) and (c), if applicable. 25 C.F.R. 151.11. As relevant here, Subsection (b) requires the Regional Director to consider the land's "distance from the boundaries of the tribe's reservation." *Id.* § 151.11(b). "[A]s the distance between the tribe's reservation and the land to be acquired increases," the Regional Director must "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition." *Ibid.* The Regional Director must also give "greater weight" to state and local government concerns. *Ibid.*

Because the northeast corner of the Willmus property touches the southwest corner of the Band's reservation, the IBIA deemed the lands contiguous and therefore held that the Regional Director appropriately considered the criteria in Section 151.10. Add.32; App.45; R.Doc.17-8, at 272. This conclusion was correct.

Contemporaneous dictionary definitions in 1995 when the Bureau of Indian Affairs amended Section 151.10 and added Section 151.11, *see*

60 Fed. Reg. 32,874-32,879 (June 23, 1995), support the IBIA's interpretation. As the district court pointed out, Black's Law Dictionary and Merriam-Webster defined "contiguous" to include lands that "touch[] at a point." Add.10 (citations omitted); App.353; R.Doc.63, at 10. By definition, cornering lands touch at a point. The American Heritage College Dictionary and The New Shorter Oxford English Dictionary contained similar definitions, defining "contiguous" to include lands that are "[t]ouching" or "in contact." Add.10 (citations omitted); App.353; R.Doc.63, at 10. Again, cornering lands fall within these definitions because they touch and are in contact at shared corners.

If the Bureau of Indian Affairs had intended for the term "contiguous" in Section 151.10 to depart from these dictionary definitions and exclude cornering lands, "it would have explicitly defined the term." Add.31; App.44; R.Doc.17-8, at 271. Indeed, as the IBIA explained, the Bureau did "just that when it wanted to exclude cornering parcels from contiguous lands in other regulatory contexts." Add.31-32 (citing regulations); App.44-45; R.Doc.17-8, at 271-272. In contrast to those examples, the Bureau amended its Part 151 regulations in 2023 and made clear that "parcels that touch at a point" are indeed contiguous. 25 C.F.R. 151.2 (2023).

Other regulations comparable to Sections 151.10 and 151.11 deem cornering lands to be contiguous. Like Sections 151.10 and 151.11, regulations implementing the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2701 *et seq.*, distinguish between on- and off-reservation lands. Add.32; App.45; R.Doc.17-8, at 272; *see also* 25 C.F.R. 292.4. Those regulations share a similar goal of "strik[ing] a balance between the needs of the tribes and the needs of surrounding communities" when determining whether to permit gaming on newly acquired lands. Add.32 (discussing 25 C.F.R. 292.13); App.45; R.Doc.17-8, at 272. The regulations define "[c]ontiguous" to "include[] parcels that touch at a point." 25 C.F.R. 292.2. This suggests that Section 151.10 should be read to do so, as well.

Finally, it would not make sense to exclude cornering lands from other contiguous lands under the agency's regulatory scheme. Under Section 151.11, when a tribe seeks trust conversion of land outside of, and noncontiguous with, the tribe's reservation, it must proffer "a relatively stronger justification for trust status" as "distance from the reservation land base increases." 56 Fed. Reg. 32,278 (July 15, 1991). But "[l]ike other 'contiguous' lands, there is no distance between" lands that touch at a corner. Add.31; App.44; R.Doc.17-8, at 271. Consequently, even if Section 151.11 applied to cornering lands, a Regional Director "would not be required to give 'greater scrutiny' to 'the tribe's justification of anticipated benefits from the acquisition' or 'greater weight to the concerns' voiced by State and local governments," as Section 151.11 normally mandates. Add.31 (quoting 25 C.F.R. 151.11(b)); App.44; R.Doc.17-8, at 271. Moreover, "[t]he potential jurisdictional problems and tax losses that may be caused by the acquisition of cornering lands do not differ materially from lands that are located within or share a boundary with a reservation." Add.31; App.44; R.Doc.17-8, at 271. Consequently, interpreting "contiguous" to exclude cornering lands would increase the regulatory burden on the agency, but with minimal practical consequences and benefits for local governments.

The Court should thus affirm the IBIA's conclusion that, at the time the Regional Director issued her decision, cornering lands were contiguous for purposes of Section 151.10.

### 2. Alternatively, the Court should defer to the agency's interpretation of its own regulation.

Alternatively, the Court should defer to the IBIA's interpretation of Section 151.10 under *Kisor v. Wilkie*, 588 U.S. 558 (2019), just as the district court did (Add.12-14; App.355-357; R.Doc.63, at 12-14). *Kisor* held that judicial deference to an agency interpretation of genuinely ambiguous regulatory text is warranted when certain conditions are satisfied. *See* 588 U.S. at 573-580. Every consideration *Kisor* identifies militates in favor of deferring to the Bureau of Indian Affairs' interpretation of its own regulation, and plaintiffs' arguments to the contrary lack merit.

<u>Ambiguity</u>

*Kisor* requires that the regulatory text be "genuinely ambiguous." 588 U.S. at 574. The district court found this requirement satisfied because, in its view, contemporaneous dictionary definitions of "contiguous" evinced no consensus about cornering lands; the agency's final rule amending Section 151.10 and adopting 151.11 "shed[] little insight" on the question; "related regulations" were "inconclusive"; and the agency's 2023 amendment of its Part 151 regulations could reflect confirmation of, or a departure from, past agency understanding.

Add.10-12; App.353-355; R.Doc.63, at 10-12. Given these competing indicators, the court reasonably held that "contiguous," as used in Section 151.10, is ambiguous.

Plaintiffs' invocation of municipal boundary and annexation case law does not demonstrate that, in actuality, the regulatory language unambiguously compels their interpretation. Plaintiffs argue that, in those contexts, contiguity requires "meaningful shared boundaries rather than nominal contact." Br.49. But "contiguous" understandably carries a different meaning when determining whether a municipality may expand its boundaries by annexing "contiguous" lands. There, the requirement of meaningful shared boundaries deters "crazy-quilt boundaries which are difficult for [a municipality] to administer." *Town of Mt. Pleasant v. City of Racine*, 24 Wis. 2d 41, 46 (1964); *see also State v. Village of Mound*, 234 Minn. 531, 545 (1951) (prioritizing the "feasible provision" of municipal services"). It also prevents boundary expansions that "leav[e] vast areas of unincorporated territory totally surrounded by" annexed land that is "otherwise totally unconnected with" the municipality. *People v. Village of Streamwood*, 15 Ill. 2d 595, 598, 601 (1959).

Such concerns are not implicated here. The IRA anticipates trust acquisitions *with or without* shared boundaries between the land at issue and a tribe's reservation. Moreover, the regulatory distinction between lands that share a boundary with a reservation and non-adjacent parcels potentially separated from a reservation by significant distance concerns more than just the administration of municipal services. Rather, it seeks to "balance the IRA's goals of restoring tribal lands and ameliorating the damage done by allotment with the concerns of local governments." Add.31; App.44; R.Doc.17-8, at 271. Accordingly, the IBIA's interpretation here simply reflects the fact that "[i]dentical words may have different meanings" in "different contexts." *Verizon California, Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009) (citation omitted); *see also* Add.31 (interpreting "contiguous" in "the specific context" the IRA and its implementing regulations); App.44; R.Doc.17-8, at 271.

Reasonableness

The agency's interpretation must also fall "within the bounds of reasonable interpretation." *Kisor*, 588 U.S. at 576 (citation omitted). The IBIA's reading does so. As the district court explained, "contiguous" could "reasonably" be read to include lands that touch at a point because such an interpretation "is supported by two dictionary definitions and aligns with the [agency's] historical practice." Add.13; App.356; R.Doc.63, at 13. It also comports with other Bureau of Indian Affairs regulations—like those implementing the Indian Gaming Regulatory Act—that distinguish between on- and off-reservation lands. *See* p. 55, *supra*.

Plaintiffs dispute the reasonableness of the IBIA's interpretation, contending that it "defeats the very purpose of Part 151." Br.51. The IBIA cogently explained why the opposite is true: the increased scrutiny of a tribe's justifications and the increased weight afforded to state and local government concerns make little sense and would have little practical effect applied to cornering lands. *See* pp. 55-56, *supra*. Plaintiffs portray this reasoning as retreating from more "complicated" balancing analyses and prioritizing "convenience." Br.52. Far from it. The IBIA simply recognized that reading "contiguous" to encompass cornering lands advances the goals and maximizes the efficiency of the agency's regulatory scheme. Add.31; App.44; R.Doc.17-8, at 271.

Plaintiffs also contend (Br.50) that the agency's regulatory amendment in 2023 proves that, prior to amendment, cornering lands were not contiguous under Section 151.10. But the district court correctly reasoned that such clarification could equally reflect the agency "formalizing its long-standing practice" of treating such lands as contiguous. Add.11; App.354; R.Doc.63, at 11; *see also* Bureau of Indian Affairs, U.S. Department of the Interior, *Fee-to-Trust Handbook* 4 (2016) (describing "standard procedures used by the Bureau of Indian Affairs" and defining "[c]ontiguous" to "includ[e] parcels that touch at a point"), https://perma.cc/9ZPV-FCPK.

Plaintiffs also wrongly assert that, when conducting its interpretive analysis, the IBIA did not "consider the regulation as being applied in the context of drastically impacting competing governments' boundaries." Br.50. The IBIA specifically referenced the agency's goal of "balanc[ing] the IRA's goals of restoring tribal lands" against "the concerns of local governments," and it explained 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.17-8, at 271. Nor do plaintiffs find purchase in arguing that "vehicular travel" typically does not exist across cornering lands. Br.47. The IBIA has already rejected the proposition that contiguity requires "direct transportation access" across tracts. Add.32 (citation omitted); App.45; R.Doc.17-8, at 272; *cf. Mackay v. Uinta Dev. Co.*, 219 F. 116, 118 (8th Cir. 1914) (holding in the context of checkerboarded land that where two parcels of public lands touch at their corners, individuals who cross between the parcels at those corners do not trespass adjoining private land).

Authoritative Position

Deference requires that the interpretation represent "the agency's 'authoritative' or 'official position'" on the issue. *Kisor*, 588 U.S. at 577.[7] This requirement is easily satisfied. The IBIA possesses "delegated authority to issue final decisions for the [agency]." Add.13; App.356; R.Doc.63, at 13. And the IBIA issued its interpretation as part of an

[7] Plaintiffs reframe this inquiry as whether an agency's interpretation is "authoritative and consistent." Br.52. However, this factor does not consider the "consistency" of the agency's position. *See Kisor*, 588 U.S. at 577. Rather, changes in an agency's interpretation are considered under the "fair and considered judgment" factor, *id.* at 579, which is discussed below.

adjudicatory proceeding. *See Goffney v. Becerra*, 995 F.3d 737, 746 (9th Cir. 2021) (deeming an interpretation issued during an agency adjudication to be authoritative under *Kisor*). The 2023 regulatory amendments further confirm that the IBIA's interpretation reflects the agency's official position on contiguity. Plaintiffs do not argue otherwise. *See* Br.52-53.

Substantive Expertise

The agency's interpretation must "implicate its substantive expertise." *Kisor*, 588 U.S. at 577. Here, "the Regional Director and [the IBIA] routinely evaluate these fee-to-trust applications, so their interpretation is grounded in substantive expertise." Add.13; App.356; R.Doc.63, at 13. Plaintiffs argue that interpreting "contiguity" requires consideration of public-lands and annexation law that falls outside the IBIA's bailiwick. Br.53. But this inquiry focuses not on the agency's *legal* expertise, but rather, on the overlap between the interpretive question at issue and "'the agency's ordinary' duties" and "policy expertise." *Kisor*, 588 U.S. at 578 (citation omitted). Here, the agency is best positioned to determine the criteria to be considered when evaluating a request to take into trust land that is corner-adjacent to a tribal reservation.

Fair And Considered Judgment

Finally, the interpretation must reflect the agency's "fair and considered judgment." *Kisor*, 588 U.S. at 579 (citation omitted). The IBIA's reading checks that box. As the district court noted, the IBIA's interpretation "aligns with standard [agency] practice" and is therefore "not a 'post hoc rationalization.'" Add.13 (citation omitted); App.356; R.Doc.63, at 13. Moreover, the IBIA considered the issue in depth, "analyz[ing] the text as well as the purpose and history of the IRA and its regulations." Add.13; App.356; R.Doc.63, at 13.

Citing the IBIA's decision in *Jefferson County, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187 (2008), plaintiffs contend that other agencies within Interior have "repeatedly recognized the opposite rule" regarding contiguity. Br.47-48, 52. However, neither *Jefferson County* nor the cases it cites establishes that the IBIA's conclusion was not fair and considered. *Jefferson County* expressly declined to resolve the issue of cornering lands. 47 IBIA at 205-206. Admittedly, the opinion references an administrative decision from 1947, which identified past agency adjudications holding that "lands which merely corner each other are not contiguous." *Id.* at 205 (quoting *Mrs. M. H. Wildermuth*, A-27409 (Jan. 30, 1947)). But those adjudications are all over 60 years old, were not decided by the IBIA, and arose in different statutory and regulatory contexts. *See ibid.*

Plaintiffs also argue that the IBIA's decision below created "unfair surprise." Br.54. But as plaintiffs acknowledge elsewhere in their brief, neither the IRA nor agency regulations implementing the statute defined "contiguous" at the time the Regional Director issued her decision, and there was no binding IBIA precedent addressing whether cornering lands qualified as contiguous. Br.46, 48 n.5. The IBIA's resolution of that open question below does not implicate the types of situations where courts have found unfair surprise. *See, e.g.*, *Walker v. BOKF, Nat'l Ass'n*, 30 F.4th 994, 1012 (10th Cir. 2022) (explaining that unfair surprise may result when an agency's interpretation "conflicts" with its prior interpretation or "imposes retroactive liability for long-standing conduct that the agency had not previously addressed"). Plaintiffs' remaining arguments reference earlier contentions that fail for the reasons discussed above. *See* Br.54; *see also* pp. 58-62, *supra*.

### E. The IBIA correctly found that the Regional Director's consideration of 25 C.F.R. 151.10(e) and (f) was sufficient.

Plaintiffs cannot show that the IBIA acted arbitrarily or capriciously when it held that the Regional Director sufficiently considered the criteria in 25 C.F.R. 151.10(e) and (f).

**1.** Section 151.10(e) addresses "the impact on the State and its political subdivisions resulting from the removal of [trust] land from the tax rolls." As the IBIA recounted, the Regional Director estimated based on plaintiffs' comments "how much money [they] would lose in taxes annually" if the Willmus Property were taken into trust. Add.38; App.51; R.Doc.17-8, at 278. However, because those comments failed to "articulate how any specific programs or services could be affected by these tax losses," the Regional Director declined to "speculate" as to the potential impacts of those losses. Add.39-40; App.52-53; R.Doc.17-8, at 279-280.

Plaintiffs argue that affirmance was arbitrary and capricious because the Regional Director did not "evaluat[e] . . . the specific concerns" plaintiffs raised. Br.56. But beyond the amounts of their estimated tax losses, plaintiffs identified no specific concerns. Morrison

County predicted an 8% reduction in tax revenue and "additional expenses" from coordinating law enforcement activities with tribal police; Leigh Township warned of an 8% loss in tax revenue and "a significant impact" on its taxpayers; and Richardson Township merely expressed "oppos[ition]" to the property's removal from tax rolls and alluded to higher "burden[s]" on its taxpayers.[8] App.195-196, 199-200; R.Doc.17-5, at 266, 275, 278-279.

In short, plaintiffs' comments provided no details for the Regional Director to consider regarding the likely impacts of trust conversion. By confirming that the Regional Director appropriately gave no "weight to Plaintiffs' speculative and general assertions," the IBIA did not act arbitrarily or capriciously. Add.16 n.14; App.359 n.14; R.Doc.63, at 16 n.14.[9]

---

[8] Leigh Township also referenced diminished tax revenues for the Onamia School District, which does not lie within Leigh Township. App.195; R.Doc.17-5, at 266.

[9] Plaintiffs wrongly suggest the Regional Director engaged in "speculat[ion]" when she stated that the Band was willing to pay Leigh Township a sum equivalent to three years of assessed property taxes for the parcel, if it is taken into trust. Br.56-57. The Regional Director's decision directly quoted the Band's response to Leigh Township's comment. *See* App.111 & n.37; R.Doc.17-5, at 59. Moreover, the Band's offer played no role in the Regional Director's analysis.

Plaintiffs suggest they provided no additional details because the agency did not specifically request them. Br.55. But nothing prevented plaintiffs from affirmatively providing more information, or from substantiating their assertions with evidence. Moreover, plaintiffs should have known that, under either Section 151.10 or 151.11, the Regional Director would consider the tax "impact[s]" of trust conversion.

**2.** Section 151.10(f) discusses "[j]urisdictional problems and potential conflicts of land use" arising from trust conversion. Plaintiffs' terse challenges to three aspects of the IBIA's review of the Regional Director's Section 151.10(f) analysis are unavailing. First, plaintiffs contend that the Regional Director failed to evaluate Morrison County's concern that no trust or reservation lands lie within the County. Br.57. However, plaintiffs fail to explain how that fact raises any jurisdictional problem or conflict of land use.

Second, plaintiffs complain that the Regional Director "dismissed" Morrison County's concern that it will incur "additional expenses" coordinating law enforcement activities with the Band if trust conversion occurs. Br.57. However, plaintiffs neither acknowledge nor respond to the IBIA's findings that (1) the Regional Director "explicitly considered the County's concern[]"; (2) such expenses likely do not constitute "the kind of 'jurisdictional problem' that falls under § 151.10(f)"; and (3) the record suggests that the property has no "significant law enforcement needs," and thus, any additional expenses would be "minimal or even non-existent." Add.41; App.54; R.Doc.17-8, at 281; *see also* App.112; R.Doc.17-4, at 25.

Third, plaintiffs argue that law enforcement coordination will inevitably give rise to a jurisdictional conflict because Morrison County and the Band have no "intergovernmental law enforcement agreement." Br.57. Again, the Regional Director considered this point. App.112; R.Doc.17-4, at 25. But regardless, any such conflict is speculative given the lack of evidence that "officers have ever been called to the property," the low likelihood they will be called there in the future, and the absence of any reason to believe that, if they are called, a jurisdictional conflict will erupt. Add.41 (noting that the property is vacant, rural, and has no public roads); App.54; R.Doc.17-8, at 281.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

Respectfully submitted,

ADAM R.F. GUSTAFSON
Principal Deputy Assistant Attorney General

ROBERT N. STANDER
Deputy Assistant Attorney General

s/ Jason Lee
JASON LEE
Attorney
Department of Justice
Environment and Natural Resources Division
Appellate Section
P.O. Box 7415
Washington, D.C. 20044
(202) 598-3394

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 32(c) because it contains 12,774 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365. The brief has also been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Version 1.457.235.0 (updated August 18, 2026), and according to the program, it is free of viruses.

s/ Jason Lee
JASON LEE
Attorney

Date: August 21, 2026

## CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2026, I electronically filed the foregoing 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 by the CM/ECF system.

s/ Jason Lee
JASON LEE
Attorney

Date: August 21, 2026