No. 26-1154

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Morrison County, et al.,
Plaintiffs-Appellants,
v.
United States Department of the Interior, et al.,
Defendants-Appellees,

On Appeal from the United States District Court for the District of Minnesota
(Case No. 24-cv-23 (NEB/LIB))

AMICUS CURIAE BRIEF BY MILLE LACS BAND OF OJIBWE IN SUPPORT OF DEFENDANTS-APPELLEES AND SUPPORTING AFFIRMANCE

Beth Baldwin
Eleanor Bohn
Ziontz Chestnut LLP
2101 Fourth Ave., Suite 1230
Seattle, WA 98121
(206) 448-1230
bbaldwin@ziontzchestnut.com
ebohn@ziontzchestnut.com

Counsel for Amicus Curiae Mille Lacs Band of Ojibwe

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Mille Lacs Band ("Band") is a federally recognized Indian tribe and its application to the Department of the Interior to take Band-owned fee land into trust is the subject of this litigation. If this litigation is successful, not only will the subject property not be held in trust for the Band, but the Band may lose the ability to place other fee lands into trust in the future. Thus, the Band's interests are directly implicated by this litigation, because if Appellants prevail, core aspects of the Band's sovereignty will be imperiled.

In two transactions in 1994 and 2001, the Band purchased a parcel of rural and undeveloped land ("the Willmus land") in fee, located within Morrison County ("the County"), Richardson Township, and Leigh Township ("the Townships") (collectively, "Appellants"). Since then, the Band has been using the Willmus land for hunting, gathering and cultural purposes and submitted its application for the Secretary of the Interior to acquire the Willmus land in trust for these same purposes in 2015. In 2017, the Bureau of Indian Affairs ("Bureau" or "BIA") Acting Midwest Regional Director ("Regional Director") approved the application. R.Doc.17-4, at 36-47.[1] Appellants timely appealed this decision to the Interior Board of Indian

[1] Counsel for the Band requested a copy of the Appendix from counsel for Appellees and Appellants. Appellees declined to provide a copy and Appellants did not respond. Thus, all citations are to the District Court record because the Band does not have access to the Appendix.

Appeals ("IBIA"). In 2023, IBIA affirmed the Bureau's decision. R.Doc.17-8, at 261-93. Appellants challenged both the Bureau's 2017 decision and IBIA's 2023 decision in the District Court, raising the same allegations of error that Appellants unsuccessfully brought before IBIA. *See* R.Doc.63, at 3. The District Court affirmed both of Interior's decisions. R.Doc.63, at 18.

Appellants' facial challenge to the constitutionality of Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108 ("Section 5"), Appellants' Br. 13-30, deeply threatens the Band's sovereignty and treaty rights. Section 5 authorizes the Secretary of the Interior to acquire lands in trust for the benefit of Indian tribes or individual Indians and exempts such lands from state and local taxation. The Willmus land was taken into trust to restore the Band's historic land base and provide a protected area for Band members to exercise treaty rights. Having the Willmus land in trust helps preserve the Band's cultural heritage and allows for environmental stewardship and offers access to federal assistance funding available for trust lands, among other benefits. Should Appellants prevail, the Band will be unable to put the Willmus land (or future properties) into trust. Additionally, declaring Section 5 unconstitutional would set a legal precedent inviting challenges to the status of the Band's existing trust lands and to other aspects of federal Indian law and policy, potentially unravelling many legal protections and benefits the Band enjoys.

The Court should affirm the District Court's Order granting summary judgment, upholding IBIA's decision to take the Willmus land into trust and denying the constitutional challenges to Section 5. The Band has filed an accompanying motion for leave to file this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and (3).[2]

BACKGROUND

I. The Willmus land is vacant wildlife habitat that the Band placed into trust to ensure Band members could exercise their treaty-guaranteed rights.

The Band's primary purpose in applying to take the Willmus land into trust was to provide a place for Band members to exercise hunting, fishing and gathering rights guaranteed by the Treaty with the Chippewa, art. 5, Jul. 29, 1837, 7 Stat. 536 ("1837 Treaty"), and confirmed by the U.S. Supreme Court in *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999). *See* R.Doc.17-6, at 9-10 (Band's fee-to-trust application). The Willmus land is an approximately 3,239 acre parcel[3] of vacant and

[2] No portion of this brief was prepared by counsel for a party; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person or entity other than the Mille Lacs Band contributed money intended to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[3] The land is one parcel for purposes of analyzing whether it is contiguous to the Reservation. R.Doc.63, at 14-15. Appellants do not contest that the land is one continuous tract in the Band's possession. *See Parcel*, *Black's Law Dictionary* (12th ed. 2024) (defining "parcel" as "[a] tract of land; esp., a continuous tract or plot of land in one possession, no part of which is separated from the rest by intervening land in another's possession"). While Appellants occasionally refer to the land as 24 parcels, Appellants' Br. i, 4, 44-45, they make no substantive argument as to why the

relatively undisturbed wildlife habitat that touches the Band's 1855 Reservation,[4] and is only a few miles from the Band's government center. R.Doc.17-6, at 1-2, 5. Because the parcel consists of vacant, rural land accessed by a state highway, the County and Townships provide little to no services to the property. R.Doc.17-6, at 13. There has been no need to provide health and human services, environmental services, and refuse management and recycling to the property given the land is uninhabited and undeveloped. R.Doc.17-5, at 53. Because no development is planned, the land has not been platted, so the County has not provided zoning services other than issuing a general zoning classification. *Id*.

Existing trust land within the Reservation is insufficient for exercising the Band's treaty rights. R.Doc.17-6, at 10-11. But leaving the Willmus land in fee status could prevent Band members' use of the land for this purpose because Mille Lacs County, which is adjacent to Morrison County and contains the Band's 1855 Reservation, has taken the position that all State hunting laws and regulations apply

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land should be considered as separate parcels for the purposes of the contiguity analysis and have thus forfeited this argument on appeal. *Karsjens v. Harpstead*, 74 F.4th 561, 568 n.3 (8th Cir. 2023) ("A passing reference in an opening brief will not suffice to preserve an issue for appeal.").

[4] The Band's Reservation has not been disestablished, contrary to Appellants' casual references, Appellants' Br. i, 3, 11, and the status of the Reservation is irrelevant to the claims raised. *See* R.Doc.63, at 9 n.8 (explaining that "Plaintiffs' argument that the Band's reservation has been disestablished does not affect the contiguous analysis because an Indian reservation, as used in 25 C.F.R. Section 151, is defined as" including "the former reservation of the tribe" if "a reservation has been disestablished" (quoting 25 C.F.R. § 151.2)).

to Band members on Band-owned fee lands.[5] *Id.* at 10; R.Doc.17-4, at 377. This purpose and need for the Willmus land to be placed into trust is evident throughout the record below, was considered by IBIA in its decision affirming the Bureau's decision and is not disputed by Appellants. *See* R.Doc.17-8, at 275-278.

II. The Band offered financial assistance to offset property tax impacts, which will be *de minimis*.

While the fee-to-trust application was pending before the Bureau, the Band met with Leigh Township officials and offered to offset any potential tax revenue loss from placing the Willmus land into trust, by paying the equivalent of three years of assessed taxes. R.Doc.17-4, at 388-389; R.Doc.17-5, at 452-453. The Township responded that it appreciated the Band's offer of $10,000 as a "neighborly gesture," but it was seeking something "of a much higher value," such as a "Town Hall" or a "Bridge Replacement" funded by the Band. R.Doc.17-5, at 41. Obviously, such projects would cost millions of dollars and are not realistic expectations by Leigh Township.

Regardless, what Appellants fail to address in their briefing, *see* Appellants' Br. 5, 56, is that removing the Willmus land from the tax rolls will not, by itself,

[5] In ruling in the Band's favor in its 1837 Treaty rights case, this Court held that the State of Minnesota could only regulate the exercise of the Band's treaty rights in limited circumstances which do not involve the title status of the land where such rights are exercised. *Mille Lacs Band v. Minnesota*, 861 F. Supp. 784, 838-39 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999).

result in any tax loss to the County or Townships. Appellants set an annual levy rate by apportioning their revenue needs across all taxable, assessed property within each taxing jurisdiction. R.Doc.17-4, at 383-85. Removing the Willmus property from the tax rolls simply means that the same tax revenue will be collected from all other assessed property in Appellants' taxing jurisdictions. *Id.* Appellants did not provide any information about purported impacts to their respective levy rate, but the Band's calculations suggested that the impact to Leigh Township would be an increase of $20 to $40 in property tax per household per year; impacts to Richardson Township and Morrison County would likely be even less. *Id*. Appellants have not disputed these facts. *See* R.Doc.17-8, at 278.

ARGUMENT

I. Section 5 of the IRA, 25 U.S.C. § 5108, is a constitutional exercise of Congressional power.

Since its passage in 1934, the Indian Reorganization Act has provided a process for the Secretary of the Interior to take land into trust on behalf of tribes. 25 U.S.C. § 5108. More than ninety years later, Appellants now allege Congress never had the authority to pass Section 5 in the first place. But under binding Supreme Court and Eighth Circuit precedent, Section 5 falls within Congress's enumerated power under the Indian Commerce Clause and permissibly delegates authority. Section 5 is, and always has been, constitutional. The Band supports the Appellees' thorough briefing on Congress's constitutional authority to enact Section 5, Appellees' Br. 19-34, and supplements those arguments here.

A. The Indian Commerce Clause provides authority for Congress to pass Section 5, which directly regulates commerce in Tribal lands.

While multiple constitutional sources confer Congress with "well established and broad" authority to legislate regarding Indian affairs, there is no need to look beyond the Indian Commerce Clause for the authority to enact Section 5. *See Haaland v. Brackeen*, 599 U.S. 255, 275 (2023). Appellants fail to grasp that one of Section 5's key purposes is to regulate commerce in Tribal lands by providing that "[t]itle to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 5108. Once land is placed in trust, it cannot be alienated without federal approval. *See*, *e.g.*, 25 U.S.C. § 5102. Preventing sale or alienation, *i.e.*, trade, of Indian land clearly relates to "selling, buying, and bartering," or "exchange of one thing for another." *Accord Brackeen*, 599 U.S. at 351 (Thomas, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) and 1 S. Johnson, A Dictionary of the English Language 361 (4th rev. ed. 1773)). Even under a narrow textualist interpretation, Section 5 falls within Congress' enumerated power to "regulate Commerce . . . with the Indian Tribes." *See* U.S. Const. art. I, § 8, cl. 3.

This is even more clear under the Court's "more modern, expansive precedents," which bring "economic activity" within the Commerce Clause's purview. *Brackeen*, 599 U.S. at 364 (Thomas, J., dissenting). "The IRA 'was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains.'" *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1012 (8th Cir. 2010) (quoting *Cohen's Handbook of Federal Indian Law* § 1.05 (2005 ed.)). The reasons for this are plain: federal allotment policy was "disastrous for Indians." *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 669 (7th Cir. 2020). Due to allotment policy, "two-thirds of allotted land passed into non-Indian ownership." *Id.* at 670. By the late 1920s, the allotment policy was recognized as a failure. *Id.* at 670–71. Thus, "[t]he purpose of the [IRA] was 'to rehabilitate the Indian's *economic* life . . . .'" *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir. 1978) (emphasis added) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)).

Furthermore, because fee-patented lands conveyed to Indians were subsequently lost not only through willing sales but also "enforcement of tax liens," *Oneida Nation*, 968 F.3d at 670, Section 5's prohibition on local taxation of trust lands also prevents such lands from being lost in the future. *Accord Chase*, 573 F.2d at 1016 ("[I]mmunity from property taxes was an important means of halting further loss of Indian land."). Regulating commerce by prohibiting taxation falls within

Congress' Indian Commerce Clause authority. *See Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) (holding two Acts exempting certain lands held by Indians, with restrictions on alienation, from state taxation were "valid exercises of Congressional power").

The District Court did not "ignore[] *Brackeen*" or exhibit "overreliance on *Cotton* [*Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)]," Appellants' Br. 16, by recognizing it was bound by precedent dictating that "Congress's power to legislate with respect to Indians is well established and broad." R.Doc.63, at 18 (quoting *Brackeen*, 599 U.S. at 275). Both *Brackeen* and *Cotton Petroleum* are binding Supreme Court precedents holding that the Indian Commerce Clause provides authority to regulate "trade" and "certain 'Indian affairs.'" *Brackeen*, 599 U.S. 273 (quoting *Cotton Petroleum*, 490 U.S. at 192). Appellants rely on dissents and concurrences, Appellants' Br. 15, but point to no binding law to the contrary. Section 5 falls squarely within Congress's enumerated power under the Indian Commerce Clause.

B. Congress permissibly delegated authority under Section 5 of the IRA.

As Appellants acknowledge, Appellants' Br. 19, binding Eighth Circuit precedent holds that Section 5 of the IRA is a constitutionally permissible delegation of power. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 796-97 (8th Cir. 2005) ("*South Dakota II*") ("the language and the context" of Section 5 "sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust").[6] Specifically, "an intelligible principle exists in the statutory phrase, 'for the purpose of providing land for Indians,'" when considering the "statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy." *Id.* at 799. Because *South Dakota II* addresses the same nondelegation claim that Appellants raise here, Appellants cannot succeed.

Even were the nondelegation issue to be taken up on rehearing en banc or appeal, there is no reason to reconsider *South Dakota II*'s holding. Nondelegation law has not changed since *South Dakota II*. Just last year, in *FCC v. Consumers' Research*, 606 U.S. 656 (2025), the Supreme Court confirmed the longstanding principles of the nondelegation doctrine that the *South Dakota II* court relied upon. In *Consumers' Research*, the Court explained that a permissible delegation of authority must provide an "intelligible principle" that makes "clear both 'the general policy' that the agency must pursue and 'the boundaries of [its] delegated authority.'" 606 U.S. at 673 (alteration in original) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). This Court followed the exact same standard. *South Dakota II*, 423 F.3d at 796 (intelligible principle exists "if Congress clearly delineates the

[6] *South Dakota II* analyzed Section 5 as 25 U.S.C. § 465. It has since been recodified at 25 U.S.C. § 5108.

general policy . . . and the boundaries of this delegated authority" (quoting *Am. Power & Light Co.*, 329 U.S. at 105)).

Consumers' Research also reaffirmed that in analyzing whether there is an intelligible principle, courts should "not examine . . . statutory phrases in isolation but instead look[] to the broader statutory contexts, which inform[] their interpretation and suppl[y] the content necessary to satisfy the intelligible-principle test." 606 U.S. at 684. Contrary to Appellants' assertion, Appellants' Br. 23, *South Dakota II* did just that. The Court examined Section 5's language (including the phrase, "for the purpose of providing land for Indians") and other sections of the IRA ("six sections addressed to land policy") in addition to "the purposes evident in the whole of the IRA and its legislative history." *South Dakota II*, 423 F.3d at 797-98. The Court interpreted statutory language by "look[ing] to the broader statutory contexts" just as *Consumers' Research* instructs. 606 U.S. at 684.

As of today, the Supreme Court has still "struck down statutes on delegation grounds on only two occasions." *South Dakota II*, 423 F.3d at 795; *see also Consumers' Research*, 606 U.S. at 674. Appellants argue that *Consumers' Research* "reaffirmed" the Court's two prior decisions finding nondelegation violations, and that those cases provide a basis to hold Section 5 unconstitutional. Appellants' Br. 20-22 (citing *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)). But the Eighth

Circuit already considered those cases in depth and distinguished them. *South Dakota II*, 423 F.3d at 795, 797 (holding that "unlike the powers conferred in *Panama Refining* and *Schechter Poultry*" Section 5 "does not involve granting to the executive authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy").

Further, every other circuit to consider a nondelegation challenge to Section 5 has rejected it, including the First, Tenth, and D.C. Circuits. *See Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009); *United States v. Roberts,* 185 F.3d 1125, 1136-37 (10th Cir. 1999) (reaffirmed by *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005)); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008); *see also Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 698 (9th Cir. 1997) (dicta stating that the Secretary's power to take land into trust "is a valid delegation"); *Vill. of Hobart v. U.S. Dep't of Interior*, No. 23-C-1511, 2025 WL 3459586 *14 (E.D. Wis. Dec. 2, 2025) (rejecting nondelegation challenge and noting "all other circuits that have addressed it have concluded [Section 5] does not" violate nondelegation doctrine). Other circuits upholding Section 5 have explicitly relied on and endorsed *South Dakota II*'s reasoning. *See, e.g., Carcieri*, 497 F.3d at 42 ("We find the reasoning of the Eighth Circuit's second *South Dakota* opinion persuasive."); *Mich. Gambling Opposition*, 525 F.3d at 31 (quoting *South Dakota II*'s articulation of the intelligible principle in Section 5). That reasoning stands today. There is no reason to revisit this Court's holding that Congress permissibly delegated authority to take land into trust under Section 5.

C. Appellants' feared impacts on states and their subdivisions from fee-to-trust acquisitions are unrealistic and do not render Section 5 unconstitutional.

Appellants' parade of horribles attributable to fee-to-trust acquisitions relies on a worn-out trope: tribes are so wealthy from gaming income that it is unfair to allow them to repurchase land in a way that "directly strips States and local governments of their authority." Appellants' Br. 18.[7] This stereotype fails to provide any justification for holding Section 5 unconstitutional. *See Bd. of Cnty. Comm'rs*, 318 U.S. at 718 ("the fact that [two statutes] with-draw" certain Indian "lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts"); *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 570 (2d Cir. 2016) ("[P]rinciples of state sovereignty do not impair the federal government's power under the IRA to

[7] The Band questions whether Appellants, as two townships and a county, have standing to raise any arguments on behalf of any state, especially when the State of Minnesota did not object to or challenge the fee-to-trust acquisition below. *See* R.Doc.17-8, at 264.

acquire land on behalf of the Tribe even if . . . [the state's] governmental power over that land is diminished.").

Appellants also overstate the impacts by arguing that fee-to-trust acquisitions will lead to "remov[ing] all land from a State" or the "systematic erosion of states and local governments." Appellants' Br. 17-18. First, tribes do not have unlimited funds or ability to acquire lands to take into trust. Unlike state and local governments, tribes generally may not tax nontribal members or their property, and have limited ability to generate income through taxes on tribal members. *See*, *e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 809-11 (2014) (Sotomayor, J., concurring); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 771-72 (2004) ("Tribal governments have extreme difficulty in raising revenue; they have virtually no tax base. . . . Therefore, they, even more than the states, need to develop creative ways to generate revenue.") (citation modified). Many tribes, including the Band, must use income from economic development enterprises (including but not limited to gaming) to fund basic tribal government services. *Accord N. Metro Harness Initiative LLC v. Beattie,* No. 24-CV-1369 (PJS/LIB), 2025 WL 776118, at *6 (D. Minn. Mar. 11, 2025) (in dismissing case against three tribal gaming operations, including the Band's corporate arm, finding that "gaming provides much of the income received by the Tribes. That income is crucial to the Tribes' economic selfsufficiency and a critical source of jobs for Tribal members."). Not all tribes have gaming operations, or gaming operations that generate significant revenue. *See Bay Mills*, 572 U.S. at 809-10 (Sotomayor, J., concurring); Fletcher, 80 N.D. L. Rev. at 782-784. Tribes thus do not have vast or unlimited revenues to use for land acquisition. Tribes also cannot acquire any land they wish. They must purchase or receive the land from willing landowners, as neither tribes nor the federal government can acquire trust lands through condemnation. 25 U.S.C. § 5108 (conferring authority to acquire lands "through purchase, relinquishment, gift, exchange, or assignment").

History shows that land acquisitions have been slow and modest. During the Allotment Era, "Indian land holdings declined from 138 million acres in 1887 to 48 million acres in 1934, when the IRA was enacted." *Cohen's Handbook of Federal Indian Law* § 15.07. That is a loss of 90 million acres over less than 50 years. Today, BIA estimates that it holds approximately 56 million acres of land in trust for Tribes. Off. of Trust Servs., Bureau of Indian Affs., *FY 2026 Mid-Year Accomplishment Report* 8 (2026). Thus, in the 92 years since the IRA's passage, tribes have regained just eight million acres of trust land—and some of those lands were acquired by direct Act of Congress, not Section 5's administrative fee-to-trust process. Moreover, nationwide sums of Tribal trust land provide little insight into the local impacts of the Band's land acquisitions. The Band has very modest land holdings. Excluding the Willmus land, the United States currently holds only 3,600 acres in trust for the Band, which is far less than the 61,000 acres originally set aside as the Band's Reservation. *Mille Lacs Band of Ojibwe v. Madore*, 128 F.4th 929, 934, 948 (8th Cir. 2025).

Further, putting land into trust does not result in a "wholesale removal of territory from the State's sovereign domain." Appellants' Br. 17. Jurisdictional boundaries have long overlapped in Indian country. As the United States explained, Appellees' Br. 28-30, when land is put into trust, Minnesota retains criminal jurisdiction under 18 U.S.C. § 1162(a), and certain aspects of civil regulatory jurisdiction, especially over non-Indians. *See* Appellees' Br. 28-30; *White Mountain Apache v. Bracker*, 448 U.S. 136, 145 (1980) (describing balancing test to determine whether the exercise of state regulatory jurisdiction is preempted by federal law or will infringe on tribal self-government). Conversely, Tribes have limits on their jurisdiction over non-Indians. *See Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (tribes have regulatory jurisdiction over non-Indians only "to the extent 'necessary to protect tribal self-government or to control internal relations'" (quoting *Montana v. United States*, 450 U.S. 544, 564-65 (1981))).

Taking the Willmus land into trust means the State shares its jurisdiction with the Band; it does not eliminate State jurisdiction. Appellants are aware of this, based on concerns they have raised about "expenses to coordinate . . . law enforcement with the Band." Appellants' Br. 57. In fact, sharing and coordinating jurisdiction with the Band could even reduce costs for Morrison County, as the Band would supply law enforcement services over Band members.[8] Any reduction in regulatory authority is also not likely to impact Appellants because the Willmus land is vacant, rural land accessed by a state highway, for which Appellants provide little or no services. R.Doc.17-5, at 53-54.[9]

II. BIA's government-to-government relationship with the Band did not bias or predetermine the Regional Director's decision.

Nothing in the language of the Memorandum of Understanding ("MOU"), communications between BIA and the Band, or the Regional Director's decision demonstrates bias in violation of the Administrative Procedure Act ("APA")'s arbitrary or capricious standard. 5 U.S.C. § 706(2)(a).[10]

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[8] The Band indicated its willingness to enter into an agreement to coordinate law enforcement with Morrison County. R.Doc.17-6, at 14. The Band already patrols the Willmus land to ensure Band members on the property comply with the Band's natural resource regulations, and those patrols will continue. R.Doc.17-5, at 61.

[9] Additionally, whether the land is in fee or trust status, states cannot regulate off-reservation treaty rights, with limited exceptions. *Mille Lacs Band,* 861 F. Supp. at 838-39. Thus, Band members' exercise of their 1837 Treaty rights to hunt, fish, and gather on off-reservation land was already subject to Band, not State regulation, prior to taking the land into trust.

[10] Because Appellants do not discuss their claim below that bias also resulted in a due process violation, that claim is forfeited and not addressed here. *See United States v. Owen*, 854 F.3d 536, 541 n.5 (8th Cir. 2017) (issues "not raise[d] . . . in the opening brief " are "forfeited . . . on appeal").

The MOU does exactly what it says: "facilitat[e] the expeditious processing of fee-to-trust applications." R.Doc.17-9, at 74. Tribes have long struggled with delays in processing land-to-trust applications. *See* Land Acquisitions, 88 Fed. Reg. 86222 at 86223 (2023) (as of 2023, "the average length of time to receive a final fee-to-trust decision [was] approximately 985 days" and there was a "backlog" of "941 cases pending approval . . . the majority of which are non-controversial, on-reservation acquisitions"). To address the long gap between an application and a decision, the Band and other tribes agreed to contribute funding for additional BIA staff. Nothing in the agreement predetermines approval of applications. The collaborative process the MOU describes to process applications, Appellants' Br. 32, is not tilted towards any outcome, only ensuring a complete application. It is quite similar to the process BIA now uses to process all fee-to-trust applications even in the absence of an MOU. *Compare* R.Doc.17-9, at 77-78 (Division employees "assur[e] that each request for fee-to-trust acquisition shall fulfill completely all of the administrative requirements" by "[s]erving as liaison and maintaining communication" with tribes, noting "deficiencies in any current application" and "providing technical assistance . . . as requested") *with* Off. of Trust Servs., Bureau of Indian Affs., *Fee-to-Trust Acquisitions and Reservation Proclamations Handbook*, 52 IAM 12-H 4-5 (2025) (describing "how the Department and applicants work together to develop a complete acquisition package"). Tribes very well may have more fee-to-trust acquisitions approved under the MOU than without it, but that is because the MOU leads to more applications being processed to a final decision, not because the MOU dictates approval. Land simply cannot be taken into trust under 25 C.F.R. Part 151 without a decision from BIA.

The record communications between the Band and BIA show nothing more than a normal relationship between a tribe and BIA, and between an applicant and an agency. BIA is the main federal agency that tribes interface with for government affairs. Tribes, including the Band, work with the Bureau every day on matters ranging from education, social services, and economic development programs to natural resources management, rights-of-way, road maintenance, law enforcement, and much more. *See, e.g.,* Bureau of Indian Affs., *What We Provide*, https://www.bia.gov/programs-services (last visited Aug. 27, 2026). BIA is particularly closely involved in issues relating to tribal land and real property interests due to the federal government's trust relationship with tribes. *See Brackeen*, 599 U.S. at 275 ("[T]he Federal Government has 'charged itself with moral obligations of the highest responsibility and trust' toward Indian tribes." (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011))). Thus, regular communication and cooperation between tribes and the Bureau is the norm.

Appellants suggest that emails between BIA and the Band demonstrate "impermissible conflicts of interest," Appellants' Br. 42, but point only to what the

District Court correctly classified as "routine communications." R.Doc.63, at 7 n.7. These communications show that BIA worked with the Band to ensure the application was complete. For example, in one email chain Appellant cites, Appellants' Br. 42, the Bureau 1) provided a status update on the timing of the Willmus application and another application, and 2) clarified the required documentation to prove a house is vacant for fee-to-trust applications. R. Doc. 17-5, at 31-33. In another communication, the Band thanked a BIA Environmental Protection Specialist for "expediting this file," as part of a discussion about how to process an application under a categorical exclusion, which streamlines compliance with certain Endangered Species Act requirements. Appellants' Br. 42; R.Doc.17-5, at 316-17. If anything, these communications show cooperative, engaged conversations about completing application requirements. Nothing indicates BIA was rubberstamping the application, especially given it took almost a year after the "expediting" email for the Bureau to issue its decision. R.Doc.17-5, at 316-17 (email dated March 17, 2016); R.Doc. 17-4, at 36 (Notice of Decision dated March 2, 2017). Even if communications between the Band and BIA staff had indicated any sort of collusion, that would not demonstrate bias by the Regional Director, who made the ultimate decision and was not a party to any of these communications. R.Doc.17-4, at 46.

III. The District Court appropriately deferred to IBIA's determination that the Willmus land is contiguous to the Reservation.

The Willmus land touches the Band's Reservation at a corner, which no party contests. IBIA affirmed the Regional Director's determination that touching at a corner makes land "contiguous" under 25 C.F.R. § 151.10. R.Doc.17-8, at 272. Because the term "contiguous" is ambiguous and IBIA's decision was reasonable and authoritative, the District Court appropriately deferred to IBIA's interpretation of the term. R.Doc.63, at 9-14; *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019) (explaining when courts defer to agency interpretations of ambiguous regulations).

As the District Court noted, the ordinary meaning of "contiguous" at the time the regulation was enacted demonstrates the ambiguity: some definitions included touching at a point (Black's Law Dictionary and Merriam-Webster), while others did not (American Heritage College Dictionary and Oxford English Dictionary). R.Doc.63, at 9-10. Before IBIA, the Band's brief included a detailed discussion of why "contiguous" may have different meanings in different contexts. R.Doc.17-9, at 458-464. Even the case that Appellants rely on, *Jefferson Cnty.*, 47 IBIA 187 (2008) demonstrates ambiguity. There, IBIA called into question—without resolving—whether cornering lands are contiguous. *Id.* at 205-06. Yet, BIA's Fee-to-Trust Handbook at the time defined "contiguous" as including "parcels that touch at a point." R.Doc.17-4, at 38 n.3 (quoting U.S. Dep't of the Interior, Bureau of Indian Affs., *Acquisition of Title to Land Held in Fee or Restricted Fee Status* 4

(2016)). The regulatory history and Bureau practices thus support rather than resolve the ambiguity.

Given the term's ambiguity, the District Court then carefully walked through each of the four *Kisor* requirements to determine that deference was warranted. R.Doc.63, at 12-13. The Band agrees with the District Court's analysis and adds only one additional point. Interpreting "contiguous" to include lands that touch at a corner is reasonable and does not undermine 25 C.F.R. § 151.11's purpose of "requiring increased scrutiny of off-reservation acquisitions" as Appellants suggest. Appellants' Br. 51-52. As Appellees explain, there would be "little practical effect" in applying off-reservation criteria to cornering lands. Appellees' Br. 60. That is particularly true of the Willmus land, where several of the criteria were already met or do not apply. Section 151.11(c) requires a business plan, which is not needed because the land is not being used for business purposes. Section 151.11(d) requires soliciting comments from state and local governments, which BIA already did. R.Doc.17-5, at 270-74. Then, Section 151.11(b) requires the Regional Director to "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" as the distance between the tribe's reservation and the land to be acquired increases, and to give greater weight to the concerns raised by state and local governments under § 151.11(d). As IBIA recognized, the distance between the Band's Reservation and the Willmus land is zero, so there can be no increased scrutiny. R. Doc 17-8, at 271 ("there is no distance between cornering lands and the reservation" so "the agency would not be required to give 'greater scrutiny'"); *see also Carcieri*, 497 F.3d at 44 n.21 (determining that whether a parcel taken into trust that was "separated from [a reservation] by a town road" was contiguous would be "insignificant to the application of either section [151.10 or 151.11] in this case, as the sections differ only slightly"). While any error would have been insignificant, the District Court correctly deferred to IBIA's interpretation that the Willmus land is contiguous and applied the on-reservation criteria.

IV. IBIA and the Regional Director considered all the on-reservation criteria, 25 C.F.R. § 151.10, and reached a reasoned decision.

The Regional Director and IBIA considered and applied each criterion of § 151.10 in determining to take the Willmus land into trust. Appellants' argument boils down to simple disagreement with BIA's decision, but on review under the APA, the Court "do[es] not substitute [its] judgment for that of the agency." *South Dakota II*, 423 F.3d at 799. Instead, the Court "consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)). The Band supports Appellees' thorough briefing explaining why the Regional Director's application of the criteria was not arbitrary or capricious. *See* Appellees' Br. 66-69. Appellants' real issue with

BIA's evaluation of the criteria is that "conclusions will never weigh against the tribe," or in other words, that Appellants lost. Appellants' Br. 58. Appellants thus fail to provide any basis for finding the Regional Director and IBIA's review of the § 151.10 criteria arbitrary and capricious.

CONCLUSION

The Band respectfully requests that the Court affirm the District Court's grant of summary judgment and uphold IBIA's decision approving the acquisition of the Willmus land into trust.

Dated: September 17, 2026

Respectfully submitted,

/s Beth Baldwin
Beth Baldwin (WA #46018)
Eleanor Bohn (WA #63894)
Ziontz Chestnut Law Firm
2102 4th Avenue, Suite 1230
Seattle WA, 98121
(206) 448-1230
bbaldwin@ziontzchestnut.com

Attorneys for Amicus Curiae Mille Lacs Band of Ojibwe

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Amicus Curiae brief complies with the length and type-size limitations under Federal Rules of Appellate Procedure 29(a)(4), 29(a)(5) and 32(a)(5) through (a)(7). The Brief contains 5,860 words set in Times New Roman, a proportionally spaced font including serifs, and the type-size is 14-point. The undersigned certifies that the word-count stated above was generated by the word-count function of Microsoft Word for Office 365 as specifically applied to include all text, inclusive of headings and footnotes, but exclusive of the cover page/caption, tables of contents and authorities, signature block and certificates of compliance and service.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this brief have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

Dated: September 17, 2026

s/ Beth Baldwin
Beth Baldwin

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 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 parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Beth Baldwin
Beth Baldwin