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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

VILLAGE OF HOBART,

Appellant,

**VILLAGE OF HOBART'S COMBINED
REPLY BRIEF TO APPELLEE'S
BRIEF AND ONEIDA TRIBE OF
INDIANS' BRIEF**

MIDWEST REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,

Docket No. IBIA 10-091, 10-092 & 10-107

Appellee,

and

ONEIDA TRIBE OF INDIANS
OF WISCONSIN,

Intervening Party.

I. INTRODUCTION

Faced with the inescapable evidence that the Tribe was not under federal jurisdiction in 1934, both the Tribe and the Regional Director (RD) attempt to misdirect the Board's attention to the issue of whether or not the Tribe had a reservation and if so, whether or not it was disestablished.¹ Although the reservation was disestablished, that is not a finding that this Board needs to make. What the Supreme Court's ruling in *Carciari* requires, is for the Board to decide if this Tribe was recognized and under federal jurisdiction in 1934. These are entirely different questions than the one regarding reservation status. Although the fact the Tribe's reservation was disestablished sheds some light on the recognition and federal jurisdiction questions and provides a backdrop for that analysis, such a finding is simply not necessary to reach the conclusion that the Tribe was not recognized nor under federal jurisdiction in 1934 and therefore the RD's decision must be vacated.

Even if the Tribe was recognized and under federal jurisdiction in 1934, which it clearly was not, the RD abused her discretion in applying the criteria outlined in 25 C.F.R. § 151.10, and fundamental bias was injected into the decisions due to a side agreement between the Tribe and the Midwest Regional Office. If the strong evidence of bias were not enough, the RD completely failed to consider numerous jurisdictional conflicts, completely failed to consider the cumulative tax impact, and further abused her discretion in deciding that the Tribe had a need and purpose

¹ The Village does not concede that the Tribe had anything other than a temporary reservation designed to provide land to two groups of people known as the Christian Party and Orchard Party. The Tribe itself has no treaty regarding the land in question. Additionally, pursuant to the Removal Act, the Treaty of Buffalo Creek and other treaties, a true federal reservation was not created or to the extent one arguably was, the land was ceded. For the sake of simplicity, the Village's brief will refer to a reservation, despite the lack of the reservation's true existence. The absence of federal jurisdiction over the Tribe in 1934 is in itself dispositive.

A finding that the reservation was disestablished would require vacating the RD's decision to accept the land into trust. However, a finding that the reservation was not disestablished would also result in the RD's decision being vacated because it is clear that the Tribe was not under federal jurisdiction in 1934, regardless of any possible remnants of a reservation.

for the land, had submitted information evidencing what services it anticipated from the BIA, and had complied with all of the environmental requirements. Based on these failures, the IBIA must vacate the decisions.

II. THE TRIBE WAS NOT UNDER FEDERAL JURISDICTION

A. IT HAS ALREADY BEEN DETERMINED THAT THE TRIBE WAS NOT UNDER FEDERAL JURISDICTION IN 1934.

The jobs of attorneys and judges, in interpreting a statute, would be much easier if they had the ability to turn back the hands of time, to the moment in history when the statute was drafted, to ask the person credited with its creation, what his conclusion would be regarding its application to a certain set of facts. Incredibly, in this case, we have the ability to do just that. Who better to determine if this Tribe was "under federal jurisdiction," than Commissioner John Collier, the man most involved in the creation of the IRA. He is the very person who included the phrase "under federal jurisdiction" in §479 of the Act, which is at the center of the *Carciari* decision.

So what did Commissioner Collier have to say, back in 1934, about whether or not this Tribe was "under federal jurisdiction?" To describe the Tribe's status, Commissioner Collier used the exact same phrase of, "under federal jurisdiction" found in the IRA. He confirmed that the Oneida Tribe in Wisconsin was "**not in any way real way under federal jurisdiction,**" in a February 26, 1934 correspondence to the Secretary of Interior,²

If that is not enough, less than three months before the enactment of the IRA, the Secretary of the Interior stated "**it is reasoned that these Indians [the Oneidas in Wisconsin]**

² Memo dated February 26, 1934 from Commissioner Collier to Secretary Ickes. Village's Appendix, Exh. 23.

would welcome federal supervision and guidance of their affairs."³ In other words, they did not have it in 1934 according to the then acting Secretary of Interior.

If for some reason the 1934 Commissioner's and Secretary's conclusions are not enough, we can look to what their predecessors decided. On March 3, 1927, Commissioner of Indian Affairs Charles H. Burke stated that "the Indians [Oneida Indians] generally and individually..." were "citizens **released from government supervision.**"⁴ A few years later, the Commissioner, in his annual report of Indian Affairs, summarized the federal government's relationship with the Oneida Indians as follows: "The **Oneidas have severed their relationship with the agency** with the exception of annuity payments."⁵

The record is replete with additional confirmation the Tribe was not under federal jurisdiction in the early 1900s. In 1909, the federal court weighed in on the issue. In analyzing the status of this Tribe the District Court for the Eastern District of Wisconsin held "[t]he **jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states.**"⁶

The 1912 annual report of the Department of Interior, stated "the Oneida reservation has been divided into two townships with a full set of officers in each, and there is **no longer any need for agency employees....**" The annual report goes on to state that "**the maintenance of order now devolves upon the township and county officers,** and require only the cooperation of this Office."⁷

The De Pere Journal reported, on January 8, 1931, that the federal government refused a request for \$5,000 in aid to meet emergency needs of the Oneidas and that the government

³ March 13, 1934 correspondence from Secretary Ickes to Mr. Watkins. Village's Appendix, Exh. 24.

⁴ House Congressional Record, p.5877, March 3, 1927. Village's Appendix, Exh. 13.

⁵ Report of Commissioner of Indian Affairs, June 30, 1929. Village's Appendix, Exh. 14.

⁶ *U.S. v. Hall*, 171 F. 214, 218 (1909)

⁷ 1912 Annual Report of Department of Interior. Village's Appendix, Exh. 10.

denied that request because "the Oneidas are no longer government charges and therefore cannot be aided through the regular channels."⁸

The United States Supreme Court, in *Carcieri*, has unequivocally stated that for a Tribe to utilize the IRA, to have land placed into trust, there must first be a determination that the Tribe was "under federal jurisdiction" in 1934. If anyone was able to accurately answer that question, shortly before and as of 1934, it would have been the person most involved in the creation of the IRA, the then acting Commissioners of Indian Affairs, the then acting Secretaries of the Interior, and a federal court judge rendering a contemporaneous decision. All of these excerpts, from the historical record, deal precisely with the question before the Board. The Board should not accept the Tribe's attempt to direct attention away from the "federal jurisdiction" issue. Similarly, the Board should not tolerate the Tribe's attempt to rewrite history. The *Carcieri* question has already been answered. The Tribe was not under federal jurisdiction in 1934.

B. EVEN IF AN EXTREMELY SMALL FRACTION OF THE RESERVATION WAS IN TRUST OR THE FEDERAL GOVERNMENT HAD SOME LIMITED CONTACT WITH THE TRIBE, IN 1934, THE TRIBE WAS STILL NOT UNDER FEDERAL JURISDICTION.

First, the Tribe erroneously attempts to convince the Board that the Village, and no one else, has come up with the crazy notion that the reservation was allotted and therefore disestablished. The Tribe's position completely ignores the historical record. As previously indicated, the Commissioner of Indian Affairs, not the Village, stated in 1891 that the Oneida reservation consisted of "65,540 acres, allotted in severalty by Special Agent Lamb, **which allotment was completed** a little more than a year ago."⁹ In a November 19, 1931 correspondence from Commissioner of Indian Affairs, C. J. Rhodes, he, not the Village,

⁸ De Pere Journal Article, January 8, 1831. Village's Appendix, Exh. 17.

⁹ 1891 Annual Report of Commissioner of Indian Affairs. Village's Appendix, Exh. 4. The Report also notes 85 acres still held for future individual allotments, as needed, which no reservation of land for the Tribe referenced.

indicated that "the Oneida **reservation has been broken up....**"¹⁰ In a document entitled "Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated June 24, 1933, which was not authored by the Village, it was stated that "**the entire reservation was allotted**, so that no surplus lands were left..."¹¹ On October 26, 1933, the superintendent of the Keshena Indian Agency, not the Village, wrote to the Commissioner of Indian Affairs in Washington, D.C. and referred to the area as the "**former Oneida reservation.**"¹² In 1931, Commissioner Rhodes discusses the area he states "**was formerly the Oneida Reservation.**"¹³

The 1912 annual report of the Department of Interior stated "the **Oneida reservation has been divided into two townships** with a full set of officers in each, and there is no longer any need for agency employees...." The annual report goes on to state that "the maintenance of order now devolves upon the township and county officers, and require only the cooperation of this Office."¹⁴

The fact governmental buildings, used to aid the Oneidas, were sold, is extremely significant. Specifically, deeds show that the Oneida school was sold to Murphy Land & Investment Company because "the operation and maintenance of the said school as a governmental institution has been discontinued and no part of the property is longer needed for Indian administrative purposes..."¹⁵

Additionally, a federal court weighing in at the time ruled as follows:

Therefore, there is no escape from the proposition that the government, in passing and applying the Dawes Act, but conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, **this resulted in a**

¹⁰ C.J. Rhodes letter to Chauncy Doxtator, November 19, 1931. Village's Appendix, Exh. 15.

¹¹ Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin, June 24, 1933. Village's Appendix, Exh. 18.

¹² Letter to Commissioner of Indian Affairs, October 26, 1933. Village's Appendix, Exh. 20.

¹³ Village's Appendix, Exh. 16.

¹⁴ 1912 Annual Report of Department of Interior. Village's Appendix, Exh. 10.

¹⁵ Warranty Deed, October 2, 1924, United States of America to Murphy Land & Investment Company. Village's Appendix, Exh. 11.

discontinuance of the reservation, and a recognition of the power of the state to incorporate the land in the towns in question.¹⁶

On February 26, 1934, Commissioner Collier stated that the Oneidas were allotted and through fee patenting and other allotment procedures they **“lost all of their lands.”**¹⁷

Most conclusively, just 14 days before the enactment of the IRA, Commissioner Collier confirmed the following:

These Indians were allotted in accordance with the provisions of the general allotment act of February 8, 1887 (24 Stat. 388), under authority of the then President issued October 16, 1889. Approximately 1500 individual selections appear on the schedule approved October 25, 1891, for which the usual 24-year trust parcels were issued in 1892. **According to this schedule, these allotments embraced about 65,440.49 acres. It also further shows that around 100 acres were reserved for school, mission, and other purposes, and have since been disposed of.**¹⁸

It is extremely telling that just days before the enactment of the IRA, Commissioner Collier discussed the schedules of allotments kept by the federal government for this Tribe. He provides an extremely precise description of what occurred with the former reservation. Specifically, he states that 65,440.49 acres [of the original 65,540 acre reservation] had been allotted. He then confirms that these same schedules show the balance of 100 acres “were reserved for school, mission, and other purposes, and have **since been disposed of.**” Therefore, twice, in 1934, Commissioner Collier confirms that the reservation was gone. This is true regardless of whether or not some individual patents may have still been in trust for the individual allottees.

Consequently, the Tribe’s assertion the Village is somehow misleading the Board, by suggesting the reservation was disestablished, is without merit. The disestablishment of the reservation was first confirmed by the federal government.

¹⁶ *Stevens v. County of Brown*, (C.A. No. 307) (E.D. Wis., November 3, 1933).

¹⁷ Village’s Appendix, Exh. 23.

¹⁸ June 4, 1934 letter from Commissioner Collier to Henry Doxtator. Village’s Supplemental Appendix, Exh. 1.

More importantly, the conclusion that the Tribe was not under federal jurisdiction remains the same regardless of whether or not the Tribe had the remnants of a reservation in 1934. However, because there are no other straws to grasp, the Tribe points to the fact there may have been some allotments for which the trust period had not yet expired. The Tribe indicates that via executive order, certain allotments remained in trust as of 1934. Specifically, the Tribe claims that the trust period on 35 allotments was extended by three executive orders “so that approximately 1,100 acres remained in trust for the Oneida allottees in 1934.”¹⁹ The Tribe's contention that the allotments, for an extremely small fraction of original reservation, may not yet have been issued in fee, is nothing but a red herring.²⁰

What is significant about this quote from the Tribe's brief is that it shows the Tribe acknowledges this land was not held in trust for the Tribe. To the extent it truly existed, it was still in trust for the individual “Oneida allottees.” The fact the federal government may still have been acting as a trustee for a few individual Indians, who received allotments for which the trust period had not yet expired, confirms the Village's position that the Tribe itself was not under federal jurisdiction. The Tribe's land was gone. Additionally, even if this land was in the Tribe's name, which it was not, the Tribe cites absolutely no legal authority for the proposition that the Tribe was therefore “under federal jurisdiction” in 1934. In reality, continuing the trust period for allottees, did nothing more than restrict the alienation of the property and the ability of the local government to tax the individual. It certainly did not re-create the Tribe, confer official recognition on the Tribe nor re-establish federal jurisdiction over tribal matters.

¹⁹ Tribe's Brief, p. 17.

²⁰ The Tribe also claims that 51 acres were issued as duplicate allotments to individual members, which were subsequently canceled and never reallocated. (Tribe's Brief, pg. 15.) First, this statement is not substantiated by the record. Second, there is no evidence the alleged duplicate allotments were cancelled prior to 1934. Third, this amounts to only .07% of the former reservation.

In addition to claiming some individual allotments may not have been issued in fee, the Tribe also argues there may have been a few acres never allotted at all. For example, the Tribe points to the 1891 annual report of the Commissioner of Indian Affairs in which it is stated that the "Oneida reservation [was] fully allotted except for 85 acres held for future Indian allotments if/as needed."²¹ The Village freely cited this document in its Opening Brief and cannot be accused of any attempt to mislead the Board.²² Why would it need to? It is this same report in which it is confirmed by the federal government that the allotment of the entire 65,540 acres was "completed." What is also so significant about this report is not only the miniscual number of acres referenced (0.1% of the original reservation) but the fact the Commissioner indicated the land was being held for future allotments, **not** for the Tribe's use or benefit. This statement shows the exact opposite of continuing federal jurisdiction over the Tribe and is totally consistent with the many subsequent reports and correspondence from governmental officials stating the Tribe was not under federal jurisdiction in 1934. Additionally, several years later it was stated by Commissioner Collier that the last 100 acres reserved was "since disposed of." The allotments were so complete that no surplus lands act was even necessary.

The Tribe also goes on to erroneously state that 130 acres were subject to a railroad right-of-way and were not allotted.²³ This statement is completely false. Without any reference to the record whatsoever, the Tribe simply states what it wishes to be true. The allotments of the reservation, in the area of the abandoned railroad, clearly and unequivocally show that the land

²¹ 1891 Annual report of Commissioner of Indian Affairs. Village's Appendix, Exh. 4.

²² Additionally, the Village's Opening Brief cites a March 13, 1934 correspondence from Secretary Ickes, in which he states that "[o]nly about 20 allotments or parts of allotments, containing between 500 and 600 acres, remain under trust. In view of the unrestricted condition of these Indians individually owned properties, efforts on our part at this time to assist them and their local activities would necessarily be very limited." It is reason that these Indians would welcome federal supervision and guidance of their affairs. Whether it was 35 allotments consisting of 1,100 acres or 20 allotments consisting of 500-600 acres, the point is the same. The individual allottees had claim to this land, not the Tribe.

²³ Tribe's Brief, p. 14 and 15.

was allotted in its entirety without any reference to maintaining any trust status for land where the railroad was located.²⁴ As examples, the Village has included three fee patents for land over which the railroad line crossed, in its Supplemental Appendix.²⁵ These patents transfer title to the entire allotment with no reference whatsoever to the railroad line somehow being excepted from the allotment or an intent to retain trust status. The same is true for all of the allotments which contained the now abandoned railroad. No such exception for the railroad line would have been expected. These allotments occurred during the heart of the disestablishment period when all of the reservation was being disposed of. It is nonsensical to suggest that for some unknown reason just the railroad tracks would have been left in trust for the Tribe.

Additionally, without any citation to the historical record, the Tribe erroneously claims that a 40 acre parcel was used as an Episcopal mission and was therefore apparently not allotted. The record simply does not confirm that fact. In fact the record totally contradicts this baseless assertion. In a June 4, 1934 letter from Commissioner Collier, he states “that around 100 acres were reserved for school, mission, and other purposes, and **have since been disposed of.**”²⁶

Moreover, even if the Board adopts the Tribe’s unsupported numbers, the amount of land for which the allotment process was not yet complete or arguably was never allotted at all, as compared to the original reservation, is miniscule. The Tribe cannot seriously contend that these extremely thin threads actually maintain the existence of the original 65,540 acre reservation or even more to the point establish the existence of “federal jurisdiction” over the Tribe itself in 1934. These types of loose ends are to be expected and cannot begin to overcome the

²⁴ Village’s Supplemental Appendix, Exh. 2,3, 4, and 5.

²⁵ Village’s Supplemental Appendix, Exhs. 2, 3 and 4. The three patents show an allotment number. The map attached as Exh. 5 to the Village’s Supplemental Appendix, shows what land that allotment included. The land included is the entire parcel, including the railroad line shown to exist on that parcel.

²⁶ Village’s Supplement Appendix, Exh. 1.

overwhelming evidence that this reservation was disestablished and that federal jurisdiction did not exist.

For example, in *Osage Nation v. State of Oklahoma, ex rel.*,²⁷ the Court ruled that the Osage reservation was disestablished despite the fact the Osage Tribe retained the mineral rights for the entire 1.4 million acre reservation. The Court held:

Although the Osage Nation retained the beneficial interest in the minerals underlying the former Osage reservation area, that interest is contrasted starkly with the pattern divesting the surface, either directly or through authorizations for future sales, of all vestiges of tribal ownership.

The Court also concluded the reservation was disestablished despite:

645.34 acres retained by the tribe and 4,575.49 acres reserved for town sites, schools, cemeteries and federal agency purposes (with those lands generally subject to sale)...[and of the allotted lands] 231,070.59 acres remained in restricted status.²⁸

The *Osage* Court also cited *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1267 (10th Cir. 2001) for the proposition that “land reserved by the government to preserve the tracts status as a tribal burial ground did not make that land a reservation”²⁹

Additionally, in concluding that the phrase “now under federal jurisdiction” in § 479 refers to tribes that were under federal jurisdiction in 1934, the *Carcieri* court noted that it was not argued that the Narragansett tribe was under federal jurisdiction in 1934.³⁰ However, the court went on to state that “and the evidence in the record is to the contrary.”³¹ The court made this conclusion despite the fact that the record clearly indicated that at all times the tribe had a minimum of “two acres” of its original reservation land.³² Additionally, the court noted that “the

²⁷ 597 F.Supp.2d 1250, (N.D. OK 2009).

²⁸ *Id.* at 1258-59, FN 7.

²⁹ *Id.* at 1259, FN 8.

³⁰ *Carcieri*, 129 S.Ct. at 1068.

³¹ *Id.* at 1061.

³² *Id.* at 1062.

Bureau of Indian Affairs (BIA) determined that the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications."³³ Additionally, the court noted the BIA's reference to "the tribe's documented history dating from 1614" and noted that "all of the current memberships are believed to be able to trace at least one ancestor on the membership list of the Narragansett community prepared after the 1880 Rhode Island Detribalization Act."³⁴

In *Alaska v. Native Village of Venetie Tribal Government*,³⁵ the court analyzed whether or not the Venetie Tribe met the 18 U.S.C. § 1151(b) definition of Indian country. In making that determination, the court noted that in order to satisfy that subsection, there must be land which has been set aside by the federal government for use of Indians as Indian land and second, they must be under federal superintendence.³⁶ The Court's analysis of "federal superintendence" sheds significant light on the "federal jurisdiction" issue at the center of this case. The court went on to note that "the federal superintendence requirement guarantees that the community is sufficiently [not entirely] dependent" on the federal government that the federal government and the Indians involved, rather than the states, are to exercise primary [not exclusive] jurisdiction over the land."³⁷

The Alaskan Native Claim Settlement Act (ANCSA) purported to transfer reservation land to private state chartered native corporations without any restraints on alienations or significant [some still did exist] use restrictions.³⁸ In light of ANCSA, the court reviewed whether or not the federal superintendence requirement was met, in order to declare the Venetie

³³ *Id.* at 1062.

³⁴ *Id.* at 1259, FN 8.

³⁵ 522 U.S. 520 (1998).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

land as "Indian country." The court noted that "although ANCSA exempts the tribe's land, as long as it has not been sold, leased or developed, from adverse claims, real property taxes and certain judgments, ... these protections simply do not approach the level of active federal control and stewardship over Indian land that existed in this court's prior cases."³⁹

The court went on to note that:

The tribe's contention that such superintendence is demonstrated by the government's continuing provision of health, social, welfare, and economic programs to the tribe is unpersuasive because those programs are merely forms of general federal aid, not indicia of active federal control.⁴⁰

The Court also noted:

The federal superintendence requirement guarantees that the Indian community is sufficiently [not totally] "dependent" on the federal government and that the federal government and the Indians involved, rather than the states, are to exercise primary [not exclusive] jurisdiction over the land in question.⁴¹

Just as in *Osage* and *Venetie*, the Tribe's minimal trust land and minimal contacts with the federal government are not indicia of federal involvement sufficient to support a finding of 1934 federal jurisdiction nor the continued existence of a reservation."

C. THE FEDERAL COURT'S HOLDINGS IN *STEVENS* AND *HALL* ARE FURTHER PROOF OF A LACK OF FEDERAL JURISDICTION.

The Tribe claims that the holdings in *Hall* and *Stevens* should be ignored because they are inconsistent with subsequent case law dealing with the disestablishment of a reservation. What the Tribe fails to note is that *Hall* and *Stevens* significantly advance the Village's position that the Tribe was not under federal jurisdiction in 1934, regardless of the status of the reservation.

³⁹ *Id.* at 521.

⁴⁰ *Id.* at 522.

⁴¹ *Id.* at 531.

The date of these cases is also very important because they reflect what was transpiring in the early 1900s, which is the time pertinent to addressing the federal jurisdiction issue in this fee to trust appeal. It is the conclusion of these cases, that federal jurisdiction does not exist, that is most significant. No subsequent cases have undermined that conclusion or overturned these cases.

The Tribe also tries to argue the creation of townships does not necessarily result in the disestablishment of a reservation. The Village has not argued that is automatically the case. What the Village argues is that the creation of the towns, combined with subsequent facts in the record, show that jurisdiction and authority did become vested with the towns and therefore there was an elimination of any previous federal jurisdiction. The historical record shows much more than simply the creation of the towns. The records show that in this case the creation of the towns eliminated "any need for agency employees;" "the maintenance of order now devolves upon the townships and county officers, and requires only the cooperation of this office."⁴² These are the words from the Department of Interior in its 1912 annual report. Therefore, it is not simply the creation of the towns that is important, but it is the acknowledgment by the Department itself that the creation of these towns, as well as other facts, resulted in federal jurisdiction being eliminated.

D. THE REFERENCE TO ONEIDAS IN A KESHENA AGENCY DOCUMENT DOES NOT ESTABLISH THAT THE TRIBE WAS UNDER FEDERAL JURISDICTION.

In a desperate attempt to show some connection between the Tribe and the federal government, the Tribe cites the fact that the Oneidas were referenced in certain documents associated with the Keshena Indian Agency. The Tribe, in a manner which is not entirely clear, attempts to equate a finding of being "recognized" and being "under federal jurisdiction," as

⁴² Village's Appendix, Exh. 10.

required by *Carcieri*, to whether or not a local Indian agency had that Tribe's name on some list. This argument is fatally flawed for several reasons. First, the Village is not disputing the fact Indians of Oneida descent lived in the Green Bay area in 1934. The Village is not claiming these individual Indians had absolutely no contact with any federal employees. The fact Oneida Indians still resided in the area explains why an Indian office in Wisconsin would still have the Oneida name on some documentation.

Having a name on a list does not equal federal jurisdiction. What the Tribe avoids is actually looking at what, if anything, the Keshena, or any other agency, was actually doing with the Tribe itself. The involvement of the government in the Tribe's affairs is what needs to be analyzed. Contrary to the Tribe's argument that "federal services" or federal contact are "a different matter from the existence of federal jurisdiction,"⁴³ the concurring opinion of Justice Breyer in *Carcieri* indicates otherwise. Justice Breyer indicated that there was no evidence of federal jurisdiction in 1934 for the Narragansett as "both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934. And until the 1970's there was '**little Federal contact** with the Narragansetts as a group.'"⁴⁴ Like the minimal federal contact with the Narragansett Tribe in *Carcieri*, the Keshena agency had little to no contact with the Oneida Tribe. In fact, on October 26, 1933, the superintendent of the Keshena Indian Agency wrote to the Commissioner of Indian Affairs in Washington, D.C. and referred to the area as the "former Oneida reservation."⁴⁵

W.R. Beyer, the Superintendent of the Keshena agency, indicated on September 6, 1932 that "[i]n all probability, conditions as to immorality and drunkenness are bad on the Oneida reservation, but **this is a problem for local township officials to correct**. If your office has any

⁴³ Tribe's Brief, p. 13.

⁴⁴ *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (concurring opinion of Justice Breyer).

⁴⁵ Letter to Commissioner of Indian Affairs, October 26, 1933. Village's Appendix Exh. 20.

additional suggestions to make wherein I can be of assistance in helping state officials, I will be glad to hear from you."⁴⁶

Additionally, the Commissioner of Indian Affairs, in 1927, stated that "While the present poverty of such Oneidas is a matter of great regret, no remedy is available from the United States government. Where they are imposed upon and defrauded, the office will give them such advice as it can through the Keshena Superintendent, but it cannot undertake the prosecution of their cases where the property is wholly within state jurisdiction." The Commissioner's reference to the fact that the Keshena agency can only provide advice is extremely telling. The Commissioner goes on to describe the Oneida Indians as "citizens released from governmental supervision."⁴⁷ Therefore, focusing on the Keshena agency makes the lack of federal jurisdiction even more obvious.

Another reason that there was still some level of contact between Oneida Indians and the Keshena agency is that the government continued to take a census of Indians regardless of whether or not they still had a reservation and regardless of whether or not they were still under federal jurisdiction. No one questions the fact that Indians of Oneida descent lived in the Green Bay area in 1934. That is all the report identified as Attachment 1 was designed to confirm. Even a cursory review of this document shows that it does not discuss federal jurisdiction, let alone conclude that the Tribe was under federal jurisdiction at the time of the census. It also does not discuss, let alone confirm, that the Indians that were counted were part of any recognized Tribe.

The Tribe's reference to the fact that the report somehow confirms "federal jurisdiction" as required by *Carciere* is inexplicable. Reference to the word "jurisdiction" is simply a

⁴⁶ September 6, 1932, correspondence from Superintendent Beyer to Commissioner of Indian Affairs. Village's Supplemental Appendix Exh. 6.

⁴⁷ House Congressional Record, P.5877, March 3, 1927. Village's Appendix, Exh. 13.

reference to which agency did the counting of the Indians. Additionally, it is important to point out that that very document refers to jurisdiction as nothing more than a geographical area. For example, it references the various Indians as "residing at jurisdiction where enrolled" or "residing at another jurisdiction." Nowhere in the report is jurisdiction defined, referenced, or any way used to describe any level, or lack thereof, of federal involvement with the Tribe.

For example, the same report shows under the Keshena agency, a reference to the Menominee-Stockbridge Tribe and a specific reference to an Indian population and Indians residing at the jurisdiction where enrolled. Despite this fact, it has been confirmed that the Stockbridge-Munsee reservation was disestablished.⁴⁸

The cover page to the attached Appendix is simply entitled "Indian Population." Individual tables are simply labeled "Indian Population in Continental United States enumerated at federal agencies according to tribe, sex, and residence, April 1, 1934." The fact the Keshena agency was tasked with counting the individual Indians of Oneida descent, residing in the Green Bay area, sheds absolutely no light on the question of whether or not the Oneida Tribe, continued to exist as a communal entity, which was not only recognized in 1934 but was also under federal jurisdiction, as required by *Carcieri* to have the land which is the subject of this appeal placed into trust.

E. THE PAYMENT OF ANNUITIES DOES NOT CONFER FEDERAL JURISDICTION.

A payment of annuities does not equate to the Tribe being under federal jurisdiction. The annuities are a debt. Paying off a debt does not mean the person or entity making the payment has jurisdiction over the one receiving them. The federal government pays contractors,

⁴⁸ *State of Wisconsin v. Stockbridge-Munsee Community, et al.*, 554 F.3d 657, 662-3.

employees and other creditors all of the time. That does not mean the recipients of those funds are incompetent wards under the jurisdiction of the federal government.

The Tribe attempts to de-emphasize the significance of the Commissioner of Indian Affairs and the Keshena Indian Agency's description of the Oneida land as the "former reservation." The Tribe claims that "[o]ftentimes, federal officials use language loosely without attaching significance to a particular term. The inquiry is whether it was the dominant view of the BIA that the Reservation continued to exist..."⁴⁹

The same could be said for the post 1934 references to the area as a reservation. In fact, the use of the word reservation, despite its disestablishment, is very easy to explain. It was used to describe a known geographical area in the same manner that geographical area used to be identified.⁵⁰ On the other hand, the insertion of the entirely new word of "former," in front of the word reservation, is a much more conscious step. But even more significant, is the fact it does not matter if the reservation was disestablished or not. What matters is whether or not the Tribe was under federal jurisdiction. "[T]he dominant view of the BIA" is that it was not. At least two Commissioners of Indian Affairs and two Secretaries of Interior, confirmed this Tribe was not under federal jurisdiction in 1934.

F. THE HAAS REPORT DOES NOT CONSIDER THE ISSUE OF FEDERAL JURISDICTION AND WAS PUBLISHED 13 YEARS AFTER 1934 AND THEREFORE PROVIDES NO SUPPORT FOR THE TRIBE'S POSITION.

The Department erroneously relies on a report prepared over ten years after the passage of the IRA for purposes of "conclusively" establishing the Tribe's alleged status of "under

⁴⁹ Tribe's Brief, p. 19, FN 20, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604, fn.27 (1977).

⁵⁰ As stated by the Court in *Osage*, "...[a]lthough the Act mentions the "Osage Indian Reservation," as do some subsequent enactments, it plainly does so only to describe a known geographic area." *Osage Nation v. State of Oklahoma, ex rel.*, 597 F.Supp.2d 1259.

federal jurisdiction” in 1934.⁵¹ The Department, purportedly relying on a concurring opinion in *Carcieri*, argues that the *Haas Report*, published in 1947, “is considered by the Department to be an authoritative list as to the IRA status of those tribes who are included on the list.”⁵² However, the Department then argues that the *Haas Report* is not authoritative in other regards because it may have erroneously left out some Tribes that had in fact voted for the IRA.⁵³ Thereafter, the Department leaps to the conclusion that this report, authoritative in some instances, but admittedly not in others, “conclusively resolves the IRA status of the Oneida Tribe.”⁵⁴ Namely, the Department argues that because certain individual Oneida Indians voted for the IRA, this equates to a “1934 determination that the Oneida Tribe was under federal jurisdiction.”⁵⁵ Not only is this an extraordinary leap, but it completely misses the point.

Table A of the *Haas Report*, which includes a listing for “Oneida,” is merely a chart showing which groups voted to accept or reject the IRA. The Village does not dispute that the individual Oneidas voted on the IRA; however, the act of individuals or even a Tribe voting does not equate to being “under federal jurisdiction” within the meaning of § 479. The Department’s argument in that regard merely plays into its circular reasoning: that because the Tribe voted, it must have had a reservation, and therefore, because it had a reservation, it must have been “under federal jurisdiction.” The existence of a reservation does not equate with “under federal jurisdiction.” Likewise, the Village has not argued that allotment of the Oneida reservation conclusively establishes that the Tribe was not “under federal jurisdiction.” Instead, the Village has argued that allotment, when combined with other strong historical evidence, dictates a finding that the Tribe was not “under federal jurisdiction” in 1934. A report prepared ten years

⁵¹ Department’s Brief, p. 12.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

after the enactment of the IRA only outlining which Tribe's voted for or against it is completely irrelevant and does nothing to dispute the vast historical evidence weighing against federal jurisdiction.

There simply never was "a 1934 determination that the Oneida Tribe was under federal jurisdiction" as the Department suggests. The *Haas Report* does not make a determination of who was or was not under federal jurisdiction. Until the *Carciari* decision was rendered in 2009, that was simply not a question that was being asked.

The Department claims "the holding of that [*Carciari*] decision does not apply to the Oneida."⁵⁶ Even the RD disagrees with that statement. When faced with the Village's supplemental objection to the applications, in which the *Carciari* issue was raised, the RD did not conclude that *Carciari* could be ignored. Rather, the RD acknowledged the application of that Supreme Court holding and solicited additional information from the Tribe in an attempt to establish the existence of federal jurisdiction as required by that case.

G. THE TRIBE'S PURPOSE FOR ESTABLISHING A STATE CORPORATION WAS TO ARTIFICIALLY RE-CREATE A TRIBE.

The Tribe takes issue with the Village's assumption that individual Indians formed a state corporation to artificially recreate a Tribe.⁵⁷ The Tribe even claims that "the Village cites no historical documentation for its interpretation of this event."⁵⁸ That is simply not true; it is the historical record, not the Village of Hobart, which explains the reason for the state corporation. At the time of passage of the IRA, certain Oneida Indians realized there was no longer a tribal organization, let alone one officially recognized and under federal jurisdiction. Consequently, certain individuals took steps to artificially recreate a tribe. On September 24, 1934, these

⁵⁶ Department's Brief, p. 12.

⁵⁷ Tribe's Brief, p. 20.

⁵⁸ *Id.*

individuals filed State of Wisconsin Articles of Incorporation to create Oneida Indians Incorporated. This was done for the sole purpose of creating an organization which could thereafter be recognized by the federal government as eligible to utilize the IRA.

The new corporation hired a law firm to advise them regarding the IRA. In a January 7, 1935 letter from that law firm to Commissioner Collier, the corporation's legal counsel confirmed the Tribe was not recognized, as required to utilize the IRA. The corporation's counsel stated the following:

As we understand the situation **no formal recognition of the Oneida Indians, Inc. has been extended by the Department.** May we venture to suggest at this time that such formal recognition be given so that there may be no longer any question as to the **character of this organization?**⁵⁹

It cannot be legitimately disputed that the purpose of the state incorporation was to make the tribe appear to be an organized group. Historical documentation shows that there was no tribe in existence, and an organizational form was needed for scattered Oneida Indians to join forces. For instance, in a letter dated March 13, 1934 from Harold Ickes, Secretary of the Interior, to Mr. Walter Watkins, Mr. Ickes references the pending legislation known as the original Collier proposal.⁶⁰ Although the BIA cites a quote from the letter as proof that the IRA applies to the Tribe,⁶¹ the quote actually demonstrates the contrary:

⁵⁹ Village's Appendix, Exh. 30.

⁶⁰ Village's Appendix, Exh. 23.

⁶¹ The BIA erroneously cited two bills that were never enacted as part of the IRA. The legislative history for the IRA indicates that the underlying bill was Senate Bill 3645. 78 Cong. Rec. 11724 (June 15, 1934). However, the BIA references pending legislation, Senate Bill No. 2755 and House Bill No. 7902, and wrongly stated, "[t]he bills referred to were enacted as the IRA." BIA Brief, p. 16. The Congressional Record indicates that Senate Bill 3645 was a "substitute for S. 2755 and the Amended H.R. 7902, known as 'The Wheeler Howard Bill.'" 78 Cong. Rec. 111736 (June 15, 1934). The Record continues "[the] votes [of Indians] were taken on the so-called 'Wheeler-Howard bill', which bill the House Committee on Indian Affairs laid on the table in the committee where it is still resting. All that was salvaged of that bill was the number and the enacting clause." *Id.* at 11741. Furthermore, the Record for Senate Bill 3645 indicates, "this bill has been revised, reprinted, amended, and so forth, so many times that it has little resemblance to the original Wheeler-Howard bill." *Id.* Therefore, the BIA clearly misstated the legislative history of the IRA, casting serious doubts on the validity of its arguments.

It is presumed that these Indians would welcome federal supervision and guidance of their affairs. In this connection, attention is invited to Senate bill No. 2755 and companion bill No. 7902 in the House of Representatives, the purpose of which is to establish a new policy with respect to Indian rights, acquisition of lands upon which to **establish Indian communities** or colonies where worthy **landless Indians** could be supplied with home places, and for other purposes. A copy of H.R. 7902 and an explanatory memorandum are enclosed for your information. The bills mentioned are the outcome of the efforts of this Department to improve Indian conditions generally, and if enacted would no doubt be applicable to the **Oneidas, as a group** that ought to be settled upon land as an **organized community**.⁶²

In a memorandum dated February 26, 1934, from Commissioner Collier to Secretary Ickes, the Commissioner described the Oneidas similarly:

The attached became mislaid and has just reached me. The answer to it is that the **Oneidas were allotted**, and through fee patenting and other allotment procedures they **lost all of their land**. And they are living practically unprotected and **not in any real way under Federal jurisdiction**. They are one of the groups that ought to be brought into new land as an **organized community**.⁶³

In a letter dated November 12, 1934 from Ralph Fredenberg, Superintendent, to the Commissioner of Indian Affairs, Mr. Fredenberg enclosed a copy of the by-laws of the Oneida Indians Incorporated and Wisconsin Articles of Organization.⁶⁴ Mr. Fredenberg states: "I have been requested by this **organization**, comprising the majority of the Oneida tribe, to submit this matter for your consideration and approval."⁶⁵ Mr. Fredenberg continues:

If I might be permitted to comment on this **organization**, I wish to say that I am pleased to recommend them as energetically and industriously **bringing together the remnants of the Oneida tribe into some semblance of organization** which is a credit to their people. It was indeed a pleasure for me to visit them at one of their meetings, which consisted of approximately 250 people, and note the enthusiasm and hopes which they hold for their future under the Indian Reorganization Act, and this prompts my **urging the Office** to do everything possible to encourage and provide for their future.⁶⁶

⁶² Village's Appendix, Exh. 24.

⁶³ Village's Appendix, Exh. 23.

⁶⁴ Village's Appendix, Exh. 31.

⁶⁵ *Id.*

⁶⁶ *Id.*

In a follow-up letter, Mr. Fredenberg stated the following:

Under date of November 12, 1934, I forwarded to your office Articles of Incorporation of the Oneida Indians Incorporated. I have had no acknowledgment of these articles and it seems highly desirable that the Office **take some action to recognize the organization as a group representing the Oneida Indians**...My contact with the tribe has been entirely through the Oneida Indians Incorporated, representing a membership of 731, which is a very large majority of the Oneida Indians residing at the site of the original reservation...

I suggest that the Office **acknowledge the existence** of the Oneida Indians Incorporated, and in some definite manner make it known that the recognized group of Oneida Indians is that group having filed papers of incorporation. It is desired at this point to call the attention of the Office to the interest which is being taken by the Oneida Indians Incorporated in holding a series of meetings for the purpose of explaining the privileges which might be obtained by the Oneidas by the adoption of the Indian Reorganization Act. This **group of people** have been active and are intelligently promoting the best interest of the Oneidas.

After reviewing the legislative history, as well as communications between the Commissioner, Secretary, and Superintendent, the dots are connected as to why this group of individual Indians believed they needed to organize a state corporation in order to utilize the IRA. The Tribe, as a governing body, was gone. The fact Departmental employees continuously referred to the individual Indians as an "organization," "group," and "group of people" rather than a recognized Tribe, tells the whole story. There was no recognized Oneida Tribe in 1934, let alone one that was under federal jurisdiction.⁶⁷

H. THE FACT INDIVIDUAL INDIANS OF ONEIDA DESCENT VOTED ON THE IRA DOES NOT ESTABLISH PRE-EXISTING FEDERAL JURISDICTION OVER THE TRIBE.

The Tribe and Department next argue that the mere fact that individual Indians were allowed to vote on the IRA, there was still an existing and recognized Tribe that was also under

⁶⁷ The Tribe notes that Commissioner Zimmerman refers to the Oneida Indians as a recognized tribal group. Tribe's Brief, p. 21. However, that letter was dated in 1936, two years after the enactment of the IRA, and after the group created the state corporation to re-create a tribal organization of some sort.

federal jurisdiction in 1934. This flawed logic requires a complete disregard for the holding in *Carcieri*.

Carcieri reversed decades of erroneous administrative practice in which the BIA had taken untold acreage into trust and placed it beyond state and local jurisdiction on behalf of groups of Indians that were neither federally recognized nor under federal jurisdiction at the time the IRA was enacted in 1934.

Nothing in the IRA indicates that the Secretary must first make a determination that there is a tribe that was recognized and under federal jurisdiction in 1934 in order to allow a vote. Such a determination was never made. Moreover, the *Carcieri* decision spelling out these requirements did not exist until 2009. The Tribe's contention to the contrary is completely unsupported by the historical record. This argument is no different than saying that because several tribes were allowed to place land into trust in the past, under the IRA, despite the fact that they were undisputedly not under federal jurisdiction in 1934, means that all future applications by such tribes must also be accepted. Such a conclusion flies in the face of the Supreme Court's holding in *Carcieri*. Such action is no longer acceptable.

As further evidence there was no determination of the existence of a recognized tribe now under federal jurisdiction, Representative Beiter voiced the following concerns as part of the congressional records:

Again, tribal membership is thrown into the discard and all adult Indians residing on the reservation are given the right to vote upon the charter. This clearly means that the charter shall be issued to a community consisting of all these adult members. Such a procedure clearly sets up a new organization which is not a tribal organization... Authority is taken away from the tribe as to who shall participate in government, and the resulting chartered community would not be a chartered tribe but a new chartered community with no treaty rights.⁶⁸

⁶⁸ *Id.* (Representative Beiter appears to be referring to an earlier draft of Senate Bill No. 3645 for which the charter provision appeared in Section 18 and provided that "such charter shall not become operative until

This suggests the exact opposite of the need for a recognized tribe, under federal jurisdiction in 1934, in order to call for a vote, as the Tribe suggests.

I. THE RESERVATION WAS DISESTABLISHED NOT JUST BECAUSE OF THE DAWES AND BURKE ACT, BUT BECAUSE OF THE 1906 ONEIDA SPECIAL PROVISION ALLOWING IMMEDIATE FEE PATENTS.

The Department incorrectly states that the Village “argues that the allotments of land to individuals under the General Allotment Act, 25 U.S.C. § 331...as amended by 25 U.S.C. § 349...(Burke Act)...resulted in the loss of the tribal relationship and the disestablishment of the reservation.”⁶⁹ The Department goes on to cite cases that stand for the proposition that disposal of lands under the Dawes Act does not terminate the reservation on which the allotments were made.⁷⁰ The Tribe makes similar arguments.

What they fail to point out is that the Village’s position, that the reservation was disestablished, is not based solely on just the Dawes Act and Burke Acts, but also the Oneida special provision of 1906, 34 Stat. 325, 380-381. This Act authorized the immediate issuance of fee patents. In interpreting the same 1906 Appropriation Act, that also allowed for the immediate issuance of fee title to members of the Stockbridge-Munsee Tribe, the 7th Circuit ruled the 1906 Act is what resulted in the disestablishment of the reservation.⁷¹

The Tribe tries to artificially distinguish the part of the 1906 Act dealing with the Oneidas from the part dealing with the Stockbridge-Munsee. The Tribe states “[a]s to Oneidas, the act authorized the issuance of fee patents to allottees before the expiration of the trust period. As to the Stockbridge-Munsee, the act authorized the issuance of fee patents *immediately*,

ratified at a special election by three-fourths of the adult Indians living on the reservation.” The version of S. 3645 passed on June 18, 1934 contained similar language in Section 17, but required only a “majority vote”.)

⁶⁹ Department’s Brief, p. 13.

⁷⁰ *Id.*

⁷¹ *State of Wisconsin v. Stockbridge-Munsee Community, et al.*, 554 F.3d 657, 662-3.

*without any trust at all.*⁷² This distinction misses the point. The point is that both provisions of the Act allowed for immediate issuance of fee patents. This is true for the Stockbridge-Munsee and the Oneidas. The 7th Circuit distinguishes the 1906 Act from other allotment acts that required the allotments to be held in trust for a period of time. The court stated: “[w]hy include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple.”⁷³ This fact is identical for both the provision of the Act dealing with the Oneidas and the provision dealing with the Stockbridge-Munsee. They both allowed immediate ownership of former tribal land in fee, by individual Indians. The fact the Oneidas were farther down the disestablishment road than the Stockbridge-Munsee, and individual Indians already had allotments, is irrelevant. The key is that for both Tribes, the 1906 Act created immediate fee status for land previously held in trust (for the Tribe or an allottee) by removing any trust status. It is the immediate issuance of fee title, upon enactment of that legislation, which the 7th Circuit found so compelling.

J. THE VILLAGE’S OBJECTION TO THE CURRENT FEE TO TRUST APPLICATION IS NOT TIME BARRED.

Contrary to any express statement in the record, the Tribe attempts to claim that the “Secretary determined that the Tribe resided on a reservation” at the times relevant to this appeal.⁷⁴ In reality, there is no such actual determination as confirmed by the Tribe’s inability to cite any document in support of that contention. The Tribe indirectly attempts to weave this argument solely from the fact that individual Oneida Indians voted on the IRA. The Tribe then jumps, without explanation, to an argument that the Secretary’s approval of the Tribe’s constitution in 1936 should have been challenged via the APA within six (6) years of that date.

⁷² Tribe’s Brief, p. 16, FN 16.

⁷³ *Id.*

⁷⁴ Tribe’s Brief, p. 23.

What the Tribe fails to state is that the Village does not take issue with the Tribe's constitution. The Village is claiming that the Tribe was not a recognized Tribe under federal jurisdiction in 1934 and is therefore precluded from having the extremely recent fee to trust applications approved. As explained *supra* and in the Village's opening brief, the record clearly shows that the federal government concluded, in 1934, that the Oneidas were not under federal jurisdiction. That is a conclusion the Village agrees with and certainly would have no need to appeal. Additionally, as far as the Board or a federal court is concerned, this is an issue of first impression the answer to which is easily obtained through a review of the records of the Commissioner's of Indian Affairs and Secretary's of Interior.

The need to establish that there was a Tribe, that was recognized and that was under federal jurisdiction in 1934 became necessary only after the Supreme Court's decision in 2009. That is simply not subject to an APA appeal. Therefore, not only does the Tribe misstate the facts when it erroneously claims that the Secretary officially determined that there was a reservation, it fails to understand that the real issue for the Board is whether or not the Tribe was under federal jurisdiction. The Tribe cannot legitimately contend that that determination was officially made in the 1930s. The historical record shows that the Commissioners and the Secretaries concluded the Oneidas were not under federal jurisdiction at that time.

III. THE VILLAGE'S CONSTITUTIONAL ARGUMENTS HAVE NOT BEEN PREVIOUSLY CONSIDERED AND REJECTED.

The Department states in its response brief that "the appellant's constitutional allegations have been previously considered and rejected."⁷⁵ In support of that contention, it cites five Circuit Court of Appeals' Decisions without citing any actual language contained within those opinions. Four of those cases do not even remotely deal with the constitutional arguments raised

⁷⁵ Appellant's Brief, pg. 10.

by the Village. They all argue the IRA is unconstitutional because it contains an unlawful delegation of power. The Village has not raised that claim. The Department cites *State of South Dakota and Moody County, South Dakota v. United States*, 487 F.3d. 548 (8th Cir. 2007). In this case, the constitutional issue addressed was whether "Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, is an unlawful delegation of power to the Department in violation of Article I, Section 1 of the Constitution."⁷⁶

The Department next cites *South Dakota v. United States Department of Interior*, 423 F.3d. 790 (8th Cir. 2005), *cert. denied*, 127 S.Ct. 67 (2006). The only constitutional issue raised in that case was that "25 U.S.C. § 465 does not delineate any boundaries governing the executive's decisions to acquire land in trust for Indians, it constitutes an unlawful delegation of legislative power in violation of Article I, Section 1 of the Constitution."⁷⁷

The Department next cites *Schivwits Band of Paiute Indians v. Utah*, 428 F.3d. 966 (10th Cir. 2005), *cert. denied*, 549 U.S. 809 (2006). In that case, the only constitutional issue raised was cited by the court as follows: "Does Section 465 of the Indian Reorganization Act violate the non-delegation doctrine."⁷⁸

The Department also cites *United States v. Roberts*, 185 F.3d. 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000). In that case, the only constitutional issue raised is whether "the Secretary of the Interior lacks authority to take tribal lands into trust is a general matter because 25 U.S.C. § 465 unconstitutionally delegates standardless authority to the Secretary."⁷⁹ None of the constitutional issues raised by the Village was even raised let alone considered in these cases.

⁷⁶ *Id.* at 551.

⁷⁷ *Id.* at 795.

⁷⁸ *Id.* at 972.

⁷⁹ *Id.* at 1136.

The last case cited by the Department in support of its argument that all the Village's constitutional arguments have been previously considered and rejected is *Carcieri v. Kempthorne*, 497 F.3d. 15, 43 (1st Cir. 2007). The Department does not cite any language from *Carcieri* but has a pinpoint cite to Page 43 of that decision. At Page 43, the court stated "We hold that Section 465 is not an unconstitutional delegation of legislative authority."⁸⁰ Therefore, every cite by the Department, in support of its claim the Village's constitutional arguments have been rejected multiple times, refer only to the unlawful delegation of legislative authority argument. That is an argument never raised by the Village.⁸¹

IV. 25 C.F.R. PART 151.10

A. THE REGIONAL DIRECTOR'S DECISIONS ARE BIASED AND MUST BE REVERSED.

In its answer brief, the Tribe argues that the Village failed to show its agreement with the Midwest Regional Office violates any law, and the Village merely "casts ordinary activities in a sinister light."⁸² The Tribe also argues that the Village cannot rely on a "structural bias" argument, but must instead present clear evidence showing bias; the Tribe then cites the BIA's Indian hiring preference policy.⁸³ However, the Tribe's argument misses the point. The Village's bias argument is not based on structural bias within the BIA, such as one's status as an employee, or one's status as a current or former member of tribal government. Rather, the Village's argument rests on evidence that the Tribe has entered into a side agreement with the Midwest Regional Office to process its trust applications in which the Tribe pays large sums of money for the salaries of those that process the applications. The Village was unable to raise this

⁸⁰ *Id.* at 43.

⁸¹ Additionally, the 1st Circuit does also address some of the constitutional arguments actually raised by the Village. However, in *Carcieri v. Kempthorne*, certiorari was granted and the 1st Circuit's decision was overturned on the "now under federal jurisdiction" issue.⁸¹ Given the reversal, it was not necessary for the Supreme Court to address any of the constitutional arguments addressed by the 1st Circuit.

⁸² Tribe's Brief, p. 53-55.

⁸³ *Id.* at p. 54.

specific argument before the RD, as the bias did not become evident until after the Village was able to review the administrative record. Furthermore, on appeal, “any information available to the reviewing official may be used in reaching a decision whether part of the record or not.”⁸⁴

The BIA argues that this type of side agreement is “statutorily authorized” and cites to several acts, including the Indian Self-Determination and Education Assistance Act (ISDEAA) and the Tribal Self-Governance Act of 1994 (TSGA).⁸⁵ It argues that the Tribe is permitted to “reprogram” federal funds to “insure that the BIA has sufficient staffing to perform its share of the retained functions.”⁸⁶ However, the statutes cited by the BIA generally focus on tribes administering programs normally administered by the BIA, and also provide for the payment of grants or other funds from the secretary to the Tribe for purposes of the Tribe disbursing the funds according to program requirements. Specifically, the BIA cites 25 U.S.C. § 458cc(3) for the proposition that it may “reprogram” funds.⁸⁷ While § 458cc(b)(3) permits a Tribe to “reallocate funds,” the statute does not contemplate federal funds going back to the BIA. Under § 458cc(g), addressing “payment” pursuant to agreements made under § 458cc, the statute contemplates “funding to the tribe to carry out the Agreement” and “advance payments to the tribes.” No where does the statute authorize the reallocation of funds back to the BIA.

In addition to the lack of statutory authorization, the Tribe and BIA failed to address the report of the Government Accountability Office that questioned the legality of such side agreements. The GAO report specifically indicated that “two separate agreements between groups of tribes and two BIA regional offices, designed to expedite the processing of certain applications, have raised concerns and were under investigation by Interior’s Office of Inspector

⁸⁴ 25 C.F.R. Part 2, § 2.21(a).

⁸⁵ Department’s Brief, p. 29.

⁸⁶ *Id.* at p. 30.

⁸⁷ *Id.*

General.”⁸⁸ Later in the report, the GAO identifies the two agreements, one of which exists in the Midwest Region.⁸⁹ The report indicates that “consortium tribes agreed to use a portion of their budget to pay for additional staff positions at BIA dedicated to processing consortium members’ land in trust applications,” and the monies used are “Tribal Priority Allocations from BIA.”⁹⁰ Finally, the report indicates, “Interior’s Office of Inspector General was conducting an investigation of these consortium agreements to determine whether the tribes’ allocation of money to fund the consortiums was legally authorized and whether BIA was favoring land in trust applications from those tribes.”⁹¹ The issues raised as part of this accountability study implicate concerns of bias that go far beyond the speculative level. At the very least, this report confirms that such side agreements are clearly not “statutorily authorized.”

Because the legality of these side agreements has been directly called into question by the Government Accountability Office, and the Village has shown substantial involvement by BIA staff employed under this side agreement in these decisions, the decisions of the RD must be reversed. Contrary to the Tribe and BIA’s arguments, this is not simply structural bias within the BIA; if it were, the GAO would not have reason to question it. It is clear that the decisions were not the product of a neutral, independent decision maker, and if this conduct occurred at the state

⁸⁸ *Indian Issues: BIA’s Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, United States Government Accountability Office, Report to Congressional Committees, GAO-06-781, p. 15-16.

⁸⁹ *Id.* at p. 20.

⁹⁰ *Id.* These Tribal Priority Allocations (TPA) have also been called into question by the GAO in a report entitled *Indian Programs: Tribal Priority Allocations Do Not Target the Neediest Tribes*, GAO/RCED-98-181. According to the GAO, “TPA funds are used to provide basic tribal services, such as law enforcement, social services, adult vocational training, child welfare, and natural resources management.” The report indicates: “In recent years, media reports have highlighted Indian tribes that have garnered considerable wealth through gaming operations and other businesses. Accordingly, the Senate Committee on Appropriations commented, in its report on the Department of the Interior’s (DOI) 1998 appropriation bill, that the tribes with substantial revenues of their own, such as business income, should become more self-sufficient.” The report further details that, “[i]n distributing these base funds, BIA does not take into consideration changing conditions, such as the tribes’ levels of need or the tribes’ own revenues from nongovernmental sources, such as business income,” and “[b]ecause the tribes’ own revenues are not considered in distributing TPA base funds, rich and poor tribes alike receive them.”

⁹¹ *Id.*

or federal court level, it would be a serious violation of due process and ethical principles. Therefore, such conduct should not be permitted at the agency level, and the decisions must be reversed.

B. THE REGIONAL DIRECTOR ABUSED HER DISCRETION UNDER 25 C.F.R. § 151.10(B) AND (C).

Under 25 C.F.R. section 151.10(b), the secretary must consider “[t]he need of the individual Indian or the tribe for additional land,” and under 25 C.F.R. section 151.10(c), the secretary must consider “[t]he purposes for which the land will be used.” Contrary to the Tribe and BIA’s arguments that the RD properly determined that the Tribe was in need of additional land, the RD failed to take into consideration the financial status of the Tribe, which is certainly relevant to whether it is in need of additional land, and also relied on inconsistent statements of need and purpose. The Tribe’s historical uses, proposed future uses, and expressed purpose contain numerous inconsistencies, and are also inconsistent with documents in the record. Therefore, the RD abused her discretion in relying on errors and inconsistencies in facts, such that the decisions must be vacated.

In its answer brief, the Tribe argues that it has no responsibility to detail why trust status is necessary despite already owning the land in fee.⁹² Nonetheless, it concedes that the RD may consider a tribe’s financial status in determining whether a tribe needs additional land, but claims that relative financial status is not dispositive.⁹³ The Tribe then cites its “overall goal” for the land, which includes “sufficient land available to support economic development, adequate housing, and agricultural purposes.”⁹⁴ Thereafter, the Tribe cites its purported housing deficit, waiting list for housing, and waiting list for vacant land to build homes, but nonetheless argues

⁹² Tribe’s Brief, p. 33.

⁹³ *Id.* at p. 34.

⁹⁴ *Id.*

that the Village is engaging in “wild speculation about possible changes in land use.”⁹⁵ Additionally, the Tribe posits that the RD need not consider the potential for gaming, as “nothing in the record suggests the Tribe contemplates the use of a property for gaming.”⁹⁶ Finally, the Tribe argues that the Village’s arguments boil down to “mere disagreement,” and the Village merely “attempts to shift the burden of proof.”⁹⁷

The BIA, in response to the Village’s opening brief, also argues that the RD has no obligation to consider why the Tribe needs the land in trust, despite the fact that the Tribe already owns the land in fee.⁹⁸ Moreover, according to the BIA, the Tribe has no obligation to show why it would be harmed if the trust application were denied.⁹⁹ It also argues that gaming revenue, financial security, and economic success do not “disqualify” a Tribe from applying for lands to be taken into trust.¹⁰⁰ Furthermore, the BIA argues that the RD has broad discretion in applying the 151.10 criteria.¹⁰¹

Whether a particular Tribe needs land pursuant to a trust acquisition is a case-by-case determination, and the BIA may consider the Tribe’s financial status.¹⁰² The RD’s decisions that are the subject of this appeal contain absolutely no discussion on the current financial status of the Tribe. The Village raised a number of objections to the fee-to-trust acquisitions based on the financial stability of the Tribe and lack of need for this land in trust, but the RD failed to discuss or even mention why the land was needed in trust despite plentiful resources. Moreover, while the RD may not have an obligation to consider why the land is specifically needed in trust status,

⁹⁵ *Id.*

⁹⁶ *Id.* at p. 36.

⁹⁷ *Id.* at p. 35-36.

⁹⁸ Department’s Brief, p. 19.

⁹⁹ *Id.* at p. 20.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 209-10 (2007).

“subsection 151.10(b) does not preclude” the BIA from considering such information.¹⁰³ The Board has held that “BIA is well within its authority to consider and weigh the extent to which an applicant has shown a need for having the specific property in trust.”¹⁰⁴ Here, the RD completely failed to discuss, let alone consider, why this wealthy and financially stable Tribe needs this land in trust. Had the RD considered it pursuant to her authority to do so, the RD would likely have concluded that the Tribe has no need.

The Tribe’s expressed historical uses, expressed future uses, and explanations for need and purpose are broad and all encompassing, leading to numerous inconsistencies. According to Departmental policy, the Tribe’s stated purpose “should be consistent with the environmental documents and all other documents submitted with the application.”¹⁰⁵ This concept is also related to section 151.10(h), and whether the BIA can rely on a categorical exclusion for no change in land use. For all three properties at issue, the RD broadly stated that the Tribe has “established goals” to ensure that members “will have lands available to support economic development, adequate housing, and agricultural purposes.” The RD thereafter describes the purported “housing deficit” and “waiting list” for housing in all three decisions; the Boyea and Cornish decisions further indicate that “members are on a waiting list for vacant land to build homes.” However, the Boyea decision indicates that the property has been historically used for “residential and agricultural purposes,” and will be used in the future as “agricultural.” Thus, the purported housing deficit is completely irrelevant. The Cornish decision indicates that the property has been historically used for “residential purposes” and will continue to be used for

¹⁰³ *State of South Dakota and Moody County, South Dakota v. Acting Plains Regional Director*, 39 IBIA 283, 293 (2004), aff’d, *South Dakota v. U.S. Dept. of the Interior*, 401 F.Supp.2d 1000 (D.S.D. 2005), aff’d, 487 F.3d 548 (8th Cir. 2007).

¹⁰⁴ *Id.*

¹⁰⁵ *Acquisition of Title to Land Held in Fee or Restricted Fee*, Department of the Interior, Bureau of Indian Affairs, p. 25.

“residential purposes” due to a “long-term residential lease.” Again, if a long-term lease exists on the land, then this trust acquisition will in no way alleviate a housing deficit. Therefore, the Tribe’s purposes are inconsistent, and it appears that the purpose is broadly stated in order to permit reliance on a category exclusion for no change in land use.

The Gerbers decision also contains inconsistencies with regard to uses, need and purpose, and with regard to environmental documents contained in the record. For instance, the Gerbers decision indicates that the property has been historically used for “residential and agricultural purposes,” and will be used in the future for “residential (Indian housing) and agricultural use.” However, environmental documents in the administrative record indicate that the Gerbers property, in addition to residences and a farming area, consists of “vacant partially developed land that was previously part of a developing light industrial park.”¹⁰⁶ Moreover, the Tribe conceded that an “actual land use conflict” exists in that “the Tribe’s use of the Gerber’s Property for agricultural purposes” is inconsistent with the Village’s zoning of the property, which is light industrial.¹⁰⁷ Therefore, the Tribe has expressed inconsistent historical uses of this property, and inconsistent future uses. Furthermore, the Tribe’s stated uses are completely inconsistent with environmental documents and other documents in the record, thus violating Department policy.¹⁰⁸ In light of these inconsistencies, it is unclear how the Tribe can state such a broad, all-encompassing purpose, to avoid any appearance of a change in land use.

The Village is not attempting to shift the burden of proof; rather, the Village is arguing that the RD completely failed to consider inconsistencies in the record, and failed to consider why the Tribe needs the land. The Village’s arguments amount to far more than simple

¹⁰⁶ Memorandum to Regional Director from Scott Hebner and Richard Berg, dated January 21, 2010. Village’s Appendix, Exh. 46.

¹⁰⁷ Tribe’s Brief, p. 47.

¹⁰⁸ *Acquisition of Title to Land Held in Fee or Restricted Fee*, Department of the Interior, Bureau of Indian Affairs, p. 25.

“disagreement” with the RD’s decisions. Unlike the county’s objections in *Jackson County, Kansas, and State of Kansas v. Southern Plains Regional Director, Bureau of Indian Affairs*,¹⁰⁹ the Village has come forward with specific arguments and facts as to why the RD abused her discretion. Furthermore, the Village’s arguments consist of far more than “barebones assertions” or “conclusory objections to the proposed trust acquisitions in one-sentence ‘bullet’ points.”¹¹⁰ Therefore, the Village has adequately shown that the RD abused her discretion under sections 151.10(b) and (c), as the Tribe has no need,¹¹¹ its expressed uses are completely inconsistent, including inconsistencies with documents in the administrative record, and the Tribe’s broadly stated purpose leaves little room for the RD to determine whether a change in land use is planned, despite the reference to a housing deficit, building homes, and economic development in general.¹¹²

C. THE REGIONAL DIRECTOR ABUSED HER DISCRETION UNDER SECTION 151.10(E).

Under 25 C.F.R. section 151.10(e), if the land at issue is currently held in fee, the secretary must consider, “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.” Here, the RD completely failed to consider the Village’s concerns, as she summarily dismissed them as speculative. In addition, the RD failed to consider the cumulative impact of these simultaneous fee-to-trust applications. Furthermore, the RD relied on an erroneous assumption, and the IBIA cannot second guess whether the RD would

¹⁰⁹ 47 IBIA 222, 230 (09/10/2008).

¹¹⁰ *Id.* at 228.

¹¹¹ The Village inadvertently miscalculated the acreage per individual Tribal member in its opening brief (Village’s Opening Brief, p. 50); however, even considering the most recent numbers available, 23,000 acres of land divided by 2,500 members living on the reservation, calculates to 9.2 acres per member. (See Berg, Rick. “Far Horizons, The Oneidas’ Secret of Sustainability.” *Insight on Business*. (October 2010). Available at: <http://www.insightonbusiness.com/ArticleText.aspx?articleId=458>. This acreage, even taking into account that some land may be used for purposes other than residential, does not support a finding that the Tribe has a “need...for additional land.” See § 151.10(b).

¹¹² Tribe’s Brief, p. 34-35.

have reached the same conclusion notwithstanding this significant error. For these reasons, the decisions of the RD must be vacated.

In its answer brief, the Tribe argues that the Village simply makes generalized statements on the loss of taxes and does not provide specific information relative to each individual parcel.¹¹³ It also argues that, despite the fact it submitted consultation letters for approximately 133 parcels of taxable land, consisting of approximately 2,673 acres, dated August 27, 2008, and October 3, 2008, respectively, that the BIA has no obligation to consider the cumulative impact of these applications.¹¹⁴ The Tribe then focuses on the individual parcels, and argues that the tax loss is minimal.¹¹⁵ Furthermore, the Tribe posits that this tax loss is “more than offset” by payments that it makes for services, as well as through service agreements with Brown County and Ashwaubenon; however, contrary to this statement, the Tribe has no service agreement with Ashwaubenon, and any agreement with Brown County is completely irrelevant to the tax impact on the Village.¹¹⁶ In addition, the Village of Hobart does not receive any payment for services, nor has it received any monies from the Tribe for its infrastructure, such as for road maintenance. Finally, the Tribe denies that the Village will face a significant erosion of its tax base,¹¹⁷ even in light of the conclusions of the Beacon Hill Institute Study,¹¹⁸ and the Tribe’s stated goal to “reestablish tribal jurisdiction” over all of the former reservation.¹¹⁹

The BIA similarly argues that the Village did not address tax losses on a parcel-by-parcel basis, and its arguments are merely “speculative and unpersuasive.”¹²⁰ Also, in response to the Village’s argument that the Tribe and Village have no service agreement, and the Tribe does not

¹¹³ *Id.* at 40.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 40-43.

¹¹⁷ *Id.* at 43.

¹¹⁸ Village’s Appendix, Exh. 51.

¹¹⁹ Village’s Appendix, Exh. 52.

¹²⁰ Department’s Brief, p. 22.

have service agreements with all other municipalities impacted by the trust acquisition, the BIA argues that “nothing in Part 151 requires the Tribe to enter [into] service agreements.”¹²¹ The BIA’s argument merely illustrates the point; the Tribe has no service agreement with the Village, nor the Village of Ashwaubenon, and no incentive to negotiate service agreements. Therefore, there is absolutely no mitigating effect for tax losses. Furthermore, like the Tribe, the BIA argues that there is no obligation to consider cumulative impact.¹²² Finally, the BIA argues that the “RD reasonably determined that the benefit to the Tribe of acquiring the land in trust outweighed the minimal negative impact to the State and local subdivisions.”¹²³ This argument implies that the RD performed some sort of balancing test; however, it is impossible to perform a balancing test when the RD fails to consider any of the Village’s arguments, nor the aggregate impact of numerous applications filed on the same day.

Because the Tribe submitted simultaneous applications for approximately 133 parcels within the Village, of which the Village was notified on August 27, 2008 and October 3, 2008, respectively, the BIA should have considered the cumulative impact.¹²⁴ The IBIA has indicated that it does not “foreclose the possibility that, in an appropriate case, BIA’s failure to consider the collective tax impact of simultaneous trust acquisitions – e.g., numerous simultaneous acquisitions which, collectively, would have a significant tax impact – might constitute a failure

¹²¹ *Id.*

¹²² *Id.* at 23.

¹²³ *Id.*

¹²⁴ Contrary to the Tribe and BIA’s argument that the Village failed to provide tax information on the individual parcels, the Village included numerous Exhibits with its objection letter dated November 26, 2008 and included in the administrative record. For example, Exhibit A to the objection letter included the Village’s 2009 Completed Real Estate Assessment Roll sorted by individual parcel, Exhibit M included the Village’s 2009 Statement of Real Estate Assessments with a chart showing use classification by parcel count, and Exhibit Q showed Special Assessments by parcel.

to properly exercise its discretion.”¹²⁵ The IBIA invited this challenge to its precedent in a case in which the tribe applied to have three parcels placed into trust on January 19, 2001, followed by another application on May 31, 2001.¹²⁶ The combined acreage for the four properties was approximately 366.¹²⁷ Additionally, the collective percentage of tax loss attributable to the simultaneous trust acquisitions was .12%.¹²⁸ Based on these figures, the IBIA concluded that “[a]ppellants have not convinced us that our consistent interpretation is wrong or that our precedent should be revisited.”¹²⁹ Unlike the small number of parcels at issue in *Roberts*, the Tribe submitted simultaneous applications for approximately 133 parcels, consisting of approximately 2,673 acres. The Village also received consultation letters for three additional parcels on May 5, 2010, totaling approximately 150 acres. Currently, the total acreage of pending fee to trust applications is approximately 2,924 acres.

The combined tax loss to the Village for the 133 parcels is approximately \$36,148.88, which represents approximately 1.4% of the Village’s annual budget.¹³⁰ Despite this significant portion of funding that will now be shifted to other residents of the Village, the BIA attempts to compare it to the collective tax loss in the *Roberts* case, in which the IBIA found only a minimal impact.¹³¹ However, in *Roberts*, the combined tax loss of the parcels at issue was only .12% of the county’s tax base.¹³² Here, the combined tax loss of pending trust applications is 1.4%, which is above what the IBIA has characterized as “minimal.”¹³³ In addition, the cumulative

¹²⁵ *Roberts County, South Dakota; State of South Dakota and Sisseton School District No. 54-2; City of Sisseton, South Dakota; and Wilmot School District No. 54-7 v. Acting Great Plains Regional Director, Bureau of Indian Affairs*, 51 IBIA 35, 51-52 (12/30/2009).

¹²⁶ *Id.* at 39.

¹²⁷ *Id.* at 35-36.

¹²⁸ *Id.* at 52.

¹²⁹ *Id.* at 51.

¹³⁰ Village’s Objection Letter dated November 26, 2008, p. 11.

¹³¹ Department’s Brief, p. 24.

¹³² *Roberts County*, 51 IBIA at 52.

¹³³ *Id.*

impact is not limited to tax loss; accepting these parcels into trust will exacerbate and intensify the Village's jurisdictional-related concerns, including the Village's ability to provide services. For instance, the Village will be faced with the difficult task of managing its stormwater program over a checker-boarded pattern of trust versus fee land. Therefore, the simultaneous nature of these applications and detrimental impact on the Village strongly suggest that the IBIA revisit its previous holding. It is simply nonsensical to consider only individual applications when 133 applications were filed on only two separate days. Therefore, the failure to consider the cumulative impact constitutes an abuse of discretion and the RD's decisions must be vacated.

In addition to its failure to consider the cumulative impact of the simultaneous trust applications, the RD summarily dismissed all of the Village's concerns, without the slightest indication that she considered any of them. The RD simply stated, "[t]here is a response of record by the Village of Hobart, objecting to fifty six applications. This response provides unsupported speculations and assertions, therefore, were unpersuasive in this decision." If the RD is referring to the Village's objection letter dated November 26, 2008, this letter included numerous legitimate concerns, such as, by way of example, the projected tax loss, the impact of tax loss on Village services, including emergency services and road maintenance, the lack of a service agreement with the Village, and the lack of funding for schools.¹³⁴ While the RD admittedly discussed the school funding concern, she did not discuss, let alone consider, any of the Village's other concerns; the RD simply dismissed the entire letter as speculative. While the IBIA is generally not permitted to substitute its own judgment relative to the RD's consideration of a factor, the IBIA has held that "a failure to consider a factor addressed by [an interested

¹³⁴ See Village's Objection Letter dated November 26, 2008.

party]” constitutes sufficient grounds to vacate the decision.¹³⁵ In addition, Departmental policy requires that the RD analyze and discuss “[a]ny comments received from the notice of application on taxes from the State and local government.”¹³⁶ Here, the RD completely failed to consider the numerous, legitimate concerns of the Village; thus, the RD abused her discretion, and the decisions must be reversed.

In addition to the RD’s failure to consider the Village’s concerns, the RD’s erroneous reliance on the existence of service agreements and “cooperative relations” amongst the impacted local governmental bodies requires that the IBIA vacate the RD’s decisions. The IBIA has held that if it is possible that an RD’s “ultimate conclusion was influenced by [an] improper assumption,” the IBIA must vacate the RD’s decision.¹³⁷ In *Rio Arriba*, the RD made an erroneous assumption regarding the collectability of property taxes on certain property.¹³⁸ The IBIA vacated the RD’s decision based on this erroneous assumption; the IBIA could not determine whether the RD would have made the same decision if the RD had the correct information.¹³⁹ In all three of the decisions that are the subject of this appeal, the RD stated, “[t]he Tribe, as part of the pre-application process has worked diligently and successfully with the local and state governments in the establishment of cooperative relations and the development of service agreements to alleviate concerns with issues that include the effects of the proposed trust acquisition.” Based on this language, it is clear that the RD relied on this information for purposes of establishing a mitigating effect on tax losses. In reality, the Tribe has no service agreement with the Village, nor does it have any agreement with the Village of

¹³⁵ *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director, Bureau of Indian Affairs*, 47 IBIA 187, 200-01 (09/02/2008).

¹³⁶ *Acquisition of Title to Land Held in Fee or Restricted Fee*, Department of the Interior, Bureau of Indian Affairs, p. 25.

¹³⁷ *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, Bureau of Indian Affairs*, 36 IBIA 14, 22 (02/06/2001).

¹³⁸ *Id.*

¹³⁹ *Id.*

Ashwaubenon, contrary to its statement that “[t]he Tribe has renewed its service agreement with the Village of Ashwaubenon on a year-to-year basis, and the Tribe and the Village of Ashwaubenon enjoy good relations.”¹⁴⁰ It is the Village’s understanding that recent negotiations between the Tribe and Ashwaubenon have failed. Because the RD clearly relied on the assumption that the Village has “worked diligently and *successfully*...in the establishment of cooperative relations *and* the development of service agreements,” and this assumption is flatly false, the Board must vacate the RD’s decisions.

Based on the RD’s cursory statement acknowledging that the Village submitted a response and that the response “provides unsupported speculations and assertions,” both the BIA and Tribe conclude that the RD considered the Village’s objections under section 151.10(e). While the RD admittedly acknowledged receipt of the Village’s concerns, she did not give any sort of meaningful response to those concerns, provide any meaningful explanation as to why the concerns were not warranted, nor otherwise address any of the Village’s concerns. This constitutes a clear abuse of discretion, and the IBIA must vacate the decisions.¹⁴¹

D. THE REGIONAL DIRECTOR ABUSED HER DISCRETION UNDER SECTION 151.10(F).

Under 25 C.F.R. section 151.10(f), the secretary must consider “[j]urisdictional problems and potential conflicts of land use which may arise.” According to Department of the Interior policy, the “BIA is *required* to consider jurisdictional issues identified in response to the Notice of Application and other relevant comments received.”¹⁴² The failure to consider a jurisdictional problem raised by an interested party constitutes an abuse of discretion, and the IBIA must

¹⁴⁰ Tribe’s Brief, p. 43-44.

¹⁴¹ See *Jefferson County*, 47 IBIA at 200-01.

¹⁴² *Acquisition of Title to Land Held in Fee or Restricted Fee*, Department of the Interior, Bureau of Indian Affairs, p. 26.

remand the matter for consideration.¹⁴³ In addition, it is not enough for the RD to simply acknowledge a jurisdictional problem; the RD must “respond to that concern, explain why it was not warranted, or otherwise address it.”¹⁴⁴ Here, the RD consistently failed to address numerous jurisdictional concerns raised by the Village; thus, the RD’s decisions must be vacated.

In its answer brief, the Tribe argues that the BIA is permitted to take into consideration “an already established jurisdictional pattern,” and “bare assertions concerning jurisdictional problems are insufficient to show that a trust acquisition would alter that pattern or worsen any existing problems within the pattern.”¹⁴⁵ In making this argument, it is unclear what jurisdictional pattern the Tribe is referring to; as the Tribe continues to purchase sporadically placed parcels within the Village and apply to have those parcels placed in trust, it creates anything but a jurisdictional pattern. Moreover, with regard to jurisdiction, there has never been a uniformity of interpretation, and new jurisdictional-related concerns frequently arise between the Village and the Tribe.¹⁴⁶ While several of these concerns exist at the present time, the acceptance of additional parcels into trust, including the parcels at issue here, will directly implicate these issues. For instance, if these parcels are accepted into trust, they will immediately implicate the issue of the validity of stormwater management fees.¹⁴⁷ Moreover, acceptance of these parcels into trust will heighten the concern over the delivery of emergency services and other services to this land, which, to date, has not been addressed or resolved.

¹⁴³ *Jefferson County, Oregon*, 47 IBIA at 200-01.

¹⁴⁴ *Id.*

¹⁴⁵ Tribe’s Brief, p. 44.

¹⁴⁶ The Tribe has also illegally claimed approximately 73 miles of roadways within the Village of Hobart; this process can only be accomplished by Village resolution. The City of Green Bay purported to grant authority to the Tribe in a letter dated March 15, 2007; this letter appears in the administrative record, along with a list of roads designated under “Village of Hobart” ownership. The City had no authority to designate roads in the Village as IRR roads. The Village did pass a Board Resolution authorizing the designation of seven short roads in Hobart; however, these seven roads involve a total of approximately 2.5 miles. It is believed that the Tribe receives a substantial amount of money with regard to the roadways that it is illegally claiming.

¹⁴⁷ This is the subject of pending litigation in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 10-CV-00137 (E.D. Wis.).

Therefore, there is no settled or existing jurisdictional pattern, and the addition of these parcels into trust will not only implicate existing concerns, but also lead to new jurisdictional concerns.

The Tribe concedes that an actual land use conflict exists, but nonetheless argues that the RD has no obligation beyond merely considering the presence of the conflict.¹⁴⁸ Similarly, the BIA argued that the RD need only “consider jurisdictional problems or potential conflicts,” not resolve them.¹⁴⁹ In making these arguments, both the Tribe and BIA ignore the fact that there is absolutely no evidence that the RD considered any of the jurisdictional concerns raised by the Village, including the conceded zoning conflict on the Gerbers property.¹⁵⁰ In its objection letter dated November 26, 2008, the Village raised specific jurisdictional concerns related to zoning; in fact, the Gerbers parcel was specifically cited as one of the parcels included in the 275 acres within the Village's Industrial Park, zoned agricultural by the Tribe, but zoned Limited Industrial by the Village.¹⁵¹ Therefore, the BIA is clearly wrong when it claims that the Village's concerns are nothing more than broad policy concerns and do not “concern...the three tracts at issue.”¹⁵² In addition to this, the Village provided numerous, specific examples of land use conflicts, all of which undermine any argument that a jurisdictional pattern exists.¹⁵³ This complete failure to consider jurisdictional conflicts, including an actual conflict specific to a parcel at issue in this case was an abuse of discretion and requires that the IBIA vacate the RD's decisions.

In addition to the jurisdictional concerns related to zoning that the Village submitted to the RD, the Village also cited concerns relative to the delivery of services, including emergency

¹⁴⁸ Tribe's Brief, p. 47.

¹⁴⁹ Department's Brief, p. 24-25.

¹⁵⁰ Tribe's Brief, p. 47.

¹⁵¹ See Village's Objection Letter dated November 26, 2008, p. 16 (the Village cites HB-328 (the Gerbers property) in footnote 21).

¹⁵² Department's Brief, p. 24.

¹⁵³ See Village's Objection Letter dated November 26, 2008, p. 15-17.

services. Specifically, the Village raised the following concerns with regard to emergency services: “Within Hobart, calls can be made to both the Village and Tribal Police leading to jurisdictional confusion that may have life-threatening consequences. Should one group respond if the other has been called? What happens if both respond and are on site? Which government has the authority to prosecute or take a person into custody? Which government has the authority to investigate or preserve evidence? What about an incident on tribal trust land involving persons who are not enrolled members?”¹⁵⁴ Additionally, the Village cited its concerns relative to the delivery of stormwater services; the parcels at issue here, if taken into trust, would immediately raise the question of whether the Village can collect stormwater fees on the land. While the RD discussed the Tribe’s police department, and mentioned an agreement with the Brown County Sheriff’s Department, the RD made absolutely no reference to any of the Village’s concerns regarding the jurisdictional confusion involved in the delivery of emergency services, nor the delivery of other services to the trust land. The IBIA has held that the failure to consider jurisdictional problems raised by an interested party relative to the obligation to provide services to trust property constitutes an abuse of discretion and warrants remand.¹⁵⁵ Because the RD completely failed to address these jurisdictional concerns, the decisions must be vacated.

E. THE REGIONAL DIRECTOR ABUSED HER DISCRETION UNDER SECTION 151.10(G).

Under 25 C.F.R. section 151.10(g), the secretary must consider, “[i]f the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.” According to Department of Interior policy, “[t]he applicant must explain the anticipated services that they

¹⁵⁴ Village’s Objection Letter dated November 26, 2008.

¹⁵⁵ *Jefferson County, Oregon*, 47 IBIA at 200-01.

will need from BIA.”¹⁵⁶ Here, the Tribe completely failed to supply any information to the BIA as required, and the RD therefore failed to consider it; this constitutes an abuse of discretion.

In its answer brief, the Tribe argues that it has assumed many responsibilities and that the Village has failed to show that the acquisition of the Gerber’s property will impose additional burdens on the BIA.¹⁵⁷ Despite the Tribe not providing any information to the BIA, as required under Department of Interior policy, the Tribe nonetheless argues that the Village is attempting to shift the burden of proof, and that the Village “did not raise any such objections before the BIA.”¹⁵⁸ The Tribe then relies on the *Roberts* case and indicates that the facts are identical. However, in *Roberts*, the tribe admittedly failed to provide information in its resolution as to additional responsibilities, but the tribe nonetheless “discussed this consideration in its...response to the Appellants’ comments.”¹⁵⁹ The tribe’s response to the appellants’ comments in *Roberts* asserted that the BIA would only have to take on “minimal administrative functions.”¹⁶⁰ Because the appellant in *Roberts* did not contradict the tribe’s submission, the IBIA determined in *Roberts* “that the Regional Director was not required to address this factor in more detail.”¹⁶¹

Here, the Tribe completely failed to address the criteria in section 151.10(g) in its application; in fact, the Tribe clearly misconstrued § 151.10(g) by stating, “[s]ection 151.10(g) is inapplicable to this trust application because the Oneida Tribe holds fee title to the land.”¹⁶² In the Village’s objection letter dated November 26, 2008, the Village cites the provisions of 25 C.F.R. section 151.10, including subsection (g), and argues that the “Tribe fail[ed] to address the

¹⁵⁶ *Acquisition of Title to Land Held in Fee or Restricted Fee*, Department of the Interior, Bureau of Indian Affairs, p. 26.

¹⁵⁷ Tribe’s Brief, p. 47-48.

¹⁵⁸ *Id.* at 48.

¹⁵⁹ *Roberts County*, 51 IBIA at 52-53.

¹⁶⁰ *Id.* at 53.

¹⁶¹ *Id.*

¹⁶² Village’s Appendix, Exh. 64.

provisions of 25 C.F.R. § 151.10” and “[t]here is nothing in the application materials that address these issues.”¹⁶³ On January 16, 2009, the Tribe submitted a letter to the BIA responding to the Village’s letter of November 26, 2008. However, the Tribe’s response letter contains no reference to section 151.10(g).¹⁶⁴ Therefore, the *Roberts* case is clearly inapplicable here, and it is unclear how the Village could be attempting to shift the burden of proof when the Tribe failed in the first instance to provide any information under section 151.10(g). Nonetheless, the Village has adequately shown that the RD abused her discretion under section 151.10(g); the RD completely failed to consider what services the Tribe anticipated that it would need from the BIA. Therefore, the decision of the RD must be vacated.

Despite the clear Department of the Interior policy addressing section 151.10(g), the BIA claims that the Village “misapprehends the nature of this requirement.”¹⁶⁵ The BIA further claims “[t]he Tribe is not required to explain what services it will need. The BIA must assess for itself whether it is equipped to provide the administrative services and oversight resulting from accepting the land in trust.”¹⁶⁶ While the Village does not dispute that the BIA must itself assess whether it is equipped to handle additional responsibilities, the Department of the Interior policy could not be more clear. The BIA’s ability to assess additional responsibilities is dependent on whether the Tribe explains what services it anticipates that it will need from the BIA. The Department of the Interior policy clearly states, “[t]he applicant **must** explain the anticipated services they will need from BIA.”¹⁶⁷ Here, the Tribe completely failed to provide this

¹⁶³ Village’s Objection Letter dated November 26, 2008, p. 7.

¹⁶⁴ See Letter to Terrence Virden, BIA-Midwest Regional Office, dated January 16, 2009.

¹⁶⁵ Department’s Brief, p. 25.

¹⁶⁶ *Id.* at 25-26.

¹⁶⁷ *Acquisition of Title to Land Held in Fee or Restricted Fee*, Department of the Interior, Bureau of Indian Affairs, p. 26.

information to the BIA. Because this information was not before the BIA, as required, the RD implicitly failed to consider it; this constitutes an abuse of discretion.

The BIA also argues that the Village has no standing to challenge section 151.10(g), but does not provide any explanation as to why the Village would not have standing, except that “[t]he Appellant is not within the to be protected (sic) in determining whether the BIA is equipped to provide administrative service to the land to be acquired.”¹⁶⁸ Presumably, the BIA meant to state that the Village was not within the “zone” of interest to be protected; however, if the BIA is not equipped to handle whatever services the Tribe may need, the burden will fall directly on the Village. For instance, the Village is required to provide emergency services to all residents within its boundaries, as well as various environmental services; other taxpayers within the Village will be responsible for those costs, despite receiving no funding from trust properties. Therefore, the Village has a direct interest in the determination of whether the BIA is equipped to handle additional responsibilities. Because the Tribe failed to articulate what services it would need, and the RD therefore failed to consider it, the decisions must be vacated.

F. THE REGIONAL DIRECTOR ABUSED HER DISCRETION UNDER SECTION 151.10(H).

Under 25 C.F.R. section 151.10(h), the secretary must consider “[t]he extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.”¹⁶⁹ Here, the RD abused her discretion in relying on a categorical exclusion for no change in land use, as there were numerous inconsistencies in the record. Moreover, reliance on a categorical exclusion was improper due to

¹⁶⁸ Department’s Brief, p. 26.

¹⁶⁹ The requirements of appendix 4 now appear in Chapter 10.

exceptions that the RD failed to consider. Also, the RD was not justified in relying on environmental site assessments that failed to comply with the required standards.

In its answer brief, the Tribe argued that it supplied the necessary information to the BIA, and the BIA fulfilled its responsibilities.¹⁷⁰ The Tribe also argues that the Village's arguments are based on "unfounded speculation" and the Village lacks standing.¹⁷¹ The Tribe further argues that the BIA was not required to perform an environmental assessment because the parcels at issue fell under the categorical exclusion for no change in land use.¹⁷² Finally, the Tribe argues that even if it failed to comply with the requirements of 602 DM 2, it does not constitute grounds for reversal.¹⁷³ However, in the decision cited by the Tribe, the IBIA concluded that the appellant had not shown the applicant failed to satisfy her duties to provide the BIA with the necessary information under subsection (h).¹⁷⁴ Here, the Village has shown inconsistencies and errors, and the decision cited by the Tribe cautions, "BIA is reminded to ensure that it has fulfilled all of its environmental, as well as other legal, responsibilities before it accepts title to the tract."¹⁷⁵

The BIA asserts similar arguments. It argues that it was entitled to rely on a categorical exclusion based on no change in land use.¹⁷⁶ Also, that NEPA does not prohibit actions that may affect the environment, even when those actions affect the environment adversely.¹⁷⁷ The BIA, like the Tribe, argues that the Village has no standing.¹⁷⁸ Specifically, the BIA argues that the Village cannot challenge the adequacy of the environmental site assessments because the Village

¹⁷⁰ Tribe's Brief, p. 49.

¹⁷¹ *Id.*

¹⁷² *Id.* at 49-50.

¹⁷³ *Id.* at 52-53.

¹⁷⁴ *City of Isbel v. Great Plains Regional Director*, 38 IBIA 263, 268 (2002).

¹⁷⁵ *Id.*

¹⁷⁶ Department's Brief, p. 26-27.

¹⁷⁷ *Id.* at 28.

¹⁷⁸ *Id.*

was not the intended beneficiary of the information.¹⁷⁹ Finally, notwithstanding the Village's numerous arguments that the RD failed to consider the criteria set forth in 151.10(h), the BIA argues that the Village must show the failure to consider one or more criteria, rather than demanding a particular level of scrutiny.¹⁸⁰

Contrary to the arguments of the BIA and Tribe, the RD erroneously relied on a categorical exclusion; the BIA should have performed further environmental assessments for these properties. First, as explained earlier in this brief, the Tribe's purported historical uses and expressed future uses are completely inconsistent. In addition, the Tribe expresses its purposes for the properties extremely broadly, such that the same language is used in all three decisions,¹⁸¹ and essentially prevents any determination as to whether the Tribe actually intends to change the use of the land. Moreover, if the Tribe "needs" the land for purposes of economic development, or for building homes for members on a waiting list for vacant land to build homes,¹⁸² this implies that the Tribe does in fact intend to change the use of the land from its present state. Secondly, there are numerous exceptions to the categorical exclusions that the RD failed to consider. Specifically, there are controversial and unresolved conflicts relative to the Village's ability to collect stormwater fees from trust land as part of its stormwater program.¹⁸³ Additionally, the Tribe has claimed that it has passed its own environmental-related ordinances.¹⁸⁴ If these parcels are accepted into trust, it will directly impact the Village's

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ The RD articulates the following purpose in each of the decisions: "[T]he Oneida Tribe has established goals to further the assurance that future generations of Tribal members will have lands available to support *economic development, adequate housing, and agricultural purposes.*"

¹⁸² Both the Boyea and Cornish decisions indicate that "10 members are on a waiting list for vacant land to build homes." The Gerbers decision indicates that "20 members are currently on a waiting list for housing."

¹⁸³ This is the subject of pending litigation in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 10-CV-00137 (E.D. Wis.).

¹⁸⁴ *Id.* (The Tribe's complaint at ¶19 states: "The Tribe has promulgated ordinances that comprehensively regulate water quality on the Oneida Reservation, including stormwater run-off on its trust land.")

stormwater program, which the Village is mandated to implement by federal and state law.¹⁸⁵ Thus, these unresolved issues, implicating federal, state, local, and tribal law, counsel against simple and conclusive reliance on a categorical exclusion without any further explanation or analysis.

The argument that the Village lacks standing is similarly without merit. The BIA argues that the decision to accept land into trust does not, in itself, adversely affect the Village; rather, it merely effects a change of title.¹⁸⁶ In addition, the BIA and Tribe argue that the Village has no standing to challenge the BIA's determinations with regard to NEPA, as well as the environmental site assessments.¹⁸⁷ In *Butte County, California v. Hogen*,¹⁸⁸ the District Court considered a similar challenge to standing and determined "[t]here was little question that the County ha[d] standing." In *Butte County*, the tribe argued the county did not have a legally-protected interest in the Department of the Interior's decision to accept land into trust under the IRA, nor the NIGC's decision to approve a gaming ordinance "because the IGRA requires neither the Department nor the NIGC to consider impacts on third parties, like the County, nor does it allow third parties to comment on their determinations."¹⁸⁹ Also, the tribe argued that the county lacked standing "because its challenge lies beyond the zone of interests protected under the statutes."¹⁹⁰ In response, the county argued that it had a legally-protected interest because "the determinations of the NIGC and the Department allow the Tribe to conduct *illegal* gaming in the County."¹⁹¹ The county cited the following injuries: "adverse environmental effects, increased traffic, safety hazards, zoning conflicts, and increased demand for County

¹⁸⁵ *Id.*; 40 C.F.R. § 122.33(a); Wis. Stat. § 283.33(1)(c).

¹⁸⁶ Department's Brief, p. 27.

¹⁸⁷ Department's Brief, p. 28; Tribe's Brief, p. 50.

¹⁸⁸ 609 F.Supp.2d 20, 26-27 (D.D.C. 2009).

¹⁸⁹ *Id.* at 26.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

services,” including that gaming would violate the county’s zoning restrictions.¹⁹² The county argued that these injuries were “immediate and non-speculative” in that both the NIGC and Department had approved of the tribe’s requests.¹⁹³

Like the county in *Butte County*, “[t]here is little question that the [Village] has standing” to challenge the determinations of the RD.¹⁹⁴ The Village has not alleged an injury arising solely from the RD’s determination to effect a change of title, in and of itself. Rather, it is the numerous jurisdictional conflicts and environmental-related concerns that will injure the Village. Moreover, like the injuries set forth by the county in *Butte County*, the Village similarly described “a host of possible injuries ranging from environmental effects, to zoning conflicts, to safety hazards.”¹⁹⁵ Furthermore, these concerns are “concrete, particularized, and imminent” as the RD has indicated her intent to accept the land into trust status despite the Village’s concerns.¹⁹⁶ Notwithstanding the imminence of these concerns, the IBIA has held that “[i]n asserting a procedural injury under NEPA...Appellants may prosecute their claims ‘without meeting all the normal standards for redressability and immediacy.’”¹⁹⁷ Therefore, the Village has standing to challenge whether the RD complied with the provisions of NEPA. Likewise, it is irrelevant that the Village may not have been the intended beneficiary of the ESAs;¹⁹⁸ the Village is an interested party and has the burden of proving the RD abused her discretion in failing to consider the criteria outlined in section 151.10. Additionally, the Village was specifically requested and permitted to comment on the trust applications, including potential

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *Arizona State Land Dep’t v. Western Regional Director*, 43 IBIA 158, 169 n. 14 (2006) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 8 (1992)).

¹⁹⁸ *See Butte County*, 609 F.Supp.2d at 26.

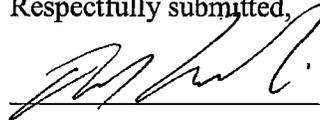
conflicts of land use. Therefore, the Village has standing to challenge the RD's decisions relative to these matters.

V. CONCLUSION

The Village respectfully requests that for the above stated reasons the RD's decision to accept this land into trust be vacated.

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Respectfully submitted,



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