

July 29, 2010

VIA OVERNIGHT

Board of Indian Appeals
Office of Hearings and Appeals
U.S. Department of the Interior
801 North Quincy Street
Arlington, VA 22203

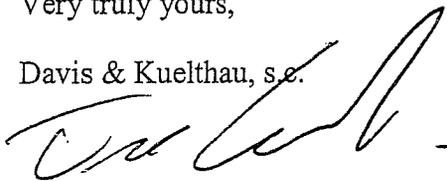
**Re: Village of Hobart v. Midwest Regional Director, Bureau of Indian Affairs
Docket No.: IBIA 10-091 and 10-092**

Dear Sir or Madam:

Enclosed please find the Village of Hobart's Opening Brief and Appendix, which includes the Certificate of Service, regarding the above-referenced matter.

Very truly yours,

Davis & Kuelthau, s.c.



Frank W. Kowalkowski

FWK:kam

Encl.

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United States Department of the Interior Bureau of Indian Affairs, Ft. Snelling, MN
Superintendent, Great Lakes Agency Bureau of Indian Affairs, Ashland, WI
Assistant Secretary-Indian Affairs, Washington, D.C.
Honorable James Doyle, Madison, WI
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Joanne House, Chief Counsel, Oneida, WI
Dr. Fred Muscavitch, Director of Division of Land Management, Oneida, WI
Kathy Hughes, Vice Chairman, Oneida Tribe of Indians of Wisconsin, Oneida, WI
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CERTIFICATE OF SERVICE

Pursuant to 43 C.F.R. § 4.333, the undersigned hereby certifies that on this 29th day of July, 2010, the foregoing VILLAGE OF HOBART'S OPENING BRIEF was served on the following parties in the manner indicated:

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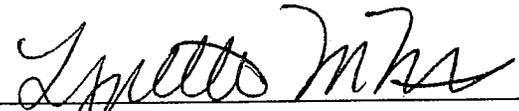
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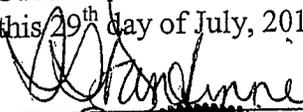
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I declare under penalty of perjury that the foregoing is true and correct.

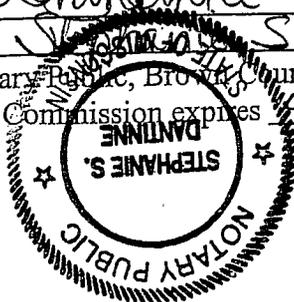


Lynette M. Mathias

Subscribed and sworn to before me
this 29th day of July, 2010.



* Stephanie S. Dantine
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My Commission expires 9/29/2013.



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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

VILLAGE OF HOBART,

Appellant,

v.

**VILLAGE OF HOBART'S
OPENING BRIEF**

MIDWEST REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,

Docket No. IBIA 10-091 & 10-092

Appellee.

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I. INTRODUCTION

This is a consolidated appeal of two Notice of Decisions ("NODs") of the Midwest Regional Director of the Bureau of Indian Affairs ("BIA"), dated March 17, 2010, to accept into trust several parcels of land owned by the Oneida Indians of Wisconsin ("Tribe"). The land is located in the Village of Hobart, in Brown County, Wisconsin ("Village"). The decisions were based upon the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 et. seq.

Pursuant to the IRA the Secretary of the Interior may take land into trust "for the purpose of providing land for Indians."¹ The IRA states "the term Indian as used in this act shall include members of any recognized Indian tribe now under federal jurisdiction"² The United States Supreme Court has held that in order for a tribe to be eligible to utilize the IRA, as a mechanism to have its lands placed into trust, it must have been a recognized tribe "under federal jurisdiction" as of June 18, 1934.³

Although the BIA correctly acknowledged the limitations the *Carcieri* court placed on the use of the IRA, it incorrectly determined that the Tribe was under federal jurisdiction as of June 18, 1934. A review of the historical record clearly shows that the reservation was fully allotted pursuant to the Dawes Act⁴, excess federal property previously used for as tribal schools was sold, and two townships were created on what was the former reservation. This all resulted in state and local jurisdiction applying to the land and all its inhabitants well before 1934.

Additionally, even if the Tribe was otherwise eligible for the benefits of the IRA, the Act is unconstitutional if it is applied to deprive the Village of the jurisdiction it previously enjoyed

¹ 25 C.F.R. § 465

² 25 U.S.C. § 479

³ The *Carcieri* court focused on the word "now" as used in § 479 and determined "now" meant June 18, 1934, the date the IRA was enacted. *Carcieri v. Salazar*, 129 S.Ct. 1058, 1068 (2009).

⁴ 25 U.S.C. 331

over the parcels placed into trust status. For over a century, these parcels were held in fee by tribal and then nontribal members and undisputedly subject to the jurisdiction of the state and Village. Congress does not have the authority to remove land from state jurisdiction to restore or create tribal sovereignty over such land. Consequently the IRA is unconstitutional as applied in this situation if the result is to extend tribal sovereignty over the parcels to be taken into trust status.

Finally, the BIA's actions were arbitrary and capricious in that the Regional Director failed to properly analyze the criteria found in 25 C.F.R. § 151 which outlines the fee to trust review process. The decisions are inherently inconsistent, are unsupported by the record and simply fail to truly analyze the Section 151 criteria.

II. STANDARD OF REVIEW

A. Standard of Review for Questions of Law

Whether or not the Tribe was under federal jurisdiction in 1934 is a question of law. It is an interpretation of a United States Supreme Court decision interpreting a congressional act.

Unlike factual findings, questions of law are freely reviewable by the courts, and courts are under no obligation to defer to the agency's legal conclusions. 5 U.S.C. § 706. *Coca-Cola Co. v. Atchison, Topeka and Santa Fe Railway Co.*, 608 F.2d 213, 218 (5th Cir. 1979). "This is particularly true when the decision of the agency is based on an interpretation of a judicial decision [Carcieri] that in turn construes the Constitution or a statute [the IRA]." *Charter Limousine, Inc. v. Dade County Board of Commissioners*, 678 F.2d 586, 588 (5th Cir. 1982).⁵

The Interior Board of Indian Appeals must review any "[l]egal determinations" made by the Regional Director "de novo."⁶

⁵ *Penzoil Co. v. Federal Regulatory Comm'n.*, 789 F.2d 1128, 1135 (5th Cir. 1981); see also *H. W. Wilson Co. v. U.S. Postal Service*, 580 F.2d 33, 37, (2nd Cir. 1978).

⁶ *Joseph La-Fauss Pappin III*, 50 IBIA at 242 (citing *Estes*, 50 IBIA at 115).

Since the *Carciere* decision, the Department of the Interior has been actively promoting a *Carciere* “fix” to legislatively overturn the decision by removing the word “now” from before federal jurisdiction in Sec. 479. The Department of the Interior has not publicly issued any definition or guidance as to the interpretation of the phrase “now under federal jurisdiction” but has left it to be determined on a case by case basis by the Regional office of the BIA. In *Carciere* itself the standard applied was that the Narragansett Tribe was not federally recognized until 1980 and therefore could not have been under federal jurisdiction in 1934. There is no specific date that can be applied to the Oneida Tribe of Wisconsin to easily resolve this question. This is a case of first impression for interpreting the express language of Sec. 479 to determine whether this Tribe is eligible for the benefits of the IRA. The Interior Board of Indian Appeals must review any “[l]egal determinations” made by the Regional Director “de novo.”⁷ Also, the IBIA must review de novo the “sufficiency of the evidence.”⁸

B. Standard of Review for agency decisions

The IBIA must review de novo the “sufficiency of the evidence.”⁹ If the Regional Director properly followed all of the required standards, the IBIA will generally refrain from substituting its own judgment.¹⁰

In reviewing the decisions of a Regional Director, the Interior Board of Indian Appeals must “determine whether they comport with the law, are supported by substantial evidence, or

⁷ *Joseph La-Fauss Pappin III v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs*, 50 IBIA 238, 242 (2009) (citing *Estes v. Acting Great Plains Regional Director*, 50 IBIA 110, 115 (2009)).

⁸ *Patricia Lafferty LeCompte v. Acting Great Plains Regional Director, Bureau of Indian Affairs*, 45 IBIA 135, 142 (2007) (citing *Birdtail v. Rocky Mountain Regional Director*, 45 IBIA 1, 5 (2007)).

⁹ *Patricia Lafferty LeCompte*, 45 IBIA at 142 (citing *Birdtail*, 45 IBIA at 5).

¹⁰ *Joseph La-Fauss Pappin III*, 50 IBIA at 242 (citing *Kent v. Acting Northwest Regional Director*, 45 IBIA 168, 174 (2007)).

are otherwise arbitrary or capricious.”¹¹ The burden is on the appellant to show “error” in the Regional Director’s decision.¹² However, on appeal, “any information available to the reviewing official may be used in reaching a decision whether part of the record or not.”¹³ Further, the IBIA may consider documents not included in the record, provided the parties are given notice and an opportunity to comment.¹⁴

III. ARGUMENT

A. **The Oneida Tribe was not a recognized tribe under federal jurisdiction in 1934 and is therefore ineligible to use the IRA to have land placed into trust.**

In erroneously determining the Tribe was under federal jurisdiction as of June, 1934, the BIA noted a “longstanding relationship with the federal government,” “which culminated in the fact the Oneida tribe voted to accept the IRA, and in 1936 the Constitution and Bylaws for the Oneida Tribe of Indians of Wisconsin were approved.”¹⁵ The BIA also noted that the Tribe eventually submitted, and the BIA considered, “treaties, statutes, congressional acts and reports that show a continual tribal existence and federal relationship with the United States government since approximately 1784.”¹⁶ Nothing more was said.

What is most telling is what the NODs do not contain. They do not explain why such extremely limited contact equates to being under federal jurisdiction, and they do not discuss the true history of the Oneida tribe which clearly shows they were not under federal jurisdiction in 1934. A review of the implementation of the allotment process for this Tribe and the record that

¹¹ *Id.*

¹² *Id.*

¹³ 25 C.F.R. Part 2, § 2.21.

¹⁴ *Id.*

¹⁵ NOD, p. 2-3.

¹⁶ NOD, p.3. This submission was not shared with the Village. This is the Village's first opportunity to respond to those documents which will be done more thoroughly infra.

followed lead to the inescapable conclusion already reached by the Department of the Interior and at least two federal courts. The Tribe and its members were not under federal jurisdiction as of 1934.

1. The Dawes Act and Subsequent Allotment Acts and Their Impact on the Oneida Tribe.

The Tribe immigrated to Wisconsin from New York. A treaty was signed between the United States and the First Orchard and First Christian parties, of the Oneidas of New York, on February 3, 1838.¹⁷ This treaty was made pursuant to the Removal Act of 1830.¹⁸ The Removal Act set the terms and limited the inherent sovereignty of the Tribes relocated to federal public lands in the West. Pursuant to this treaty, 65,400 acres were set aside for these parties in Wisconsin. By the mid to late 1800s, federal Indian policy shifted. The segregation caused by the establishment of reservations was no longer favored. Consequently, on February 8, 1887, the General Allotment Act, 24 Stat. 388, ch. 119, 25 U.S.C. 331, generally known as the Dawes Act, was passed.

Under the Dawes Act, land then held in trust by the federal government for the collective benefit of a tribe was divided into parcels, called allotments. These allotments were then assigned to individual tribal members for their use, management, and ownership. After a 25 year waiting period, the individuals were then issued patents in fee, a final act signaling the termination of federal responsibility for both the lands and the persons involved.

Section 5 of the Dawes Act says that after approval of the allotment:

¹⁷ Treaty with the Oneida, February 3, 1838. Appendix Exhibit 1

¹⁸ 21st Congress Sess. 1, ch. 184, 411 (May 28, 1830)

The United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charges or encumbrances whatsoever.¹⁹

Section 6 of the Dawes Act states:

That upon the completion of said allotments, and the patenting of the land to said allottees, each and every number of the respective bands or tribes or Indians to whom allotments have been made shall have the benefit of and **be subject to the laws, both civil and criminal, of the state or territory in which they may reside....** (emphasis added)²⁰

In the year of its enactment, the Commissioner himself described the purpose and effect of the Dawes Act as follows:

I fail to comprehend the full import of the allotment act if it was not the purpose of Congress which passed it and the Executive whose signature made it a law ultimately to dissolve all tribal relations and to place each adult Indian on the broad platform of American citizenship.²¹

Approximately 20 years after the Dawes Act was enacted, a federal judge for the Eastern District of Wisconsin when discussing the Dawes Act as it applied to this Tribe described the effect of this law as follows:

That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language of the act of 1887 that no argument could make it plainer. . . . The jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states.²²

The allotment process was advanced to its intended conclusion for the Oneida reservation in Wisconsin, perhaps more so than any other tribe. In the 1891 annual report of the Commissioner of Indian Affairs, the Commissioner reported as follows:

The Oneida reservation, situated between the counties of Brown and Outagamie, . . . contains less than three townships, 65,540 acres allotted in severalty by special agent land, which allotment was completed a little more than a year ago.

¹⁹ 25 U.S.C. § 5

²⁰ 25 U.S.C. § 6

²¹ 1887 Annual Report of the Commissioner of Indian Affairs. Appendix Exhibit 2

²² *U.S. v. Hall*, 171 F. 214, 218 (1909)

Allotment trust patents are dated June 13, 1892. **Oneida reservation fully allotted except for 85 acres held for future Indian allotments if/as needed.**²³

Federal policy supporting individual ownership of land and making Indians full citizens, subject to state and local jurisdiction, continued to progress. The 25 year waiting period, contained in the Dawes Act, was shortened by the Burke Act, for those Indians deemed "competent" by the Secretary of the Interior.²⁴ The Burke Act resulted in many fee patents being issued sooner than would have otherwise been allowed under the Dawes Act. Yet another Act, dealing specifically with the Oneida Tribe, was enacted on June 20, 1906, and authorized the Secretary of Interior to immediately issue fee patents to certain individuals who previously received trust allotments as well as to "any Indian of the Oneida reservation in Wisconsin."²⁵

Consequently, pursuant to the Dawes Act of 1887, the Burke Act of 1906, and the Oneida special provision of 1906, the reservation was fully allotted in fee. Consistent with this elimination of the reservation and federal jurisdiction, the Towns of Oneida and Hobart were created without limitation of their authority over the former reservation lands, including those that are the subject of this appeal

2. The Creation of the Towns of Hobart and Oneida

²³ 1891 Annual Report of the Commissioner of Indian Affairs. Appendix Exhibit 3

²⁴ 25 U.S.C. § 349, 34 Stat. 182 (1906).

²⁵ 34 Stat. 325, 380-381. The Oneida special provision was part of a larger Act, 34 Stat. 325, which also references the Stockbridge-Munsee tribe in Shawano County, Wisconsin. The portion relating to the Stockbridge-Munsees and the Oneidas are the same in that they both authorized the immediate issuance of fee patents of the former reservations to individual tribal members. In interpreting that Act, as it applied to the Stockbridge-Munsee, the 7th Circuit Court of Appeals noted that "the circumstances surrounding the Act show that Congress wanted to extinguish what remained of the reservation when it passed the Act." *State of Wisconsin v. The Stockbridge-Munsee Community, et al.*, No. 04-3834, page 13. It distinguished the 1906 Act from other allotment Acts that required the patents to be held in trust for a period of time. The court stated "[w]hy include this peculiar provision? Because the reservation could not only be abolished if the tribal members held their allotments in fee simple." *Id.*

Federal agents on the local scene were fully aware of the Wisconsin Assembly actions to create towns in place of the reservation and their import: indeed, the Oneidas' sub-agent, with the full knowledge of the Commissioner of Indian Affairs and the Secretary of the Interior, actively aided state officials in implementing this state law.

In their reports for the year 1903, two federal officials of the Department of the Interior reported to the Commissioner of Indian Affairs and the Secretary of the Interior that the State of Wisconsin was preparing legislation to establish the towns of Hobart and Oneida, and they did so approvingly.²⁶ These officials were J. Franklin House, the Superintendent of Indian Schools, and Joseph C. Hart, Superintendent of the Oneida School and ex officio sub-agent for the Oneida Indians. Both officials indicated that this development was within existing Department of the Interior policy and, in fact, Sub-Agent Hart actively worked in cooperation with state and local officials to forward the implementation of the state law creating the towns.²⁷ The Commissioner of Indian Affairs and the Secretary of the Interior, in their annual reports to the Congress, duly reported these facts without further comment and without hint of opposition or the slightest suggestion that federal jurisdiction was being violated in any fashion.²⁸

Eventually, legislation was passed allowing for the creation of the towns in place of the reservation.

CHAPTER 339:

AN ACT, to create two townships in Brown and Outagamie counties from the territory now embraced within the Oneida Reservation in said counties, the town in Brown county to be known as the town of Hobart and the town in Outagamie county to be known as the town of Oneida.

²⁶ 1903 Annual Report of the Department of the Interior. Appendix Exhibit 4

²⁷ *Id.*

²⁸ *Id.*

...Towns of Hobart and Oneida defined. SECTION 1. All that portion of the territory embraced within Oneida reservation, situated in Brown County, Wisconsin, is hereby duly created and organized as a separate town to be known and designated as the town of Hobart. All that portion of the territory embraced within Oneida reservation situated in Outagamie County, Wisconsin, is hereby duly created and organized as a separate town to be known and designated as the town of Oneida.

Powers, etc. SECTION 2. The **said towns** of Hobart and Oneida are hereby created and organized **with all the rights, powers and privileges conferred upon and granted to other towns** in the state of Wisconsin, and shall be subject to all the general laws enacted for town government therein.

...When towns deemed organized. SECTION 5. When said town meetings shall have been held as herein provided and the town officers as required by law shall have been duly elected, the said town of Hobart and the said town of Oneida shall be deemed duly organized, **shall possess all the rights, powers, privileges and authority** and shall be subject to all the liabilities of **other towns** of the state of Wisconsin.

...SECTION 8. This act shall take effect and be in force from and after its passage and publication.

Approved May 20, 1903.²⁹

After the law was passed allowing for the creation of towns, but before the process was finalized, in his annual report for 1904, Sub-Agent Hart reported that there was "strong feeling among the Oneida that all restrictions on the alienation of the [alloted] land should be removed, and they be **wholly relieved from [federal] government control.**"³⁰

No further action on the part of the Secretary of the Interior or the Commissioner of Indian Affairs was required or called for. The standing congressional legislation of the day--the Dawes Act, the Burke Act and Oneida provision of 1906, were being carried into effect with the

²⁹ Chapter 339, Wisconsin Laws of 1903 (May 20, 1903).

³⁰ 1904 Annual Report of the Department of the Interior. Appendix Exhibit 5

active cooperation of a majority of the Oneidas, local and state officials, and federal officials on the scene.

This paved the way for the formal creation of the town of Hobart on March 13, 1908.³¹ The rights of the towns were in no way limited by federal or state law because of the existence of a reservation or the presence of Oneida Indians. This was because by this time the reservation had been allotted and the tribal members were subject to the laws of the state and its local subdivisions. This complete allotment of the reservation effectively disestablished the Oneida Indian reservation in Wisconsin.

3. Contemporaneous Evidence Confirming the Loss of Federal Jurisdiction as a Result of the Allotments and Creation of the Towns

The first Wisconsin federal district court case to confirm that allotments removed federal jurisdiction, on what was the Oneida Reservation, was *United States v. Hall*.³² *Hall* involved an attempted federal prosecution of members of the Oneida Tribe for carrying liquor onto the Reservation in violation of federal law, prohibiting the presence of liquor on a reservation.³³ The defendant tribal members owned allotted land, in fee, within the original boundaries of the Oneida Reservation. The defendant tribal members challenged the jurisdiction of the federal authorities to prosecute them because they were allottees. The court agreed with the tribal members, relying primarily on the allotment policy which made tribal members subject to state law.³⁴ The court stated the following:

It is obvious that the later legislation of Congress providing for allotments and consequent citizenship has changed the attitude of the parties. The defendants, being allottees, are citizens of the state of Wisconsin to all intents and purposes,

³¹ Incorporation of the Village of Hobart, March 13, 1908. Appendix Exhibit 6

³² 171 F. 214 (E.D. Wis. 1909).

³³ See generally, 25 U.S.C. § 241.

³⁴ 171 F. at 215-16.

receiving protection from the laws of the state, and being amenable thereto. Here the color line fades out.³⁵

The court also described the circumstances of land ownership within the boundaries of the former Oneida Reservation at the time the prosecution was attempted, and explained why the continuation of federal jurisdiction over piecemeal parcels would create an unworkable situation:

Furthermore, it is conceded in argument that a large fraction of the territory formerly known as the Oneida Reservation is owned and occupied by white men. It is conceded that the state has complete and exclusive jurisdiction over such white men. If the theory of the government here presented were to be adopted, we should have this anomalous situation: a quarter section occupied by a white man would be under the jurisdiction of the state, while the next quarter section, occupied by an allottee, would fall under the federal jurisdiction. There would be two rules of conduct, which might be entirely different, operating at the same time upon the same township, according to the complexion of the inhabitants. This amounts to a *reductio ad absurdum*.³⁶

The court then described the legal status of the tribal members and land while trust protection remained under trust allotments:

The Indian allottees are citizens of the state of Wisconsin upon an even footing with all other citizens. It is the exclusive prerogative of the state to pass and enforce laws relating to the liquor traffic which is wholly separate and apart from the jurisdiction which the federal government retains to protect and regulate the allotted [but still held in trust] lands. This jurisdiction of the state extends to all its citizens without regard to color, race, or former condition.³⁷

The federal court's view in 1909, therefore, was that the Oneida Reservation was a "former" reservation and that Congress had given the state of Wisconsin the right to regulate, through its police power, the activities of tribal members on their allotted fee land, even though that land was within the boundaries of the original Oneida Reservation. To the extent that the restrictions on alienation in the trust patents had not yet expired, the federal government

³⁵ 171 F. at 217.

³⁶ 171 F. at 218.

³⁷ *Id.*

temporarily retained jurisdiction. Once the trust protection of the allotted lands did expire, the federal government lost all jurisdiction.

The historical record goes on to support the conclusion the Tribe and its members were no longer under federal jurisdiction in 1934. In 1911, Henry Doxtator of West De Pere, Wisconsin, wrote a letter to Congressman Thomas F. Konop regarding his citizenship rights and asking whether or not the state had the right to tax his personal property. More specifically, he inquired into whether or not he was "still a ward of the government and exempt from personal property taxes."³⁸ Congressman Konop forwarded that inquiry to the Office of Indian Affairs. C.F. Hauke, the Second Assistant Commissioner responded by stating the following:

In the opinion of the office, any personal property acquired by Mr. Doxtator as a result of his own efforts and industry, or **any property** acquired by him from the government which has passed out of the control and supervision of the government and **over which the government asserts no jurisdiction, is taxable the same as the property of any other person situated in the state of Wisconsin.** (emphasis added)³⁹.

The 1912 Annual Report of the Department of the Interior, United States Indian Services, stated the following:

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, except the one police private to secure attendance of witnesses at hearings and probate cases, and such other purposes as may be required.

The maintenance of order now devolves upon the township and county officers, and require only the cooperation of this Office.⁴⁰

The report goes on to state there are no social functions which require the supervision of the United States Indian Services, but all marriages and divorces are conducted under state law,

³⁸ Henry Doxtator Letter to Congressman Thomas F. Konop, April 30, 1911. Appendix Exhibit 7

³⁹ C.F. Hauke's Letter to Congressman Thomas F. Konop, May 6, 1911. Appendix Exhibit 8

⁴⁰ 1912 Annual Report of the Department of the Interior. Appendix Exhibit 9

religious work is conducted by four societies and that the Federal officers take practically no part in the supervision of the liquor traffic. **"The Oneidas are all allotted citizens, and federal laws apply only to lands still in trust."**⁴¹ For the allotted land of the Oneida Reservation, the 25 year trust protection period, provided in the Dawes Act, ended in 1917. Therefore there could not have been any land or Indians "now under federal jurisdiction" as of 1934.

In order to tie up the few remaining loose ends relating to the elimination of the reservations, under the Allotment Acts, 39 Stat. 969-973 was enacted on March 2, 1917 allowing the sale of land purchased by the United States for schools when that land was no longer needed by a tribe. Similarly, 41 Stat. 408-415 was enacted on February 14, 1920 authorizing the sale of abandoned schools and agency buildings.

Thereafter, on October 2, 1924, a warranty deed was issued from the United States to Murphy Land and Investment Company for the Oneida school, which pursuant to language contained in the deed itself, was sold pursuant to 41 Stat. 408-415.⁴² Additionally, some farm land used in conjunction with the schools was sold pursuant to 39 Stat. 969-973, as referenced in the same deed. More specifically, the deed reads as follows:

That the following described property situated on the Oneida Indian reservation in Wisconsin constitutes the now abandoned Oneida Indian boarding school plant, consisting of 118.71 acres with the buildings thereon:

- a. 80 acres, being Claim 145 in Sections 2 and 4, Township 23 North, Range 19 East, 4th. P.M., in Wisconsin unceded and retained and set apart for tribal school purposes, said tract being the site of all the buildings;
- b. Three tracts aggregating 38.71 acres, hereinafter more particularly described, lying within the boundaries of Oneida allotment No. 1 made to George Doxtator, acquired by the United States for farm use in connection with

⁴¹ *Id.*

⁴² Warranty Deed, October 2, 1924, United States of America to Murphy Land and Investment Company. Appendix Exhibit 10

the said Oneida School, by purchase from the allottee; purchase and title being equivalent by deed executed by the allottee and his wife on March 20, 1903.

That the **operation and maintenance of the said school as a government institution has been discontinued** and that no part of the property is longer needed for Indian or administrative purposes and therefore that the lands and buildings are subject to the sale and disposition as provided in the following acts of Congress:

- a. Claim 145; under the Act of February 14, 1920.⁴³
- b. 38.71 acres; under the Act of March 2, 1917.⁴⁴

On October 31, 1924, the Murphy Land and Investment Company sold the 80 acres identified as Claim 145 to the Catholic Diocese of Green Bay.⁴⁵

The House Congressional Record, dated March 3, 1927 also confirms the Tribe was under state jurisdiction. The Record reads as follows:

While the present poverty of such Oneidas is a matter of great concern 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 office retains an interest in the general welfare of the tribe and its individual members and appeals from them individually will always have careful attention and reply. It will always be gratified to learn that the **Indians generally and individually are profiting by their first unfortunate experience as citizens released from government supervision.**

Sincerely yours,
Chas. H. Burke, Commissioner.⁴⁶

The elimination of the Oneida reservation and subsequent sale of the abandoned federal buildings broke the link between the Oneida tribe and the federal government. In its June 30, 1929 report, Commissioner of Indian Affairs summarized the situation as follows: "**The**

⁴³ 41 Stat. 408-415.

⁴⁴ 39 Stat. 969-973.

⁴⁵ Warranty Deed, October 31, 1924, Murphy Land and Investment Company to Catholic Diocese of Green Bay. Appendix Exhibit 11

⁴⁶ House Congressional Record, p. 5877, March 3, 1927. Appendix Exhibit 12

Oneidas have severed their relationship with the agency with the exception of annuity payments."⁴⁷ It does not get any cleaner than that.

Elimination of the reservation and federal jurisdiction over the tribal members is also confirmed by several other historical documents. On November 13, 1931, the Commissioner of Indian Affairs, C.J. Rhodes, wrote to Oscar Archiquette in response to his inquiry about homesteading land on the former Oneida reservation and answering his questions about hunting and fishing rights of Indians. The Commissioner's response reads in pertinent part as follows:

There are a few scattered tracts of unallotted land on the Oneida reservation, embracing approximately 85 acres. This land is not subject to entry under the homestead laws. We have considered selling these isolated tracts under the Act of April 12, 1924 (43 Stat. 95) under sealed bids to the highest bidder. However, as it is occasionally found that members of the Oneida tribe, entitled to allotments, did not receive land, this small unallotted area is still being retained as tribal property for that purpose.

The Oneida allotment roll was closed on May 21, 1889 and persons born to members of the tribe subsequent to that time are not entitled to land. As the date of your birth is given as June 15, 1901, this accounts for your failure to receive an allotment.

As a general rule, the state game laws apply to the Indians, except when exercising their hunting or fishing privileges within their reservation on restricted tribal or allotted land [still held in trust]. There are only a few scattered tracts of tribal land on the Oneida reservation and you have no allotment of your own. **You should, therefore, obtain a license and comply with the state regulations as to season, quantity, etc., just the same as any other citizen.**⁴⁸

In 1931, the Office of Indian Affairs received a correspondence from a Chauncey Doxtator in which he claimed that he was an Oneida Indian and a government ward. He asked for clarification about his hunting and fishing rights given his status. C.J. Rhodes, the Commissioner of Indian Affairs, responded to his inquiry as follows:

⁴⁷ Report of Commissioner of Indian Affairs, June 30, 1929. Appendix Exhibit 13

⁴⁸ C.J. Rhoads Letter to Oscar Archiquette, November 13, 1931. Appendix Exhibit 14

Generally speaking the state game laws apply to the Indians except when exercising their hunting and fishing privileges on tribal Indian land within their reservation or, if allotted, within the limits of their own allotments still held in trust or under restricted patents.

There are only a few small tracts of tribal Indian lands within the limits of what was formerly the Oneida Indian reservation. The ceded land to which the Indian title has been extinguished no longer belongs to the Indians, and as you have received a fee patent to your land and **the Oneida reservation has been broken up**, you would have no special hunting or fishing privileges thereon because of the fact that you are an Indian. **Under the circumstances, you should comply with the state laws and regulations as to season, license, etc.**⁴⁹

The perception of the local community at the time also confirms that the reservation and federal jurisdiction over the Oneida tribe was eliminated. A January 8, 1931 news article from the De Pere Journal reads as follows:

The town has petitioned the Federal Indian Bureau at Washington DC, for \$5,000 with which to meet the emergency but the Bureau has denied the request pointing out that it is impossible to grant it because **the Oneidas are no longer government charges and therefore cannot be aided through the regular channels.**⁵⁰

In a document entitled "Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated January 24, 1933, the following observations were made:

In choosing the Oneidas as the first to be studied, the allotment system has been given perhaps the fairest trial that can be instanced, for several reasons.

In the first place, the Oneidas were as nearly ready for allotment as any people can be ready to step from tutelage into independence....

In the second place, **the entire reservation was allotted, so that no surplus lands were left** to create a tribal fund with its consequent pull away from individualization.

The report goes on to state:

⁴⁹ C.J. Rhoads Letter to Chauncey Doxtator, November 19, 1931. Appendix Exhibit 15

⁵⁰ De Pere Journal Article, January 8, 1931. Appendix Exhibit 16

The Oneida Indians were listed for allotment and the roll closed May 21, 1889. Allotting followed during the next three years and the trust patents bear the date of June 13, 1892. The 25 year trust period was thus due to expire June 13, 1917.⁵¹

In 1933, William Skenadore, wrote to the Commissioner of Indian Affairs seeking assistance for Samson Cornelius Stevens, who brought suit against Brown and Outagamie Counties relating to taxation of his property. William Zimmerman, Jr., the Assistant Commissioner of Indian Affairs, wrote back noting that "Mr. Stevens was issued a fee patent for his allotment after the trust period expired in 1918 and therefore, it is our view that the **jurisdiction of the Department (Dept. of Interior) over the allotment in question terminated on the expiration of the trust period.**"⁵² .

On October 26, 1933, the Superintendent of the Keshena Indian Agency wrote to the Commissioner of Indian Affairs in Washington D.C. He stated that a non-ward Indian of Oneida blood asked to lease a piece of unallotted land on the "former Oneida reservation." The Superintendent stated "your office understands that **we have no field employee in Oneida country, neither do we have any clerk to handle Oneida affairs.**"⁵³ The fact the Keshena Agency, which previously monitored the Oneida reservation, no longer had any field agents or clerks handling Oneida affairs confirms there was nothing under federal jurisdiction in 1933.

In 1933, the Eastern District again addressed the impact of the Dawes Act. In *Stevens v. County of Brown*,⁵⁴ Samson Stevens, an Oneida tribal member, on behalf of himself and others, challenged the right of local governments, that had been established by the state of Wisconsin and that were within the boundaries of the original Oneida Reservation, to tax land owned by

⁵¹ Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated January 24, 1933. Appendix Exhibit 17

⁵² William Zimmerman Letter to Willam Skenadore, July 24, 1933. Appendix Exhibit 18

⁵³ Letter to Commissioner of Indian Affairs, October 26, 1933. Appendix Exhibit 19

⁵⁴ (C.A. No. 307) (E.D. Wis. 10 November 3, 1933)

tribal members. Stevens' argument was based on the Treaty of 1838 which established the original reservation. The court rejected the argument and held:

Even if it be assumed that in a treaty with the Oneida Indians many years ago, language was used which supports the contention that there was a purpose to assure the Indians perpetual immunity against the incorporation of the lands into any state or governmental subdivision of a state, **the uniform judicial recognition of the efficacy of the Dawes Act since its passage is entirely repugnant to the right of the Indians, after congressional action, to insist upon the treaty provision;** and likewise against the existence of judicial power to enforce the treaty stipulation. . . . That is to say, the congressional power is recognized as 'plenary', and not subject to review or control by the judicial department of the Government. . . . **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 discontinuance of the reservation, and a recognition of the power of the state to incorporate the lands in the towns in question. *Id.***

The *Stevens* case was decided on the eve of the passage of the IRA. Its statements regarding the status of the lands within the boundaries of the original reservation at that moment can only be paraphrased as "there is no longer a reservation after the Dawes Act." The controlling federal precedent confirms that the IRA did not undo the Dawes Act. Land that had been allotted and that had restrictions on alienation removed did not return to communal ownership. Therefore, in 1934, there were only state civil governments existing within the original boundaries of the Oneida reservation and only unrestricted fee land. There is no evidence of federal jurisdiction over the land or any tribal members at that time.

In 1934, Mr. Skenandore, an Oneida Indian from Wisconsin, sent a correspondence to the Secretary of Interior's office soliciting the federal government's intervention into a suit instituted by the Indians in the United States District Court for the Eastern District of Wisconsin. In a legal memorandum to Nathan Margold, a solicitor for the Department of Interior, the following observations were made:

So far as can be determined from the facts on hand, the suit in question was instituted by individual Indians for the purpose of challenging the jurisdiction of the State of Wisconsin and its legal subdivisions over plaintiffs and their lands.

The author of the memo informed solicitor Margold that:

The foregoing section (the Burke Act of May 8, 1906, 34 Stat. 182) provides in clear and unequivocal language that when the trust period expires and when the lands have been conveyed to the Indians by patent in fee, each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state and territory in which they reside. The fee patent divests the United States of the legal title. **The jurisdiction and authority theretofore exercised by the Secretary of the Interior by reason of the prior trust and restriction come to an end.**⁵⁵

The memorandum then goes on to state:

That **the government is under no constitutional obligation to perpetually continue the relationship of guardian and ward**; that it may at any time abandon it and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*, and that it is for Congress to determine when and how the relationship of the guardian and ward shall be terminated. Citing *United States v. Celestine*.⁵⁶ "Under these principles, **the power of Congress to subject the lands of the Oneidas, through the issuance of fee simple patents or otherwise, to taxation and otherwise bring these Indians within the jurisdiction of the state and its legal subdivisions, cannot be successfully challenged.**"

The author of the memo then concluded that **"in the light of the facts now at hand, therefore, I am aware of no basis for intervention by the United States in the pending suit."**⁵⁷

On January 31, 1934, Walter Watkins, of West De Pere, wrote to the Department of the Interior about what could be done to reclaim "the old Oneida reservation" given that "the conclusion has been reached that they are not under direct control of the govt..."⁵⁸ Prior to

⁵⁵ Citing *Larkin v. Paugh*, 276 U.S. 431.

⁵⁶ 215 U.S. 279.

⁵⁷ Memorandum for Mr. Margold, January 16, 1934. Appendix Exhibit 20

⁵⁸ January 31, 1934 correspondence of Mr. Watkins. Appendix Exhibit 21

responding, Harold L. Ickes, the Secretary of the Interior sent a memo to Commissioner Collier asking "what is the answer to this." Commissioner Collier responded as follows:

MEMORANDUM FOR SECRETARY ICKES

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.⁵⁹

On March 13, 1934, Secretary Ickes, then responded to Mr. Watkins. He noted the following:

In 1892 the usual 25 year trust patents were issued to approximately 1500 members of the Oneida tribe, embracing about 70,000 acres. Through the sales and issuance of fee patents to allottees and heirs, **practically all of these allotted lands have passed from government supervision**. Only 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 property **efforts on our part at this time to assist them in their local activities would necessarily be very limited**.

It is reasoned that these Indians would welcome federal supervision and guidance of their affairs.⁶⁰

In other words, just three months prior to the enactment of the IRA, the Secretary of Interior himself confirmed that the Oneida reservation had "passed from government supervision," that the federal government's ability to assist them was "very limited," and that it was presumed that the Oneidas would welcome "federal supervision and guidance of their affairs." You do not welcome something you already have. The inescapable conclusion to be drawn from these statutes is that less than three months prior to the enactment of the IRA, the

⁵⁹ Memo dated February 26, 1934 from Commissioner Collier to Secretary Ickes. Appendix Exhibit 22

⁶⁰ March 13, 1934 correspondence from Secretary Ickes to Mr. Watkins. Appendix Exhibit 23

Secretary of Interior himself believed the Oneidas were not under "federal supervision and guidance of their affairs."

What is even more conclusive is Commissioner Collier himself confirming, less than four months before the enactment of the IRA, that this Tribe was "not in any real way under Federal Jurisdiction." In *Carciere*, the court relied upon a similar letter from Commissioner Collier. The court noted that:

Also, the record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. App. 23a-24a. Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it.⁶¹

In a June 4, 1934 letter from John Collier, to Henry Doxtator, the Commissioner also stated 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. Practically all of this allotted land has passed from government supervision through sale and the issuance of fee patents. **For this reason, nothing could be gained through resurvey of the exterior boundary of the reservation lands. There is no way by which these lands could be restored to their former restricted status.** However, you are no doubt aware of proposed legislation now before Congress. This legislation, if enacted will permit the acquisition of lands upon which to establish Indian communities or colonies and other activities for Indian benefit.

⁶¹ *Carciere v. Salazar*, 129 S.Ct. 1058, 1065 (2009)

There is also ample evidence found after the IRA was passed on June 18, 1934, which further confirms the Tribe was not under federal jurisdiction in 1934. On June 27, 1934, Commissioner Collier, wrote to Osloch Smith and Chauncey Doxtator. He stated:

The records of this Office indicate that out of the 65,000 acres or more originally included in the Oneida Reservation, less than 1,000 acres are now held in trust, the balance having been allotted and patented in fee to the Indians or sold to whites. **The government therefore has no further jurisdiction over the lands thus disposed of.**

On August 17, 1934, Mr. Steward, Chief of the Land Division, wrote a memorandum to Mr. Dalker in response to Mr. Skenandore's contention that the United States should sue to prevent the taxation of Oneida allotments. Mr. Steward indicated that after Mr. Skenandore's complaints were referred to the Attorney General:

[t]he Attorney General replied January 30, 1929 that as the Oneida lands had become taxable when the trust period was allowed to expire, and as the United States had no such interest in the allotment of Henry Doxtater as to enable it to maintain a suit to cancel the mortgage in question (a view supported by the decision of the supreme Court in the case of *United States v. Waller*, 243 U.S. 452) there were no grounds upon which the United States Attorney could properly be directed to represent the Oneida Indians in their claims. The case was then considered closed.

Later, ... some Oneidas ... brought suit in their own names in the United States District Court, Eastern District of Wisconsin, to contest the legality of tax assessments against their lands. By letter of May 8, 1933, Skenandore requested the United States intervene in the suit on behalf of the Oneida Indians. By letter of July 24, 1933 this office advised him that **the United States did not have such an interest in the subject matter of the suit as would enable it to maintain a bill or petition for intervention.**⁶²

If the former Oneida reservation and its inhabitants were under federal jurisdiction at the time, there certainly would have been grounds for the United States to intervene as Mr. Skenandore requested.

⁶² Memorandum for Mr. Daiker, August 17, 1934. Appendix Exhibit 24

Stadler King, a resident of the former reservation, gave this account of the problems involved in getting relief from the local authorities before the New Deal took on that task. Relief had been the obligation of the federal government through the Bureau of Indian Affairs, but from 1910 Oneida was no longer considered a reservation and the bureau had abandoned most operations and services there. By the early years of the depression the township government of Oneida was largely in the control of whites.⁶³

In 1937, the Commissioner Collier provided a list of "Indian Tribes Under the I.R.A." Notably, while the list references Oneida under the column for "Reservation or Rancheria," it is not listed as a "tribe." If there was no Oneida tribe it could not have been under federal jurisdiction as of 1937.⁶⁴ Similarly, there is a reference to Stockbridge under the reservation column but not in the "tribe" column. That is because these two reservations were disestablished and the land and its occupants were no longer under federal jurisdiction. This fact was recently confirmed for the Stockbridge by the 7th Circuit Court of Appeals which determined that reservation was abolished by the allotment process.⁶⁵ Unlike for Oneida and the Stockbridge, the other six Wisconsin reservations listed on the list all have a corresponding "tribe" reference. That is because those tribes still existed.

In 1937, the then acting Commissioner Collier, the principal author of the Indian Reorganization Act, wrote to U.S. Senator Duffy about concerns the Oneida Town Board had with the Indian Reorganization Act. In his correspondence Commissioner Collier noted the fact

⁶³ *Oneida Lives...Long-Lost Voices of the Wisconsin Oneidas*, edited by Herbert S. Lewis, with assistance of L. Gordon McLester III, with a forward by Gerald L. Hill. Published 2005 by the University of Nebraska Press, ISBN 13: 978-0-8032-2943-3; pgs. 132-137 – "Account of Stadler King." Appendix Exhibit 25

⁶⁴ Commissioner of Indian Affairs List of Indian Tribes Under the I.R.A., 1937. Appendix Exhibit 26

⁶⁵ *State of Wisconsin v. The Stockbridge-Munsee Community*, No. 04-3834, 14.

that the Town of Green Bay in the past felt that it bore a disproportionate share in the cost of supporting public schools. Commissioner Collier responded as follows:

I should like to point out that the reason why the federal government did not participate to a greater extent in meeting the cost of educating Indian children, was the fact the **Oneida Indians had largely passed out of government supervision** by reason of their having been granted fee patents and having alienated the greater part of their land holdings....⁶⁶

4. **The fact the Oneida tribe was forced to create a Wisconsin corporation to even arguably become eligible to utilize the IRA, is proof that they were not under federal jurisdiction in 1934.**

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, a few months **after** the IRA was enacted, these 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 one eligible to utilize the provisions of the IRA. A review of the historical record confirms this scheme.

The new corporation hired a law firm to advise them regarding the Indian Reorganization Act. 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

⁶⁶ John Collier Letter to U.S. Senator F. Ryan Duffy, May 10, 1937. Appendix Exhibit 27

time that such formal recognition be given so that there may be no longer any question as to the character of this organization?⁶⁷

The fact that creation of the state corporation was all a pretense to artificially create "recognition" was also confirmed in that same correspondence. It goes on to explain the reason for the creation of the state corporation, after the IRA was passed.

As I read the Wheeler Howard Act a federal charter of incorporation issued by the Secretary of the Interior to the group so recognized and it seems to me that it would be only necessary to issue such a charter to the Oneida Indians Inc., recognizing their present organization as being a compliance therewith and that it would then be incumbent upon them to surrender their state charter, it having fulfilled its purpose [creating something that could be recognized] and to thereafter operate under the direction of your bureau.⁶⁸

It was not only the corporation's legal counsel that believed the Tribe was not recognized or eligible to use the IRA at the time of its adoption. On November 12, 1934, Ralph Fredenberg, the Superintendent of the Keshena Indian Agency in Wisconsin, wrote a letter to the Commissioner of Indian Affairs. In that correspondence, Mr. Fredenberg references the State of Wisconsin's bylaws for the corporation and its State Articles of Incorporation. He stated that the Oneidas were "industriously bringing together the remnants of the Oneida tribe into some semblance of organization which is a credit to their people."⁶⁹ The only logical inference which can be drawn from such a statement is that prior to the IRA, there was no semblance of an organization relating to the Oneidas of Wisconsin.

Superintendent Fredenberg also wrote the Commissioner of Indian Affairs on February 8, 1935 and 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

⁶⁷ Attorney L. D. Jaseph to John Collier, January 7, 1935. Appendix Exhibit 28

⁶⁸ *Id.*

⁶⁹ Ralph Fedenberg Letter to Commisison of Indian Affairs, November 12, 1934. Appendix Exhibit 29.

acknowledgement 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....

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 the Oneida Indians is a 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....⁷⁰

On September 17, 1935, the president of the Oneida Indian state corporation, also wrote to Commissioner Collier. He indicated that **"the purpose of organizing [the tribe] under the state law is to come under the new Indian Reorganization Act at the earliest date possible."**⁷¹

It cannot be legitimately disputed that the purpose of the state incorporation was to make the tribe appear to be an organized group, for which there could then be recognition and thereafter, use of the IRA. However, even if the state incorporation process truly resulted in some sort of organization, that was eventually recognized, it all occurred well after June 18, 1934. The Tribe's federal corporate charter was not approved until April 14, 1937.⁷²

Therefore, pursuant to the holding in *Carciere*, the Oneida tribe is not eligible to utilize the IRA to have land placed into trust. The fact that a tribe arguable was reorganized and recognized after June 18, 1934, may not have seemed significant at that time. Today, however, after the Supreme Court's ruling in *Carciere*, timing is everything. Post 1934 organization and recognition, even if legitimately done, prohibits a tribe from using the IRA to place land into trust.

⁷⁰ Ralph Fredenberg Letter to Commission of Indian Affairs, February 8, 1935. Appendix Exhibit 30

⁷¹ President of Oneida Nation State Corporation Letter to John Collier, September 17, 1935. Appendix Exhibit 31

⁷² State Corporate Charter of the Oneida Tribe of Indians of Wisconsin, Approved April 14, 1937. Appendix Exhibit 32

5. The Documents submitted by the Tribe to the Regional Director do not Establish Federal Jurisdiction as of 1934.

Concerned with the *Carciere* ruling, the Regional Director asked the Tribe to supplement its application with information addressing the federal jurisdiction question.⁷³ In response, the Tribe cited the 1933-1934 Annual Report of the Commissioner of Indian Affairs.

This report estimates the number of Indians in the country. More specifically, under the Keshena Agency for Wisconsin, there is a reference to the Oneida Reservation and an estimated "Indian population" of 2,992. The Tribe argues that the introduction to the appendix "described the Indians and Tribes who fell under federal jurisdiction." The Tribe also describes the appendix as a tabulation of the Indian population that was "at that time subject to the jurisdiction of various field agencies."

In reality, neither the introduction nor the appendix itself say anything whatsoever about jurisdiction. The introduction defines an Indian and the appendix lists the number of Indians. The Village has never argued that there was no such thing as an Indian of Oneida descent in Wisconsin in 1934. It is the Village's position that there was no "Tribe now under federal jurisdiction" as defined by Sec. 479 of the IRA as interpreted by the *Carciere* court. The fact that the appendix references a number for Oneidas in Wisconsin does not even remotely suggest the Tribe itself was under federal jurisdiction in 1934.

The Tribe then argues that the Oneida Indians referenced in the 1933-1934 Annual Report resided in the same Oneida Reservation established by the Treaty of 1838, 7 Stat. 566. It

⁷³ At the time the *Carciere* decision was rendered, the applications which are the subject matter of this appeal had been submitted to the regional director but a notice of decision had not yet been issued. The regional director requested additional information from the Tribe, in an attempt to establish that the Tribe was under federal jurisdiction in 1934. Neither the regional director nor the Tribe informed the Village of the fact the regional director requested additional information in an attempt to satisfy the *Carciere* requirement. Additionally, the Village was not provided with a copy of what the tribe submitted or an opportunity to respond.

appears the Tribe felt the need to establish a link between the Indians counted in the 1933-1934 report and the physical location of the reservation they allegedly occupied. Specifically, the Tribe references an 1891 annual report of the Commissioner of Indian Affairs which states as follows:

The Oneida Reservation, situated between the counties of Brown and Outagamie, about 45 or 50 miles in the southeasterly direction from this office, contains a little less than three townships, 65,540 acres, allotted in severalty by special agent land, which allotment was completed a little more than a year ago.

It is not clear why the Tribe would cite the 1891 annual report given that it clearly states that the reservation was "allotted in severalty" and further states "which allotment was completed a little more than a year ago." This language clearly supports the Village's position there was nothing "under federal jurisdiction" in 1934. Therefore, the Tribe's reference to this report, which merely showed the historic boundaries of the allotted reservation, actually undermines the Tribe's position.

The Tribe also notes that in 1934, the BIA expended Civilian Conservation Corps appropriations on the Oneida Reservation. The Tribe's position appears to be that the CCC appropriations could not have occurred unless the Oneida Reservation was a recognized governmental reservation "under federal jurisdiction as of 1934." That position is unfounded. There is no basis to claim CCC funds could only be expended in an area where a Tribe under federal jurisdiction existed. CCC funds were expended across the entirety of Brown County including areas never included in the former Oneida Indian reservation. Additionally, the Tribe did not supply any supporting documents relating to the CCC argument.

The Tribe next argues they were under federal jurisdiction because they continued to receive annuity payments pursuant to the Treaty of Canandaigua. Obviously, the Oneidas of Wisconsin did not exist in 1794 and this treaty was with the Oneidas of New York. In order for

this argument to succeed, the Oneidas of Wisconsin would have to be considered one and the same with the Oneidas of New York. The Tribe cites a 2001 affidavit from Sharon Blackwell as Deputy Commissioner of the BIA in which she says the Oneidas of New York and Wisconsin are successors in interest to the 1794 treaty. However, she also says these two tribes are "distinct and separate."⁷⁴

Additionally, even if the Oneidas of Wisconsin are entitled to and are receiving annuity payments, that does not mean they were "Indians now under federal jurisdiction" pursuant to § 479. The mere fact that the federal government could trace the ancestry to owe someone money does not mean that person was half-blood or more as of June 1, 1934. Because there was no existing tribal entity in June 1, 1934, the definition of Indian applies directly. The Oneida descendants were intermarried with whites before they ever left New York in 1838. If there had been a group of half bloods or more as of June 1934, it would not have been necessary to create a state tribal corporation to attempt to apply the IRA to these individuals.

The Tribe also states that in order to adopt a constitution under the IRA, "the Tribe must either be recognized and in residence on a reservation or be adult Indians unaffiliated with a recognized tribe but in residence on a reservation." They then state that since they were eligible to organize under the IRA, they were obviously a recognized tribe in occupation of a reservation which according to their logic equates to being under federal jurisdiction.

First, this argument fails to even consider "under federal jurisdiction" and the state of the law after *Carcieri*. Second, the fact the Tribe had to organize, **after** the passage of the IRA, so it could thereafter attempt to utilize the IRA, actually undermines the BIA's position that the Tribe was recognized and under federal jurisdiction in June of 1934. Additionally, the limited

⁷⁴ Affidavit of M. Sharon Blackwell, June 14, 2001. Appendix Exhibit 33

documentation showing that the federal government had some level of contact with the Tribe does not satisfy the requirement that the Tribe actually be under "federal jurisdiction" in 1934. The BIA wrongfully equates the extremely limited "contact" with being "under federal jurisdiction."⁷⁵ Before 1934, the Tribe's reservation was allotted and had ceased to exist, as did any meaningful involvement with the federal government.

In summation, the Village does not contend there were no persons of Oneida descent living in Wisconsin in 1934. The Village does not contend that those individuals had absolutely no contact with the federal government. What the Village does contend, and the Secretary of Interior and Commissioner of Indian Affairs confirmed, is that there was no reservation or recognized tribal organization under federal jurisdiction as of 1934.

This inescapable conclusion is confirmed by the previously cited quotes from the Department of Interior's own representatives who have stated:

...[this Tribe] is not in any real way under Federal Jurisdiction.

The Oneidas have severed their relationship with the agency with the exception of annuity payments.

...we have no field employee in Oneida country, neither do we have any clerk to handle Oneida affairs.

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 property is wholly within state jurisdiction...

⁷⁵ In *Carcieri*, it was noted that the "Narragansett community and its predecessors ... existed autonomously since first contact ..." and that at least two acres of the reservation were never relinquished, *Carcieri v. Salazar*, S.Ct. 1058, 1062 (2009). The BIA referred to the Tribe's "documented history dating from 1614" and noted that "all of the current membership are believed to be able to trace to at least one ancestor on the membership lists of the Narragansett community prepared after the 1880 Rhode Island 'detrribalization' act." *Id.*

...Indians generally and individually...released from government supervision.

The maintenance of order now devolves upon the township and county officers, and require only the cooperation of this Office.

...the Oneida reservation has been broken up....

...the Oneidas are no longer government charges and therefore cannot be aided through the regular channels.

...the entire reservation was allotted, so that no surplus lands were left....

This evidence dramatically over powers the Tribe's limited submission to the contrary, not one of which actually discusses "federal jurisdiction" or pre-1934 recognition.

B. Taking Land into Trust pursuant to Section 25 U.S.C. 465 of the IRA as it Applies to this Case, is Unconstitutional in that it Strips the State and Village of the Jurisdiction they have had over these Parcels for over a Century.

1. Constitutional Concerns in General.

The federal government's taking of land into trust for Indian tribes pursuant to Sec. 465 does not necessarily remove it from state and local control. In fact, Solicitor Marigold wrote an opinion just after the passage of the IRA where he concluded that taking land into trust expressly does not remove state jurisdiction over the land. Land taken into trust according to current regulation and case law becomes "Indian country" and is not subject to state and local taxation. Nevertheless, the local government is still required to provide services to the trust land or as a result of activity on that land. Additionally, federal regulations also attempt to exempt trust land from state and local land use regulation.⁷⁶ In addition to lost revenue and diminished control over land use, the state's civil and criminal jurisdiction may be significantly compromised where

⁷⁶ 25 C.F.R. § 1.4 (2003).

tribal land or members are involved.⁷⁷ Moreover, under certain conditions, tribes may conduct gaming on trust land under IGRA, an activity that creates several other significant problems.⁷⁸

There are over 562 federally-recognized Indian tribes.⁷⁹ Several tribal acknowledgment petitions are pending at the BIA.⁸⁰ The number of tribes seeking to secure trust land for whatever purpose makes the issue of creating new Indian reservation or trust lands a growing and highly-controversial issue. In fact, as recently as March, 2009, the United States Supreme Court weighed in on this issue. In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), the Supreme Court reviewed a Congressional Act which purported to strip the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role the United States played in overthrowing the Hawaiian Monarchy in the late nineteenth century. Relying on the Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain lands pending resolution of native Hawaiian land claims that the court described as unrelinquished. *Id.* The United States Supreme Court in reversing the State Supreme Court, indicated this resolution would raise grave constitutional concerns if it purported to cloud Hawaii's title to its sovereign lands more than three decades after the State's admission to the union. The court went on to state that "we have emphasized that Congress cannot, after statehood, receive or convey submerged lands that have already been bestowed upon a state." *Id.* The fact the Court invoked this fundamental interpretation of the structure of the Constitution indicates the seriousness of the constitutional question presented by

⁷⁷ Compare *U.S. v. Stands*, 105 F.3d. 1565 (8th Cir. 1997) with *U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999)

⁷⁸ 25 C.F.R. § 2703(4).

⁷⁹ Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs; Notice, 73 F.R. 18,553 (2008).

⁸⁰ Department of Interior, Bureau of Indian Affairs Report, *Status Summary of Acknowledgement Cases* (September 22, 2008), <www.doi.gov/bia/docs/ofa/admin_docs/Status_Summary_092208.pdf> [Last visited May 30, 2009](Attachment 21).

the federal government asserting that land can be withdrawn from state jurisdiction and somehow converted back into federal territorial land subject to the Property Clause, Art. IV, Sec. 3, Cl. 2. As the Supreme Court unanimously concluded in *Hawaii*, once Congress has disposed of territorial land and created the new state, its exclusive power over that land ceases. To conclude otherwise would allow the Congress to potentially remove any land from state jurisdiction, effectively cancelling the creation of the state.

The loss of the State's and Village's jurisdiction over the parcels which are the subject matter of this appeal, more than a century after they undisputedly had jurisdiction over the land, allotted in fee and owned by non-tribal members, likewise raises grave constitutional concerns.

It should also be noted that the Enabling Act which created the State of Wisconsin contains absolutely no limitation of the State's authority over this former reservation. Additionally, the Act which allowed for the creation of the Towns of Hobart and Oneida, expressly states the towns are created out of what used to be the reservation, rather than limiting local jurisdiction.

2. Congressional Authority to Create a Federal Enclave is Limited and Does Not Allow for the Placement of Land Into Trust for the Benefit of a Tribe Under § 465 of the IRA.

The Constitution provides the federal government only limited ability to reduce the land under control of the states. Under the Enclave Clause⁸¹, congressional power is limited to establishing a federal "enclave," land over which the federal government exercises "exclusive jurisdiction," to that needed for "the erection of forts, magazines, arsenals, dock-yards, and other

⁸¹ U.S. Const. art. I, § 8 ("To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings....")

needful Buildings....”⁸² Even then, the land cannot be taken into federal jurisdiction without first obtaining the affected State's consent.⁸³ No other provision of the Constitution provides the federal government the authority to take land from state jurisdiction.⁸⁴

Various courts, including the Supreme Court, have described “Indian country” and Indian reservations as federal enclaves.⁸⁵ The creation of these enclaves requires the consent of the affected state. Our federal system was created upon the premise of the dual state and federal sovereignty. The lack of Constitutional authority to reduce state jurisdiction reflects the founders' respect for the territorial jurisdiction and integrity of the states as a fundamental aspect of their sovereignty. As the annals of the Constitutional convention reflect, delegates proposed and eventually adopted the Enclave Clause in the interest of safeguarding our nation's then-unique system of federalism.⁸⁶ To this end, the Enclave Clause grants Congress the right of exclusive legislative power over federal enclaves as prophylactic against undue state interference

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See also U.S. Const. art. IV, § 3 (expressly prohibiting the “involuntary reduction” of the State's sovereign territory in the creation of the new state.)

⁸⁵ See *U.S. v. Antelope*, 430 U.S. 641, 648 n.9 (1977); *U.S. v. Goodface*, 835 F.2d 1233, 1237, n. 5 (8th Cir. 1987)(stating that the phrase “within the exclusive jurisdiction of the United States” in 18 U.S.C. 1153 refers to the law in force in federal enclaves, including Indian country.”); *U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan*, 939 F.2d 499, 501(7th Cir. 1991), *cert denied*, 502 U.S. 1060 (1992)(tax code imposes taxes upon U.S. citizens through the nation not just in federal enclaves “such as ... Indian reservations”). Notwithstanding this fact, the First Circuit rejected an argument that taking trust lands for Indian tribes violates the Enclave Clause. *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev. on other grounds*, *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). That Court found that the Enclave Clause is inapplicable because the taking of land into trust by the federal government for the benefit of an Indian tribe is not one of the Clauses's enumerated permissible actions. The court also dismissed the assertion that taking land into trust by the federal government is an Enclave Clause violation because there is some sharing of jurisdictional authority between state and federal governments. *Id.* citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)(“[Th]e Supreme Court offered an Indian reservation as a “typical illustration” of federally owned land that is not a federal enclave because state civil and criminal laws may still have partial application thereon.”). The First Circuit reliance on *Surplus Trading* is a gross error. That case was decided well before the Indian Reorganization Act of 1934, which created the notion of Indian trust lands, and presented other facts rendering the court's premises unsupportable. And, the fact that States retain some jurisdiction over some matters in “Indian country” does eliminate the protection that the Enclave Clause provides to the territorial integrity of the states.

⁸⁶ *Commonwealth of Va. v. Reno*, 955 F.Supp. 571, 577 (E.D. Va. 1997) *vacated on other grounds*, *Commonwealth of Va. v. Reno*, 122 F.3d 1060 (4th Cir. 1997).

with the affairs of the federal government.⁸⁷ Yet, ever sensitive to the risk of granting the federal government unchecked power, the founders limited and balanced this grant of power by requiring state consent to the federal acquisition of land for an enclave.⁸⁸

The federal government simply lacks Constitutional authority to take land from the states without the state's consent. This would include taking land into trust for Indian tribes in the area of a former reservation where representatives of the Department of Interior and in at least two federal court cases, have confirmed that more than a century ago this reservation was fully allotted and under state and local jurisdiction.⁸⁹ The pending acquisitions would transform the land into "Indian country" under federal law and divest the state of its rightful sovereignty over the land.⁹⁰ Such a result is unconstitutional.

⁸⁷ *Id.*

⁸⁸ As James Madison noted, many delegates expressed concern that Congress' exclusive legislation over federal enclaves would provide it with the means to "enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [national] government." James Madison, 2 Debates in the Federal Convention, 513 (quoting Elbridge Gerry of Massachusetts). Ultimately, the delegates' apprehension about excessive federal power was allayed by requiring the national government to obtain the states' express consent to acquire and employ state property for federal purposes. *Id.*

⁸⁹ See the history of Tribe and the allotment process discussed *supra*.

⁹⁰ *U.S. v. Roberts*, 185 F.3d 1125, 1131 *cert. denied*, 529 U.S. 1108 (2000) (Tenth Cir. 1999); *U.S. v. John*, 437 U.S. 634, 648-649 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). Federal property acquired under the powers found in the Constitution's Property Clause, U.S. Const. art. IV, § 3, are generally subject to state laws except to the extent they are contrary to federal law. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976). When acquisitions are made by taking land into trust for Indian tribes, thereby creating "Indian country," the federal government's position is that state jurisdiction is preempted. This is based on the notion of "'semi-independent position' of Indian tribes [which gives] rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980). In *White Mountain Apache*, the Supreme Court explained the two barriers are that such authority may be pre-empted by federal law and such authority may infringe upon the "right of reservation Indians to make their own laws and be ruled by them." *Id.* While the court was referring to Indian reservations and not trust land, the federal government would expand that to all Indian Country such that the preemption is a profound displacement of state authority. The application of this federal preemption and related barriers to state regulation on any newly-acquired land for Indians has significant and immediate ramifications for a state's authority over that land. One of the earliest Supreme Court cases stated that "the laws of [a state] can have no force" within reservation boundaries. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); See also *Williams v. Lee*, 358 U.S. 217, 219 (1959). Recent Supreme Court cases continue to presume that state jurisdiction over Indian country is automatically diminished. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 ("Generally speaking,

3. The 10th Amendment to the United States Constitution Prohibits the Placement of Land Into Trust at the Expense of State Jurisdiction

The Constitution created a federal government with only specifically enumerated powers.⁹¹ This constitutional structure was then further limited by the adoption of the Bill of Rights which includes the Tenth Amendment. Under the Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁹²

The powers delegated to the federal government and those reserved to the states are mutually exclusive.⁹³ Therefore, all federal statutes must be grounded upon a power enumerated in Article I of the Constitution.⁹⁴ If the Congressional act lacks Article I authority, then the federal government has invaded the province of the states' reserved powers.⁹⁵

James Madison wrote during the process by which the various states ratified the Constitution, that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."⁹⁶ The United States Supreme Court has also stated:

Just as the separation and independence of the coordinate branches of the federal Government serves to prevent the accumulation of excessive

primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States"); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Generally, absent the tribe's consent or an express congressional authorization, a state cannot exercise certain criminal or civil jurisdiction in Indian country. See 25 U.S.C. § § 1321, 1322; *McClanahan*, 411 U.S. at 171-72, (1973). As to regulatory matters, the federal courts apply a complex balancing test to determine if the state's interests in regulating a matter outweigh the federal government's interest in tribal self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144-5; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

⁹¹ U.S. Const., art. I, § 8.

⁹² U.S. Const., amend. X.

⁹³ See *New York v. U.S.*, 505 U.S. 144 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States....")

⁹⁴ *Id.* at 155.

⁹⁵ *Id.*

⁹⁶ THE FEDERALIST NO. 45, pp. 292 - 293 (J. Madison)(C. Rossiter, ed. 1961).

power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.⁹⁷

It is axiomatic that Congress cannot unilaterally expand its authority, or the authority of any other branch of the federal government, with respect to the states. As the Supreme Court noted, “[s]tates are not mere political subdivisions of the United States....The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.”⁹⁸ Congress cannot infringe upon the rights retained by the states under the Tenth Amendment.

With the exception of the Enclave Clause, the federal government lacks any Constitutional authority to impinge upon state sovereignty by removing land from a state’s jurisdiction. The removal of state jurisdiction which would result from placement of these parcels into trust would therefore be a violation of the Tenth Amendment, which limits the powers of the federal government to those specifically enumerated in the Constitution. Consequently, 25 U.S.C. § 465, to the extent it results in a loss of state jurisdiction to tax and further results in a total loss of jurisdiction under 25 C.F.R. § 1.4, is unconstitutional.

4. The Indian Commerce Clause Does Not Allow for the Placement of this Land into Trust.

⁹⁷ *U.S. v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)[emphasis added].

⁹⁸ *New York*, 505 U.S. at 156-57 (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. The benefits of this federal structure have been extensively cataloged elsewhere, but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. “The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.” [citations omitted.]

The Indian Commerce Clause⁹⁹ is often cited as the authority for Congressional actions with respect to Indian tribes.¹⁰⁰ Federal courts deciding Tenth Amendment challenges have often based their opinions on the false assumption that Article I provides Congress with plenary authority over all matters involving Indians, no matter how remote, indirect, or tenuous the facts of the case related to the notion of “commerce,” which is the only Constitutional authority actually granted the federal government.¹⁰¹ Although lower courts have interpreted the Indian Commerce Clause to give Congress “plenary power...to deal with the special problems of Indians,” the Supreme Court has limited this assertion of plenary power.¹⁰²

That limitation is appropriate. The language of the Constitution does not support the assertion of plenary authority under the Indian Commerce Clause. That clause grants the federal government authority “to regulate commerce with...the Indian tribes.”¹⁰³ In the legal and constitutional context, however, “commerce” means only mercantile trade.¹⁰⁴ The phrase “to regulate commerce” has long meant to administer the *lex mercatoria* (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.¹⁰⁵ The common use of the phrase “to regulate commerce,” and similar phrases, at the time of the Constitutional Convention “almost invariably meant ‘trade with the Indians’ and

⁹⁹ U.S. Const. art I, § 8, cl. 3. “The Congress shall have the power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

¹⁰⁰ See e.g. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

¹⁰¹ See e.g., Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER UNI. L. REV. 201, 217 (2007)(“Natelson”)(“When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian ‘affairs.’”).

¹⁰² *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996).

¹⁰³ U.S. Const. art I, § 8, cl. 3.

¹⁰⁴ Natelson, *supra* n. 189, at 214.

¹⁰⁵ *Id.* (“Thus, ‘commerce’ did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution's advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.”)

nothing more....It was generally understood that such phrases referred to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.”¹⁰⁶

The ability to distinguish a reference to “commercial activities” and references to all other activities was common in the vernacular of the time.

“When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian ‘affairs.’”¹⁰⁷

Federal documents treated “affairs” as a much broader term than “trade” or “commerce.”¹⁰⁸ An academic article studying of the Indian Commerce Clause states:

A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs....Their report showed the department's responsibilities as including military measures, diplomacy, and other aspects of foreign relations, as well as trade. The congressional instructions to Superintendents of Indian Affairs...clearly distinguished ‘commerce with the Indians’ from other, sometimes overlapping, responsibilities. Another 1787 congressional committee report listed within the category of Indian affairs: ‘making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former.’¹⁰⁹

There is, therefore, no basis to argue that the language of the Constitution grants plenary authority over any matter that concerns Indian affairs. The text of that Constitutional provision provides only authority over Indian commerce.

¹⁰⁶ *Id.* At 215-16.

¹⁰⁷ *Id.* at 216-17 (“Contemporaneous dictionaries show how different were the meanings of ‘commerce’ and ‘affairs.’ The first definition of ‘commerce’ in Francis Allen’s 1765 dictionary was ‘the exchange of commodities.’ The first definition of “affair” was “[s]omething done or to be done.” Samuel Johnson’s dictionary defined “commerce” merely as “[e]xchange of one thing for another; trade; traffick.’ It described ‘affair’ as “[b]usiness; something to be managed or transacted.” The 1783 edition of Nathan Bailey’s dictionary defined “commerce” as “trade or traffic; also converse, correspondence, but it defined ‘affair’ as ‘business, concern, matter, thing.’”)[citations omitted.]

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 217-18.

The fact Congress' lack of authority over any Indian matters beyond those related to commerce, coupled with the lack of any authority to remove land from a state without the consent of the state, leads to the conclusion that § 465 of the IRA, especially combined with 25 C.F.R. § 1.4, is unconstitutional. Because the Regional Director's decision rests solely on the Regional Director's exercise of unconstitutional authority, the Secretary cannot take the land into trust as requested by the Tribe.

5. The Regional Director's Attempt to Place the Land at Issue into Trust is Unconstitutional in that it Violates Article IV, Section 3 of the United States Constitution by depriving the State and its Subdivisions of a Republican form of Government.

The Congress does have authority under the Property Clause over lands ceded by treaty or through war to the United States. This power has been interpreted as remaining in Congress until the lands are disposed of and placed under the jurisdiction of a state.¹¹⁰ This authority to reserve federal public lands from application of state law at statehood has been consistently upheld. But the lands for the Oneida Reservation were not reserved when Wisconsin became a state.¹¹¹ This leads to the conclusion that Sec. 465 of the IRA, when combined with 25 C.F.R. Sec. 1.4, is unconstitutional. Because the Regional Director's decision rests solely on the Regional Director's exercise of unconstitutional authority, the Secretary cannot take the land into trust as requested by the Tribe.

6. The Acceptance of these Parcels into Trust Violates the Fourteenth Amendment of the United States Constitution.

Section 1 of the Fourteenth Amendment reads as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

¹¹⁰ *Winters v. U.S.*, 207 U.S. 564 (1908)

¹¹¹ Federal Enabling Act

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.¹¹²

In analyzing the Fourteenth Amendment, the United States Supreme Court discussed the issue of a Republican form of government.

The equality of the rights of citizens is a principle of Republicanism. Every Republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its powers. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guarantee.¹¹³

By taking these parcels into trust under 25 U.S.C. § 465 and removing all state and local jurisdiction via 25 C.F.R. 1.4, the United States is abridging the privileges and immunities of the citizens of the State and the Village. The Village and its citizens have no ability to participate in governments over the trust parcels and may be subject to tribal jurisdiction for activities occurring on these parcels. The Fourteenth Amendment does not allow for such a result. Consequently, 25 U.S.C. § 465, to the extent it results in trust parcels being removed from all state and local jurisdiction, pursuant to 25 C.F.R. § 1.4, is unconstitutional because it results in the state and local governments being forced into violating the Fourteenth Amendment.

C. The Regional Director failed to adequately consider the criteria found in 25 C.F.R. § 151.10 when deciding to accept the parcels into trust.

¹¹² Fourteenth Amendment of the United States Constitution

¹¹³ *U.S. v. Cruikshank*, 92 U.S. 542, 555 (1875).

25 C.F.R. § 151.10 provides the mechanism for the secretary to accept land into trust for a tribe pursuant to the IRA.¹¹⁴ Therefore, if the Tribe was eligible to use the IRA, and if its use was constitutional, as applied to the facts of this case, 25 C.F.R. § 151.10 requires the secretary to consider eight separate criteria when deciding whether to accept the land into trust. The first criteria deals with statutory authority to accept the land, the lack of which has been discussed in depth in the first two sections of this brief, and will not be repeated here. The Regional Director's failure to properly analyze the remaining criteria is discussed below.

1. An agreement between the Tribe, BIA, and Midwest Regional Office proves fundamental administrative prejudice at the BIA level.

An allegation of bias must be more than "purely speculative."¹¹⁵ However, because the concept of due process varies depending on the context, "it is imperative that...agencies use the procedures which have traditionally been associated with the judicial process."¹¹⁶ Accordingly, an agency must act as an "impartial tribunal" and "the most we can hope for is that persons charged with the responsibility for decisions affecting other people's lives and property will be as objective as humanly possible."¹¹⁷ Further, due process requires that "one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs,

¹¹⁴ This brief considers the criteria for an on-reservation fee-to-trust application governed by 25 C.F.R. § 151.10. At the present time, both the Village and the Tribe are assuming that all of the land involved lies within the boundaries of the Reservation as established in 1838. This assumption is made for the purposes of this brief and does not waive any right the Village may have to challenge the location of the Reservation's boundaries under federal law. Under the federal regulations governing trust acquisitions, a reservation that has been disestablished or diminished is treated in the same manner as the former reservation of the Tribe. 25 C.F.R. § 151.2(f); *Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 245-46 (2005); *County of Mille Lacs, Minnesota v. Midwest Regional Director*, 37 IBIA 169, 172 (2002); *Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1054 (2007) ("The land acquisition regulations under the 1934 Act treat acquisitions on a diminished reservation as an on-reservation acquisition.").

¹¹⁵ *U.S. v. Litton*, 462 F.2d 14, 17 (9th Cir. 1972) (citing *Securities and Exchange Com'n v. R.A. Holman & Co.*, 323 F.2d 284 (D.C. Cir. 1963)).

¹¹⁶ *Amos Treat & Co. v. S.E.C.*, 306 F.2d 260, 263 (D.C. Cir. 1962).

¹¹⁷ *Id.* at 264.

take no part in the decision of that case by any tribunal on which he may thereafter sit."¹¹⁸ Thus, in the adjudication process, administrative agencies must ensure due process and impartiality to the same extent as a judge.¹¹⁹

When assessing claims of bias, courts look at whether the decision maker has made a "preannounced decision" on the matter, or whether there is "objective and undisputed evidence of administrative bias."¹²⁰ Moreover, courts have held that a claim of bias "is judicially cognizable to the extent it bears upon the fairness of a hearing," and "the standard of impartiality is applied even more strictly to administrative adjudicators because of the lack of procedural safeguards normally available in judicial proceedings."¹²¹ Thus, administrative agencies must actively ensure that adjudicative proceedings remain free of bias, and ensure procedural safeguards above and beyond that of judges.¹²²

The Government Accountability Office noted significant concerns with the practice of some Tribes of entering into agreements with BIA offices for the purpose of expediting fee-to-trust applications.¹²³ These side agreements raised enough of a concern that the Interior Office of Inspector General instituted an investigation.¹²⁴ While the results of this investigation are not easily traceable, there is sufficient evidence to indicate that Tribes continue to enter into these agreements with the BIA, raising considerable questions about the impartiality of the BIA.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 263.

¹²⁰ *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988).

¹²¹ *Small v. Sullivan*, 820 F.Supp. 1098, 1108 (S.D. IL 1992) (citation omitted).

¹²² *Id.*

¹²³ United States Government Accountability Office, Report to Congressional Committees, Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications, GAO-06-781, p. 15-16 (July 2006).

¹²⁴ *Id.* at 16.

The Tribe is a participating member in the Midwest Region Division of Fee to Trust which has entered into a Memorandum of Understanding with the Department of the Interior, BIA, and Midwest Regional Office.¹²⁵ The title of the agreement is “Memorandum of Understanding between the Oneida Tribe of Indians of Wisconsin and the Bureau of Indian Affairs-Midwest Regional Office,” and the agreement extends from 2008 through the fiscal year of 2010.¹²⁶ The express purpose of the agreement is to “facilitat[e] the expeditious processing of fee-to-trust applications submitted by the participating Division Tribes,” which will be accomplished “through funds by participating tribes to supplement BIA staff.”¹²⁷ The agreement indicates that the “sole duties and responsibilities [of the staff] will be to process fee-to-trust applications consistent with the terms [of the agreement].”¹²⁸ Moreover, the parties “agree[d] that the BIA personnel for the Division shall be governed by the terms of the Agreement,” and “additional employees in the [Midwest Regional Office] will be necessary to achieve the goals of this Project.”¹²⁹ The parties further agreed that the Midwest Regional Office would follow federal personnel policies in selecting the employees, and the MWRO would also be responsible for the position descriptions and interviewing.¹³⁰ Accordingly, the staff selected by the MWRO for purposes of processing the Tribe’s fee-to-trust applications are employees of the BIA, yet receive compensation from the participating tribes.

Not only are the staff of the Midwest Regional Office paid by the Tribe, and perform duties solely for the participating tribes, but the Regional Office also meets and confers with the

¹²⁵ Memorandum of Understanding between Oneida Tribe of Indians of Wisconsin and the Bureau of Indian Affairs-Midwest Regional Office FY 2008 – FY 2010. Appendix Exhibit 34

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at ¶ 4.

¹³⁰ *Id.*

Tribe, including immediately disclosing any FOIA requests received by the BIA.¹³¹ In fact, on March 25, 2010, the Regional Director denied as “too broad in scope” a FOIA request from the Village for “[r]ecords which relate to the number of fee to trust applications in the Midwest Regional Office of the Bureau of Indian Affairs that were processed using persons hired pursuant to any agreement like the...Memorandum of Understanding and the names of the tribes who filed trust applications.”¹³² Consequently, this side agreement confirms the lack of impartiality of the BIA.

The Oneida Tribe contributes a significant amount of money to the BIA directly related to its fee-to-trust applications. A travel report included as part of the Oneida Business Committee Agenda indicates that the Advisory Council, established as part of the Memorandum of Understanding and comprised of the Midwest Regional Director and one representative of each participating tribe, met on September 8, 2008.¹³³ The meeting was attended by Terry Viriden, Area Director, Diane Baker, Realty Specialist Supervisor, and one representative from the Oneida Tribe, Shakopee Tribe, Mille Lacs Tribe, and Ho Chunk Tribe.¹³⁴ After exchanging email addresses “for the BIA staff working on [the] fee to trust applications,” the parties outlined various details under the agreement.

First, the travel report indicated that “[t]he consortium staff consists of one supervisor, Diane Baker, 4 Realty Specialists, 1 Realty Assistant and 1 Environmental Protection Specialist.”¹³⁵ Documents included in the administrative record indicate that Diane Baker is a Supervisory Realty Specialist employed by the Bureau of Indian Affairs, Midwest Regional

¹³¹ *Id.* at ¶ 10.

¹³² U.S. Department of the Interior, Bureau of Indian Affairs Letter to Paul Kent dated March 25, 2010 on FOIA Control Number BIA-2010-00665. Appendix Exhibit 35

¹³³ Oneida Business Committee Agenda packet (October 1, 2008). Appendix Exhibit 36

¹³⁴ *Id.*

¹³⁵ *Id.*

Office.¹³⁶ In addition, various memorandums and emails in the administrative record show that Diane Baker was extensively involved in processing these fee-to-trust applications. In addition, Scott Hebner, pursuant to numerous documents in the administrative record, is an Environmental Protection Specialist employed by the BIA Midwest Regional Office.¹³⁷ Scott Hebner performed and approved both Phase I environmental site assessments for the subject properties, and under the section of the reports entitled "Qualification(s) of Environmental Professional(s)," he attached his "Environmental Professional Qualifications and Experience."¹³⁸ Under "work experience," he listed the BIA Midwest Regional Office, as an Environmental Protection Specialist, and stated in the description, "[c]onduct Environmental Site Assessments for four tribes Fee to Trust Acquisitions in the Midwest region."¹³⁹ He also noted under the description of his work experience that he "complete[s] the requirements for the National Environmental Policy Act (NEPA) for these same properties," including "[c]omplet[ing] Categorical Exclusions and Environmental Assessments."¹⁴⁰ From these statements, it is clear that Scott Hebner is a member of the "consortium staff," thus receiving a portion of his salary and benefits from the Tribe. Based on both of these BIA employees significant involvement in the fee-to-trust applications process, there is a clear lack of impartiality at the BIA.

The travel report also indicates that "[t]he budget for this staff is \$860,000" and "[e]ach of the four Tribes contributes \$215,000."¹⁴¹ In addition, the travel report states that because of auditing of another consortium, the parties may need to make changes to the Midwest

¹³⁶ See Bureau of Indian Affairs Midwest Regional Office Fax Coversheet from Diane Baker, Supervisory Realty Specialist, to Dr. Fred Muscavitch, Director of Division of Land Management, Oneida Tribe of Indians of Wisconsin. (Showing involvement in fee-to-trust application process). Appendix Exhibit 37

¹³⁷ See "Environmental Professional Qualifications and Experience" of Scott William Hebner. Appendix Exhibit 38

¹³⁸ See *id.*; Phase I Environmental Site Assessment Reports for both the Boyea and Cornish properties.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Oneida Business Committee Agenda packet (October 1, 2008).

Consortium agreement: "A follow up conference call will need to take place to talk to the solicitor about some suggested changes to the consortium agreement. This comes out of some auditing actions that occurred from reviewing the California consortium." These "auditing actions" may relate to the GAO study that noted concerns about Tribes entering into side agreements with BIA Offices. Finally, the packet included a breakdown of the budget for the dates of October 1, 2007 through September 30, 2008, which indicated that \$622,169.00 was spent on salary and benefits alone.

Based on this documented evidence, concerns of bias are far more than speculative and constitute "fundamental administrative prejudice."¹⁴² The environmental site assessments were prepared by a BIA employee that is also part of the "consortium staff," and likely receives part or all of his salary and benefits from the members of the consortium, including the Tribe. Accordingly, these environmental site assessment reports are completely unreliable, as is the determination that a categorical exclusion applied to the properties. Diane Baker is also an employee of the BIA and part of the "consortium staff." She participated throughout the process in gathering and processing title reports and various other documents, which raises serious concerns of bias. Thus, based on her extensive involvement in processing the fee-to-trust applications, the Regional Director could not reasonably rely on the documents included in the record.

Given the GAO's concern about side agreements between Tribes and BIA offices, and the documented evidence showing such an agreement here, it is clear that the BIA violated all concepts of due process, as well as established ethical principles. What is more, courts have stated that "it is imperative that...agencies use the procedures which have traditionally been

¹⁴² See *U.S. v. Litton*, 462 F.2d 14, 17 (9th Cir. 1972) (citing *Securities and Exchange Com'n v. R.A. Holman & Co.*, 323 F.2d 284 (D.C. Cir. 1963)).

associated with the judicial process," and agencies must act as an "impartial tribunal."¹⁴³ Moreover, courts have held that "the standard of impartiality is applied even more strictly to administrative adjudicators because of the lack of procedural safeguards normally available in judicial proceedings."¹⁴⁴ There is simply no question that if a judge or his staff received significant monetary funds or other benefits from a litigant in a case over which he or she presided, this would constitute a serious violation of due process as well as established judicial ethics. Based on the Tribe's agreement with the BIA and Midwest Regional Office, not only to provide the BIA with funds, but also to participate extensively in the process, there is "objective and undisputed evidence of administrative bias."¹⁴⁵ Further, the fee-to-trust applications were processed by employees of the BIA who are also members of the Tribe's consortium, such that all documents and reports prepared by these employees are completely unreliable.

Even beyond the blatant bias created by the agreement, the Memorandum of Understanding between the Tribe and the BIA Midwest Regional Office is otherwise contrary to current Supreme Court law. The agreement states that it is in effect through the fiscal year 2010; however, the parties signed the agreement in early 2007.¹⁴⁶ Pursuant to the express terms of the agreement, "the Midwest Regional Office will hire employees/contract staff whose sole duties and responsibilities will be to process Fee-to-Trust applications *in a manner consistent with the terms contained herein.*"¹⁴⁷ Nowhere in the agreement do the parties reference the *Carciari* decision, and the agreement contains no amendment to incorporate whether a Tribe is eligible to receive the benefits of the IRA, including fee-to-trust. Thus, not only does the agreement raise

¹⁴³ *Amos Treat & Co.*, 306 F.2d at 263-64.

¹⁴⁴ *Small*, 820 F.Supp. at 1108.

¹⁴⁵ See *White Mountain Apache Tribe*, 840 F.2d at 677-78.

¹⁴⁶ Memorandum of Understanding between Oneida Tribe of Indians of Wisconsin and the Bureau of Indian Affairs-Midwest Regional Office FY 2008 – FY 2010.

¹⁴⁷ *Id.*

considerable bias-related concerns, but the application process is completely void of all considerations under *Carciari*. Therefore, the agreement is clearly in violation of the law.

2. The Tribe has no need for the trust acquisition, nor does the Tribe have a valid purpose under 25 C.F.R. § 151.10(b) and (c).

Under 25 C.F.R. § 151.10(b), a tribe must set forth its specific need for land to be placed into trust status, and the secretary must consider “the need of...the tribe for additional land.” A tribe can establish a need for additional land by showing that it has minimal or no land in trust,¹⁴⁸ that the land acquisition would “greatly enhance the Tribe's economic base and its ability to be self-sufficient,”¹⁴⁹ or “trust acquisition will help ensure the survival of the Tribe.”¹⁵⁰

As a corollary to showing a need, the tribe must also describe the purposes for which it will use the land.¹⁵¹ Under 25 C.F.R. § 151.10(c), the secretary must consider “[t]he purposes for which the land will be used.” The secretary may accept land into trust status under 25 C.F.R. § 151.3(a) if it is “necessary to facilitate tribal self-determination, economic development, or Indian housing.”¹⁵² However, where there is “no justification for placing the land in trust status and removing the property from the state and local tax rolls,” the secretary should deny the application.¹⁵³ Consequently, the application must adequately justify both the need and purpose for land to be placed into trust.¹⁵⁴

The Tribe did not adequately set forth a need for additional land under 25 C.F.R. 151.10(b). The parcels at issue are already owned by the Tribe. Neither the Tribe nor the

¹⁴⁸ See *Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs* (Decision 6/24/2009, p. 5)

¹⁴⁹ *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 801 (8th Cir. 2005).

¹⁵⁰ *South Dakota v. U.S. Dept. of Interior*, 401 F.Supp.2d 1000, 1008 (D.S.D. 2005).

¹⁵¹ 25 C.F.R. § 151.10(c).

¹⁵² 25 C.F.R. 151.3(a).

¹⁵³ See *McAlpine v. U.S.*, 112 F.3d 1429, 1436-37 (10th Cir. 1997).

¹⁵⁴ See *id.*

Regional Director explain why the Tribe's need for this land, to effectuate whatever "purpose" it may have in mind, cannot be accomplished with the land remaining in fee. This wealthy casino Tribe, perhaps more than any other property owner in the Village, can easily afford to pay its taxes. Additionally, if there is a fear that a future sale of the land may result in the Tribe losing its ownership, such a decision rests entirely with the Tribe. The Tribe could also place restrictive covenants on the land thereby further protecting its future use and alienation. The record simply contains no evidence to support a conclusion that there is a need to place these parcels into trust. The Tribe's only motivation is to acquire 100% of its original 65,400 acre reservation.¹⁵⁵

In both the NOD for the Boyea property and the NOD for the Cornish property, the Regional Director stated that the acquisition would "ensure[] that tribal investments within the Oneida Reservation will never be lost." Unlike other cases in which need was found, the Regional Director did not state that the Tribe currently has no other land in trust, nor that the acquisition of the land is necessary to enable the Tribe to be self-sufficient.¹⁵⁶ In fact, the Tribe currently has a full-fledged government and business enterprise that acts in the interests of its enrolled members. Moreover, the statement of need does not assert that the land acquisition is necessary for purposes of the Tribe's continued existence.¹⁵⁷ Instead, the Regional Director relies on the language of "tribal investments," but does not explain any further what those "investments" include, or why they cannot be made on fee land. This is not surprising because the Tribe has no need. The Tribe has only 2,500 members living on the reservation and 21,453 acres of land, which calculates to 116 acres for each Tribal member on the former reservation.

¹⁵⁵ Oneida Tribe Division of Land Management Mission Statement, Oneida Tribe official website (accessed November 12, 2008). Appendix Exhibit 39

¹⁵⁶ See *Keetoowah Band of Cherokee Indians*, p. 10; *South Dakota*, 423 F.3d at 801.

¹⁵⁷ See *South Dakota*, 401 F.Supp.2d at 1008.

Although a Tribe “need not be suffering financial difficulties,” it must nevertheless show that it has a demonstrable need for the property, such as that “existing land is already developed.”¹⁵⁸ Here, the Regional Director did not even consider, let alone justify, placing this land into trust and removing it from the tax rolls. The Tribe’s stated goal to acquire 100% of its former reservation is a “want” and not a “need.”

With regard to the Tribe’s purpose, pursuant to § 151.10(c), the Regional Director stated that the 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.” Both NODs thereafter describe the current “housing deficit” for members of the Tribe. However, the NOD on the Boyea property then states that the land will be used “to expand the Oneida Tribal land base and to provide future agricultural use.” Thus, the Tribe’s expressed purpose to continue utilizing the Boyea property for agricultural purposes is inconsistent with its description of a housing deficit and economic development. Moreover, unlike the NOD for the Cornish property, in which the Regional Director expressly stated, “[t]he Tribe does not anticipate any change in land use, therefore minimizing regulatory and land use impacts,” a similar statement does not appear in the NOD on the Boyea property. From this absence of language in the Boyea NOD, one can infer that the Tribe anticipates that the land use will change, especially in light of the Tribe’s “established goals.” Moreover, to the extent that the Tribe references “economic development” as a purpose for both properties, this undermines the Regional Director’s reliance on the categorical exclusion where no change in land use is

¹⁵⁸ Department of Interior, Bureau of Indian Affairs Handbook on *Acquisition of Title to Land Held in Fee or Restricted Fee*, p. 25 (citing *Avoyells Parish, Louisiana, Policy Jury v. Eastern Area Director*, BIA, 34 IBIA 149, 153 (1999)).

planned. Thus, not only did the Tribe fail to establish a clear need for the trust land, but its purposes are entirely inconsistent with the conclusion that no change in land use is planned.

The Tribe has achieved self-sufficiency. It is a full-fledged government and business enterprise that acts in the interest of its enrolled members, and particularly, the small number of enrolled members who live within the Reservation's boundaries. It does not have to tax its members or its land. It has vast financial resources, a well-developed governmental and economic infrastructure, and plenty of land. The Tribe has openly stated its goal to reinvent the 1838 Reservation, which means nothing less than eventual obliteration of the Village and other local governments that have been created within the Reservation's boundaries in that 170-year span of time. There is certainly no demonstrated need for additional trust land.

3. The Regional Director failed to consider the substantial impact on the Village resulting from the acquisition of the trust land and subsequent removal of the land from the Village's tax rolls under 25 C.F.R. § 151.10(e).

Under 25 C.F.R. § 151.10(e), the secretary must consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." Inexplicably, the Regional Director completely ignored the substantial data supplied by the Village relating to the loss of tax revenue and focused almost exclusively on the fact that there is a service agreement between the Tribe and Brown County. This focus is even more confusing given that the Village, and not the County, is the primary recipient of tax revenue received from fee property within the Village. The Regional Director also indicates in the NODs that the Tribe attempted to renew the service agreement with the Village, which expired on November 16, 2007, and implies that the Tribe has service agreements with all other local governmental entities. This is clearly a mistake of fact. In reality, the Tribe has no service agreement with the Village of Hobart, the Village of Ashwaubenon (where the Tribe's casinos and hotel operations

are located), nor the Town of Pittsfield. The Regional Director's focus solely on the County ignores the conflicts between the Tribe and other local communities, and constitutes an abuse of discretion.

The Tribe passed a resolution under which it refuses to even attempt to negotiate a service agreement with the Village.¹⁵⁹ Specifically, on February 20, 2008, the Tribe passed a resolution in which it stated the following:

Now, therefore, it is resolved, the **Oneida Tribe of Indians of Wisconsin will not enter into service agreement negotiations with the Village of Hobart** until such time as the Village board formerly recognizes the right of the Oneida Tribe to maintain its own government and exercise jurisdiction within the reservation and the Village board abandons assimilation rhetoric and attempts to change federal Indian policy to the detriment of the Oneida Tribe.¹⁶⁰

In other words, the Tribe has refused to enter into a service agreement with the Village based on an unsubstantiated claim that the Village does not recognize the Tribe's right to maintain its own government and because the Village has subsequently questioned the jurisdiction of the Tribe on fee land within the Village.¹⁶¹

This refusal by the Tribe has resulted in the Village losing all tax revenue from trust land and the \$118,816.00 it received from the old agreement.¹⁶² Unfortunately, the Village has received nothing in 2008, 2009, and 2010. The Village of Ashwaubenon is currently suffering the same fate at the hands of the Tribe. In addition, the Tribe has nearly all of its land in trust or included in currently pending fee-to-trust applications, and the Tribe has expressly stated that it

¹⁵⁹ Oneida Tribe of Indians of Wisconsin, Business Committee, *Resolution Regarding Government-to-Government Relations with the Village of Hobart*, #2-20-08-C. Appendix Exhibit 40

¹⁶⁰ *Id.* (Emphasis added).

¹⁶¹ *See, generally, Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 06-CV-1302 (E.D. Wis. 2008) (The Tribe claimed its property could not be condemned and assessed for public improvements within the Village; the federal court agreed that the Village was correct).

¹⁶² *See* Village's opposition to trust application filed June 2, 2010, p. 12.

intends to put its newly acquired golf course, located within the Village, into trust.¹⁶³ This highly developed property would significantly impact the Village if removed from the tax rolls. If all of this is accomplished, the Tribe would have nearly all of its Village land in trust, which constitutes approximately 25% of the taxable land base.¹⁶⁴

Placing land into trust is not the only way the Tribe is attempting to eliminate the Village's tax rolls. The Tribe also acquired an unbuildable strip of land.¹⁶⁵ The Tribe paid \$3,400,000, several times the fair market value, for an unusable 60-foot wide strip of land, solely to prevent the extension of road, sewer and water, and other services into a 300 acre parcel the Village purchased to use as an industrial park.¹⁶⁶ The Regional Director's refusal to even discuss these issues, which were raised in the Village's November 26, 2008 opposition to the applications, clearly demonstrates a failure to consider the § 151.10(e) criteria.

In April 2009, the Beacon Hill Institute conducted a study to determine the effects of trust acquisition on the Village.¹⁶⁷ The study noted that the Tribe had filed trust applications for 133 parcels in 2008, comprising 2,673 acres of taxable Village land, and pending applications at the time of the study would increase the trust land to approximately 4,254 acres, or 17% of the Village's property tax base.¹⁶⁸ Based on those figures, the study determined that "[i]f the [Tribe] continues to increase fee-to-trust transfers at the historical growth rate, then the quantity of [the Tribe's] trust land will equal the Village's property tax base by 2040," and "within 50 years all of the land in [the Village's] tax base would be transferred into [the Tribe's] federal trust,

¹⁶³ *Letter to GTC*, Oneida Tribe official website, dated October 9, 2009 (accessed October 15, 2008). Appendix Exhibit 41

¹⁶⁴ See Village's opposition to trust application filed June 2, 2010, p. 14.

¹⁶⁵ *Id.* at 17.

¹⁶⁶ *Id.*

¹⁶⁷ The Beacon Hill Institute at Suffolk University, *Hobart Village and OTI: Tax Base Issues*, 7 (April 2009). Appendix Exhibit 42

¹⁶⁸ *Id.* at 4.

completely eliminating property tax revenue.”¹⁶⁹ At this serial rate, the Tribe will effectively eliminate the Village. The Tribe’s website recently announced its goal to own 2/3 of the former reservation by 2030.

In light of the lack of standards for assessing the loss of tax revenue to local governmental bodies, the Secretary has considered voluntary payments made by the Tribe as well as service agreements.¹⁷⁰ Where a Tribe states that “it is willing to negotiate future intergovernmental service agreements” with local municipalities for the costs of services, this supports a conclusion that the local governments will face less of an impact from the loss of tax revenue.¹⁷¹ Here, not only does the Village not receive payments from the Tribe, but the Tribe has gone several steps further and has enacted a Tribal Resolution refusing to negotiate with the Village.¹⁷²

Despite refusing to enter into any service agreements with the Village, the Tribe is entitled to benefits and services provided by the Village, but the effect of accepting this land into trust status is to place the burden of those costs on other property owners within the Village. For instance, the Village and other local municipalities will be affected in numerous ways by the loss of tax revenue, including tax revenue for West De Pere and Pulaski High Schools, the cost of road maintenance and repairs, and other services such as police and fire protection. Moreover, the Tribe benefits from the Village’s stormwater program, which the Village is required to implement under the Clean Water Act. To the extent that the Tribe develops the land, whether for businesses or housing, this development will almost certainly increase the Tribe’s need for

¹⁶⁹ *Id.*

¹⁷⁰ *See Shakopee Mdewakanton Sioux Community* NOD, dated June 7, 2007).

¹⁷¹ *See id.* (Finding that intergovernmental agreements produced a “mitigating effect” on the loss of tax revenues).

¹⁷² Oneida Tribe of Indians of Wisconsin, Business Committee, *Resolution Regarding Government-to-Government Relations with the Village of Hobart*, #2-20-08-C.

services. However, the Tribe has refused to pay for the cost of services, including the stormwater management services, and has enacted a Tribal Resolution refusing to negotiate with the Village. Thus, the cost and burdens for the current services, as well as increased future services, will unjustly fall on other property owners within the Village, despite the Tribe's clear ability to pay.

The Regional Director relied almost exclusively on the loss of tax revenue at the county level, and how that loss has been mitigated pursuant to the service agreement between the Tribe and Brown County. The Regional Director also noted that the school districts are not affected by a loss in tax revenue as the schools receive federal grant money. However, this conclusion does not take into account that the schools currently receive both federal funds and tax revenues; the loss of tax revenues will not be reflected in additional federal grants. Moreover, although the Tribe may provide some of its own services, the Tribe is still entitled to the benefit of services from the local municipalities. With the funds collected from these property tax revenues and other sources, the Village provides fire and emergency services, roads, sewer and water, and law enforcement services to all of its residents, enrolled tribal members and non-enrolled residents alike. The Village is unaware of money that the Tribe may have contributed to the "infrastructure," relied on by the Regional Director in both decisions under § 151.10(e), as the Tribe has not contributed any monies to the Village. Because the Regional Director summarily dismissed all of the Village's concerns, and focused almost exclusively on the county level and its service agreement with the Tribe, the Regional Director's decision is arbitrary and capricious.

The Regional Director failed to comply with the Department of Interior Handbook on the acquisition of trust land. Although both NODs acknowledge that the Village submitted numerous objections, the Regional Director summarily concluded that the Village's responses

consisted of “unsupported speculations.” It is unclear the extent to which the Regional Director considered any of the Village’s objections, if at all. However, the Department of Interior Handbook contains a requirement that “[a]ny comments received from the notice of application on taxes from the State and local government should be analyzed **and discussed in the decision.**”¹⁷³ The complete failure to analyze or otherwise discuss the Village’s concerns constitutes an abuse of discretion, and “an agency’s failure to follow its own regulations is challengeable under the APA.”¹⁷⁴

4. The Regional Director failed to consider significant jurisdictional problems and land use conflicts under 25 C.F.R. § 151.10(f).

Under 25 C.F.R. 151.10(f), the Secretary must consider “[j]urisdictional problems and potential conflicts of land use which may arise.” Where a Tribe unilaterally attempts to revive its sovereign control “[p]arcel-by-parcel,” the effect is to “seriously burde[n] the administration of state and local governments.”¹⁷⁵ Because of the potential for significant consequences, the BIA “is **required** to consider jurisdictional issues identified in response to the Notice of Application and other relevant comments received.”¹⁷⁶ In addition to analyzing potential conflicts, the BIA must also discuss negotiations and agreements between the state and/or local governments relative to services.¹⁷⁷ Although the BIA is not required to consider “every speculative use,” it must nevertheless “give reasonable and prudent review of all credible

¹⁷³ U.S. Department of the Interior, Bureau of Indian Affairs, *Acquisition of Title to Land Held in Fee or Restricted Fee*, p. 25 (May 20, 2008).

¹⁷⁴ See *McAlpine v. U.S.*, 112 F.3d 1429, 1434 (10th Cir. 1997) (citing *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990)).

¹⁷⁵ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 200 (citing *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

¹⁷⁶ Department of Interior, Bureau of Indian Affairs Handbook on *Acquisition of Title to Land Held in Fee or Restricted Fee*, p. 26.

¹⁷⁷ *Id.*

information received or obtained independently.”¹⁷⁸ Moreover, for “individual acquisition requests,” the BIA must consider how the acquisition would affect existing land use ordinances. Thus, prior to acquiring land into trust status, the BIA must conduct an adequate review and analysis of the potential for jurisdictional or land use conflicts; the failure to do so is arbitrary and capricious, an abuse of discretion, and otherwise in violation of the law.

In the NODs, the Regional Director summarily concludes that “no new jurisdictional problems are likely to result from the transfer” of the properties into trust, as “the jurisdictional pattern on the reservation is well established.” In making these summary conclusions, the Regional Director does not state what he considered and analyzed with regard to jurisdiction, if anything, nor did he mention, let alone discuss, any of the concerns submitted by the Village. Given the Regional Director’s complete failure to address the Village’s concerns, he failed to comply with the BIA Handbook’s requirements, thus indicating an abuse of discretion. In addition, the decisions were arbitrary and capricious, and otherwise not in accordance with the law. This trust acquisition implicates serious jurisdictional and land use conflicts in numerous areas, several of which are addressed below.

- a. **The Regional Director failed to consider numerous jurisdictional and land use conflicts with zoning and comprehensive planning under § 151.10(f).**

When a parcel is accepted into trust, the resulting patchwork of jurisdiction and lack of regulatory coordination unduly interferes with state and local governments’ ability to protect and preserve the health and safety of the public. For instance, pursuant to state law, the Village has enacted a zoning code for the purpose of promoting the health, safety, morals and general

¹⁷⁸ *Id.*

welfare of the public.¹⁷⁹ The Village was also required by state law to enact a comprehensive plan for the purpose of “guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote public health, safety, morals, order, convenience, prosperity or the general welfare, as well as efficiency and economy in the process of development.”¹⁸⁰ A comprehensive plan tends to create predictability and reliability with regard to land use plans, and in effect maintains and preserves property values. To the extent that this land is removed from the Village’s jurisdiction, this will undermine the Village’s ability to protect the general welfare of the public, and other property owners within the Village will likely face reduced property values. Consequently, the BIA should recognize that acquiring this land in trust will negatively impact the ability of local governments to provide cohesive and consistent governance, and will further result in both the loss of regulatory control and lack of contiguity among the trust lands.

The Tribe’s purported purposes for the land undermine the Village’s zoning and building regulations. For instance, the NOD for the former Boyea property indicates that the property has been historically used for residential and agricultural purposes, but the Tribe’s purpose in acquiring the land “is to expand the Oneida Tribal land base and to provide future agricultural use.” However, the Regional Director also cites to the Tribe’s purported “housing deficit,” when trying to justify the Tribe’s need for the land, and indicates that numerous tribal members are on a waiting list for housing and vacant land. The majority of the Boyea property is currently zoned agricultural and is undeveloped.¹⁸¹ To the extent that the Tribe intends to develop the land for housing or for business enterprises, this will significantly undermine the Village’s zoning code

¹⁷⁹ Wis. Stat. § 62.23(7)(a).

¹⁸⁰ Wis. Stat. § 62.23(3).

¹⁸¹ Village of Hobart Zoning Map. Appendix Exhibit 43

and comprehensive plan. Further, the Regional Director failed to consider if this use is consistent with the Village's future use as spelled out in its comprehensive plan.

In addition to the Village's zoning code and comprehensive plan, the Tribe has a zoning ordinance, including a comprehensive zoning map for land within the exterior boundaries of the 1838 Oneida Reservation.¹⁸² The map apparently includes each parcel of land within the 1838 Reservation boundaries and assigns a use category from among nine listed categories.¹⁸³ If the land is acquired into trust, these categories, not the Village's zoning code, will apply to the parcels at issue. This will most certainly lead to jurisdictional and land use conflicts under § 151.10(f), yet the Regional Director failed to consider or otherwise address these zoning and land use concerns in both NODs.

As a specific example of a significant jurisdictional conflict, fourteen parcels, including about 275 acres within the Village's Industrial Park, are zoned Agricultural by the Tribe but zoned Limited Industrial by the Village.¹⁸⁴ The Tribe has done virtually nothing with those parcels since they have been owned in fee. The Tribe already has a 32-acre industrial park that fulfills its needs, and its plan for the Village's Industrial Park is to allow only agricultural use. The Village has paid for and extended infrastructure to much of the land in the Industrial Park.¹⁸⁵ The few parcels that have sold will be isolated and the goal of having this facility located close to transportation routes will be foiled. Since the Tribe's intentions are both clear and public, buyers have been wary of investing in the Village's sites for fear of having to deal with two governmental jurisdictions in close proximity to each other. With this strategy, the Tribe has the

¹⁸² Oneida Tribe Code of Laws § 69.7-1; Oneida Zoning Map. Appendix Exhibit 44

¹⁸³ *Id.* at § 69.7-1(b).

¹⁸⁴ Parcels HB-328, HB-340-1, HB-342, HB-329, HB-327, HB-327-1, HB-339, HB-338, HB-322, HB-324, HB-336, HB-327-3, HB-325-1, HB-325-2.

¹⁸⁵ The Tribe has not paid special assessments on its property in the Southeast Industrial Park.

long term impact of depressing property values, making it cheaper still for the Tribe to buy up the remaining land. The Tribe's deliberate strategy of slowing development by buying land in the Village is noted on the Tribe's website.¹⁸⁶

The Southeast Industrial Park was part of the Village's long term land use planning as early as 1974. In 1995, the Village began to take action to create the Industrial Park. From 1997 to 1999, the Village spent approximately \$5,000,000.00 to provide sewer, water, gas, roads and other improvements to the 490 acres included the Industrial Park. In 2000 and 2001, the Tribe acquired 371.9 acres in the Industrial Park, more than 75% of the total area. It has developed only 7.45 acres since then, effectively limiting the Village's development and tax base.¹⁸⁷

A striking example of the Tribe's efforts to stymie the Village's land use plan occurred in 2001 when the Tribe purchased 273.5 acres of land in the Southeast Industrial Park. This purchase occurred the same day the Village met, after public notice, to lay out an order for a town road as the main east-west thoroughfare through the Southeast Industrial Park. The land that the Tribe purchased was needed for the road. This unilateral tribal action illustrates the Tribe's utter lack of respect for Village land use decisions, and evidences a clear jurisdictional conflict that the Regional Director failed to address.¹⁸⁸

Another troublesome conflict is that the Tribe's zoning ordinance permits mobile home parks in an area where the Village has zoned the land for higher density, planned use development. Mobile home parks are inconsistent with the current residential character of the Village and are not allowed by Village zoning. This difference is a reflection of the different

¹⁸⁶ *The Town of Hobart* (accessed November 24, 2008). Appendix Exhibit 45

¹⁸⁷ See Village's opposition to trust application filed June 2, 2010.

¹⁸⁸ See Village's opposition to trust application filed June 2, 2010. The Tribe refused to fully pay special assessments for the road, despite a court order directing it to do so, until the Tribe needed a liquor license from the Village, the issuance of which is contingent upon being current on all taxes, fees, and assessments.

objectives of the Tribe and the Village. The Tribe has its own plan and seeks to serve only its members. The Village's plan seeks to serve all of the residents of the Village, to protect current land uses and property values, and to implement a long term plan for the community.¹⁸⁹

Another example also highlights the Tribe's disregard for important Village land use decisions. In 2006, shortly after the Village invested \$6,000,000 for farmland along State Highway 29 to develop a commercial area needed to offset property tax loss, the Tribe acquired, for \$3,400,000, a sixty-foot wide, L-shaped strip, including 17.4 acres known as the Forest Road Property.¹⁹⁰ The Tribe obtained a conservation easement on the balance of the property, preventing the Village from being able to bring infrastructure to the acreage it had just purchased for urgently needed commercial development. When the Village was forced to condemn a portion of tribal fee land for an infrastructure easement, the Tribe claimed its fee land was exempt from condemnation and that they did not need to pay any assessments on that land. Although the court eventually confirmed the Village's right to condemn and assess, the Tribe's suit against the Village in federal court delayed the development for at least three years.¹⁹¹ The Tribe told the Village it would not develop the Forest Road Property after its acquisition in 2006, and has effectively stopped any development, proving both its disrespect for the Village and its lack of need for the land.¹⁹²

The proposed trust acquisitions superimposed on a Village map confirms the Tribe's use of its resources to disrupt current and future cohesive land use planning by the Village through a

¹⁸⁹ See Village's opposition to trust application filed June 2, 2010.

¹⁹⁰ The purchase price was approximately 13 times the market value of the property acquired by the Tribe.

¹⁹¹ *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 06-CV-1302 (E.D. Wis. 2008).

¹⁹² See Village's opposition to trust application filed June 2, 2010.

pattern of noncontiguous acquisitions.¹⁹³ This pattern will exacerbate current conflicts. The BIA has previously recognized the problems that can result from this type of checkerboard ownership of land because it prevents a community from effectively planning and regulating. Some specific problems that result are complications in leasing both trust and non-trust properties, disputes over access and rights-of-way, disruption of large scale planning, regulation of natural resources, and application of different jurisdictional codes and regulations to different land owners.¹⁹⁴ Tribal trust land will be contiguous to fee land.¹⁹⁵ Despite the proximity of the land parcels, they will be governed by different regulations, different land use planning, different jurisdictions, and will have different tax status. The regulatory and jurisdictional chaos that will result is entirely predictable, and the Regional Director should have addressed these significant concerns in his NODs.

The conflicts in land use are not limited to land acquired by the Tribe; the Tribal government instructed owners of fee land to ignore Village ordinances. For example, in June of 2009, the Robert Cornelius Post No. 7784 of the Veterans of Foreign War of the United States was constructing a new facility on its land. The Tribe instructed the VFW and the contractor to ignore the Village's ordinance and not obtain a demolition and building permit.¹⁹⁶ The VFW is an entity organized under Wis. Stat. § 188.11, and is registered with the Wisconsin Department of Financial Institutions. To that end, this fee land is not owned by the Tribe or even a Tribal member. Despite this fact, the Tribe had the stop work order posted by the Village removed, and

¹⁹³ See Map of Village of Hobart, Tribal Trust and Fee Land. Appendix Exhibit 46

¹⁹⁴ Record of Decision, Oneida Indian Nation of New York Fee-to-Trust Request, U.S. Department of the Interior, Bureau of Indian Affairs (May 2008).

¹⁹⁵ See Map of Village of Hobart, Tribal Trust and Fee Land.

¹⁹⁶ See Letter of Kathy Hughes, Oneida Tribal Vice-Chairwoman to Richard Heidel, Village President; Letter of Frank W. Kowalkowski, Counsel for the Village, in response. Appendix Exhibit 47

attempted to continue construction.¹⁹⁷ Even after receiving a letter from the Village's counsel clearly stating why this fee land owned by a Wisconsin corporation was subject to Village ordinances, the Tribe threatened to pull its donation to the VFW if it obtained Village permits.¹⁹⁸ Only after the Village was forced to continue issuing stop work orders for the failure to obtain the proper permits and after incurring legal costs did the Tribe relent and allow the builder to obtain the proper permits from the Village.

As an additional example of a jurisdictional conflict, the Tribe has instructed owners of fee land to ignore zoning changes implemented by the Village and refuse the Village's request to conduct its routine well inspections on fee and trust land.¹⁹⁹ The inability to conduct well inspections threatens the Village's ability to comply with federal and state mandates on environmental protection. Furthermore, the Tribe has refused to follow other local regulations in the past, such as when it refused to obtain a liquor license from the Village, despite the requirement that any business serving alcohol obtain such a license. Instead of obtaining the liquor license from the Village, the Tribe circumvented local regulations by obtaining legislation allowing them from now on to seek a liquor license directly from the state.²⁰⁰ These jurisdictional problems will be significantly magnified as a result of this acquisition; however, the Regional Director failed to consider these problems.

Based on these numerous jurisdictional conflicts and potential land use conflicts, it is unclear how the Regional Director could summarily conclude, without explanation or analysis, that "no new jurisdictional problems are likely to result from the transfer." The Regional

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Letters on zoning changes in the Village. Appendix Exhibit 48

²⁰⁰ 2009 Wisconsin Act 28 (creating Wis. Stat. § 125.27(3) on permits for certain tribes).

Director's decision was therefore arbitrary and capricious, an abuse of discretion, and in violation of the law, in that he failed to discuss and address these significant and well-documented jurisdictional conflicts.

b. The Regional Director failed to consider significant environmental-related jurisdictional and land use conflicts under § 151.10(f).

Acquiring the land in trust status also threatens to undermine local programs and ordinances enacted pursuant to federal laws and mandates. For instance, pursuant to the Clean Water Act,²⁰¹ and the accompanying federal regulations, the Village is required to implement a stormwater management program. Federal regulations, pursuant to 40 C.F.R. § 122.34(a), “require at a minimum that [the operator of a regulated small MS4] develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.”

The Tribe has recently sued the Village claiming the Village's stormwater ordinances do not apply to trust land and that the Tribe does not owe any service charges associated with the Village's stormwater program for trust lands.²⁰² The Tribe has also indicated that it has passed ordinances to regulate water quality within the reservation. However, water does not flow according to lines established by the Tribe, and a decision in favor of trust status could lead to a duplication of services. In passing the CWA, Congress expressed its policy that “to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork ...and the best use of available manpower and funds, so as to

²⁰¹ 33 U.S.C. § 1251, et seq. (CWA).

²⁰² *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 10-CV-00137 (E.D. Wis.).

prevent needless duplication.”²⁰³ A decision in favor of trust status could significantly undermine the Village’s ability to implement a cohesive stormwater management program and collect stormwater fees for its program, which will threaten the Village’s ability to protect the health and welfare of the public. This problem will be exacerbated if these parcels, along with the additional pending applications, are accepted into trust.

The Regional Director failed to even consider these conflicts, which constitutes an abuse of discretion, and his decision is otherwise arbitrary and capricious.

c. The Regional Director failed to consider immense jurisdictional conflicts in the delivery of emergency services arising from the trust acquisition under § 151.10(f).

The BIA Handbook specifically requires that the BIA “consider jurisdictional issues identified in response to the Notice of Application,” and to “give reasonable and prudent review of all credible information received or obtained independently.”²⁰⁴ In both NODs, the Regional Director briefly discusses Public Law 280 and how Oneida Tribal police officers are cross-deputized pursuant to county agreement. The Regional Director thereafter states in both decisions that “[t]he Village of Hobart is located within the Oneida Reservation and as such, Oneida Tribal members are entitled to city services, such as, police, fire, etc.” Despite this acknowledgement, the Regional Director did not consider the lack of service agreements between the Tribe and the Village, and that the Tribe has refused to enter into negotiations with the Village for the purpose of services.²⁰⁵

²⁰³ 33 U.S.C. § 1251(f).

²⁰⁴ Department of Interior, Bureau of Indian Affairs Handbook on *Acquisition of Title to Land Held in Fee or Restricted Fee*, p. 26.

²⁰⁵ Oneida Tribe of Indians of Wisconsin, Business Committee, *Resolution Regarding Government-to-Government Relations with the Village of Hobart*, #2-20-08-C.

The Village currently has four full-time police officers, a full-time chief of police, and two part-time officers.²⁰⁶ All calls from residents of the Village, whether tribal members or non-members and from fee land or trust land, are dispatched to the Hobart Police Department through the Brown County Sheriff's Department. The Hobart Police Department is under a state mandate to provide law enforcement services to all residents of the Village within the boundaries of the Village. This state mandate will continue if the proposed fee-to-trust application is approved.²⁰⁷

The jurisdictional conflicts in the delivery of emergency services were further exacerbated when the Tribe had a provision inserted in its Service Agreement with Brown County.²⁰⁸ The provision stated, “[t]he Tribe shall provide primary police service protection...” for a designated portion of the Village. Acknowledging the illegality of taking away the Village’s policing authority and making the Tribe’s force “primary,” the Tribe and County modified this provision to read that the Tribe shall be the entity to receive emergency 9-1-1 phone calls in the identified area.²⁰⁹

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? If the trust acquisition goes forward, the

²⁰⁶ See Village of Hobart website on the Hobart-Lawrence Police Department (accessed July 29, 2010). Appendix Exhibit 49

²⁰⁷ Wis. Stats. §§ 61.65 (1),(5) (2008).

²⁰⁸ Service Agreement between Oneida Tribe of Indians of Wisconsin and Brown County, at ¶ 3(a). Appendix Exhibit 50

²⁰⁹ Amendment to Service Agreement between Oneida Tribe of Indians of Wisconsin and Brown County, at ¶¶ 3(b), (f). Appendix Exhibit 51

checkerboarding and jurisdictional conflicts will only get worse.²¹⁰ Police officers must determine jurisdiction for every call based on where the call is coming from within the Village. The Village will retain the legal responsibility under state law to serve all of the land in the Village under these difficult circumstances.²¹¹

Placing additional land into trust will continuously increase the conflicts between the competing police forces, and ultimately threaten the health and safety of the general public. Consequently, the Regional Director's complete failure to consider these serious jurisdictional conflicts is a violation of the agency's own rules and is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law.

d. The Regional Director failed to consider the potential for gaming and the resulting jurisdictional conflicts under § 151.10(f).

Although the Tribe did not expressly indicate any intention to engage in gaming on the parcels, the Regional Director should have considered the potential for gaming, including the significant jurisdictional conflicts. The Tribe is legally capable of conducting either Class II or Class III gaming on the land if it is in trust status. Moreover, the Tribe indicated its intention to purchase a resort and golf course in the Village as an adjunct to its gaming operation; the Tribe subsequently purchased the Thornberry Creek Golf Course for \$10,775,000.²¹² On October 9, 2008, the Tribe posted on its official website an update on the acquisition of Thornberry Creek.²¹³ The following excerpt from that posting states plainly that the Tribe has gaming-related intentions:

²¹⁰ See Map of Village of Hobart, Tribal Trust and Fee Land.

²¹¹ Wis. Stat § 61.65 (1),(5) (2008).

²¹² *A Year in Review*, Oneida Tribe official website located (accessed July 28, 2010). Appendix Exhibit 52

²¹³ *Letter to GTC*, Oneida Tribe official website, dated October 9, 2009 (accessed October 15, 2008). Appendix Exhibit 53

The ability to market a golf course in a package with our existing hotel and casino will generate new and extended business for the hotel and casino, and will increase the activities that can be offered to tourists, convention clientele and business meetings.

We know this type of diversification will benefit the Oneida people as well as our surrounding community. This particular property has been of interest to the Tribe for many years, and the prospect of another party acquiring it would not be in our best interest as a tribe. As such, this is an opportunity for the Oneida Tribe to recover a business out of bankruptcy, use our resources and expertise to revitalize and expand it into a complimentary amenity, one that will enhance our existing businesses and will fuel our local and regional economy.

It is clear from the Tribe's posting that it intends to develop the property in conjunction with its existing gaming operation. The Tribe has also stated that it intends to place this land into trust. Accordingly, the Regional Director should have considered the potential for gaming and the resulting jurisdictional conflicts on this land as well.

Class II gaming, as defined by the Indian Gaming Regulatory Act (IGRA) includes, generally, bingo and electronic facsimiles of bingo.²¹⁴ To legally conduct Class II gaming, all that is required is a tribal gaming ordinance approved by the National Indian Gaming Commission.²¹⁵ The Tribe has such an ordinance, and it permits Class II gaming.²¹⁶ The jurisdictional provisions of the Ordinance allows Class II and Class III gaming to "all Tribal Land within the exterior boundaries of the Reservation of the Oneida Tribe of Indians of Wisconsin, as defined in the 1838 Treaty with the Oneida, 7 Stat. 566."²¹⁷ All of the land involved in the proposed trust acquisition fits that definition.²¹⁸

²¹⁴ 25 U.S.C. § 2703(7)(A)(i) (2008).

²¹⁵ 25 U.S.C. § 2710(b)(1)-(2) (2008).

²¹⁶ Ch. 21, Oneida Code of Laws.

²¹⁷ Oneida Gaming Ordinance § 21.3-1.

²¹⁸ "Tribal Land" is defined in § 21.4-28, Oneida Gaming Ordinance, as "all lands within the exterior boundaries of the Oneida Indian Reservation as defined by the 1838 Treaty." This definition does not require that the land be in trust but federal law arguably requires trust status for land used for gaming.

Even more troubling is the prospect of Class III gaming, which includes electronic games of chance and banking card games, such as blackjack, in the Village.²¹⁹ Conducting Class III gaming requires a compact with the State of Wisconsin in addition to an approved tribal gaming ordinance. The Oneida Tribe has such a compact allowing Class III on the proposed trust land.²²⁰

Since the proposed trust lands are located within the boundaries of the Reservation of the Oneida Tribe on October 17, 1988 (the enactment date of IGRA), Class III gaming may be conducted under IGRA even though the trust status occurs after October 17, 1988.²²¹ Generally, trust land acquired after the enactment of IGRA cannot be used for Class II or Class III gaming until after the extensive consultation process which includes state and local officials and is subject to a veto by the governor of a state.²²² This process is referred to as "the two-part determination," and involves consultation with local officials. One part of the determination that the Secretary must make involves detriment to the surrounding community.²²³ This requirement is in recognition of the significant impact Class III gaming can have on state and local jurisdictions, and evidences Congressional intent that gaming is not imposed on surrounding

²¹⁹ 25 U.S.C. § 2703(7)-(8) (2008).

²²⁰ The original compact was signed in 1991. It provides that Class III gaming may be conducted on "tribal lands" in Wisconsin. Oneida Tribe/State of Wisconsin Gaming Compact of 1991, II, A. "Tribal lands" are defined in the same document as "all lands within the limits of the Oneida Tribe of Indians of Wisconsin reservation," and, "all lands within the State of Wisconsin which may be acquired in trust by the United States for the benefit of the Oneida Tribe of Indians of Wisconsin after October 17, 1988 [date of enactment of IGRA] over which the Tribe exercises governmental power, and which meet the requirements of sec. 20 of the Act. 25 U.S.C. § 2719." *Id.* at III. G.

²²¹ This provision in IGRA regulates gaming on tribal trust land acquired on behalf of a tribe by the Secretary of the Interior after October 17, 1988, so-called "after acquired property." 25 U.S.C. § 2719(a)(1) (2008).

²²² 25 U.S.C. § 2719(b) (2008).

²²³ 25 U.S.C. § 2719(b)(1)(A) (2008).

communities by a tribal government without extensive consultation, careful analysis of detrimental impacts, and, ultimately, state consent.²²⁴

The Tribe's ability to conduct Class II or Class III gaming on trust land in the Village presents potential serious impacts to the Village in terms of traffic, potential air pollution, land use, conflicts and safety and law enforcement issues.²²⁵ Because of the potential for gaming on this land, the Regional Director should have considered and analyzed these numerous jurisdictional concerns; the failure to do so constitutes an abuse of discretion.

The Tribe should not be permitted to end run procedures which protect local communities from the impacts of gaming by being equivocal in regard to whether it intends to game on the land, and thereby avoid analysis of potential substantial community impacts. This end run approach was rejected in *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 139 (1998). In that case, the Tribe disclaimed any intention to game on the proposed trust land, but the decision found that the gaming checklist was a relevant concern and should have been further evaluated. One of the factors influencing the decision in *Ruidoso* was that the tribe had an existing gaming facility and the relationship of that facility to the proposed trust acquisition was not explained in the BIA's decision. This is also true of the Tribe's current gaming facilities and their relationship to the trust land in the Village.

The United States General Accounting Office in 1999 wrote to Senator Ben Nighthorse Campbell, then Chairman of the Senate Committee on Indian Affairs, about how much Indian

²²⁴ *Id.*

²²⁵ There is no current governmental services agreement between the Tribe and the Village. The Village, therefore, pays 100% of the cost of Village services to tribal trust land within the Village with no tax revenue or reimbursement for its services to Indian trust land.

trust land had been created after October 17, 1988.²²⁶ The letter confirms that even if the Tribe is not required to complete the two-part determination under 25 U.S.C. § 2719(b) (2008), tribes should and do indicate whether gaming may be acquired on land proposed for trust status: "In general, according to BIA officials, tribes seek approval to game on land acquired after the act's (sic) passage **at the same time as they request the federal government to accept the land into trust on their behalf.**"²²⁷ The letter to the Senator also points out that gaming proposals are analyzed differently from non-gaming proposals:

The approval process for gaming acquisitions differs from that for nongaming acquisitions. The Office of Indian Gaming, as part of its function, manages land acquisitions initially identified for gaming and coordinates the Secretary's two-part determination for off-reservation gaming; BIA's regional offices manage and approve land acquisitions for nongaming purposes. For all land acquisitions, the regional offices are responsible for accepting and reviewing the tribes' applications. For gaming acquisitions, the cognizant BIA regional office will consider the application initially and make a recommendation to approve or disapprove the acquisition, the office then reviews the regional office's recommendation and makes its own recommendation to the Assistant Secretary for Indian Affairs, who approves or disapproves the acquisition. As part of the process of approving a land acquisition, BIA's regional offices and the Office of Indian Gaming work with the Department's Office of the Solicitor to determine whether any of the act's exceptions can be applied to allow gaming on the parcel to be taken into trust. If the land is off-reservation land, before gaming can legally occur, the Secretary must make the two-part determination specified in the act and, if the determination is positive, seek the concurrence of the state's governor.²²⁸

The most important document that supports the need for a more thorough analysis of the fee-to-trust proposal if it includes gaming is a memorandum from the Office of the Secretary, United States Department of the Interior, to all regional directors of the BIA, called the

²²⁶ This date is the date of enactment of IGRA; Letter from the U.S. General Accounting Office (dated October 1, 1999).

²²⁷ *Id.* at 2.

²²⁸ *Id.* at 3.

"September 2007 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and Two-Part Determinations Under Section 20(b)(1)(A) of the Indian Gaming Regulatory Act" (Checklist).²²⁹ As stated in the memorandum, the Checklist applies to **any** land acquisitions when gaming may be involved. The use of the Checklist is not limited to off-reservation gaming proposals under the IGRA, but also applies to: ". . .the review of recommendations from Regional Offices regarding requests for the acquisition of land into trust for gaming and gaming-related purposes." The use need not be a new gaming facility, but can be for any facility that supports the gaming operating.²³⁰

If the Checklist applies to the Tribe's request, the Tribe must submit a complete file of information and documents that indicate compliance with 25 C.F.R. Part 151, IGRA, the National Environmental Policy Act (NEPA) and other applicable federal laws. The list of NEPA issues alone contains over thirty items.²³¹ Moreover, apart from completing the checklist and submitting a complete file of information, the Regional Director should consider the numerous jurisdictional conflicts that would arise from a gaming operation on the land. Neither NOD discusses the potential for gaming, nor did the Regional Director consider the resulting jurisdictional conflicts; this constitutes an abuse of discretion.

5. The Regional Director failed to comply with 25 C.F.R. § 151.10(h).

a. The Regional Director failed to comply with Part 516 of the Interior Department Manual.

²²⁹ Department of the Interior Memorandum, September 2007 Checklist for Gaming Acquisitions, Gaming-related Acquisitions, and Two-Part Determinations under section 20(b)(1)(A) of the Indian Gaming Regulatory Act (dated September 21, 2007). Appendix Exhibit 54

²³⁰ *Id.*

²³¹ *See id.*, Part 2.III.

Federal statutes and regulations governing fee-to-trust acquisitions require an analysis under the National Environmental Policy Act (NEPA) of 1969, as amended.²³² Congress passed the NEPA to promote the preservation of environmental resources, and encouraged the Federal Government to work "in cooperation" with state and local governments.²³³ In passing the NEPA, Congress mandated that all federal agencies follow certain procedures when dealing with environmental concerns.²³⁴ For instance, when determining whether to grant a request for acquisition of land into trust status, Congress mandated that the Regional Director examine the "extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4,²³⁵ National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations."²³⁶ In addition to complying with these congressional mandates, the Department of the Interior established its own policy "[t]o consult, coordinate, and cooperate" with state and local governments, and to "give consideration to those activities that succeed in best addressing State and local concerns."²³⁷

The Council on Environmental Quality, created under the NEPA, has established binding regulations for the purpose of implementing the NEPA.²³⁸ Under 40 C.F.R. § 1501.03, federal agencies are required to perform an "environmental assessment" in accordance with regulations of the particular agency. An environmental assessment may in turn require the preparation of an "environmental impact statement."²³⁹ The purpose of an environmental impact statement (EIS),

²³² 42 U.S.C. § 4321, *et seq.*; 25 C.F.R. § 151.10(h).

²³³ 42 U.S.C. § 4331(a).

²³⁴ *See* 42 U.S.C. § 4332.

²³⁵ 516 DM 6 states that bureau requirements for the Bureau of Indian Affairs are located in Chapter 10, which was formerly Appendix 4.

²³⁶ 25 C.F.R. § 151.10(h).

²³⁷ 516 DM 1.2(E).

²³⁸ 40 C.F.R. § 1500.3.

²³⁹ 40 C.F.R. § 1501.4.

in part, is to “provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”²⁴⁰ In addition, while the EIS “need not be exhaustive,” the Department must nevertheless compile the required information in good faith to ensure a “reasoned decision after balancing the risks.”²⁴¹ To that end, the EIS “must consider all significant environmental consequences that can reasonably be expected to flow from the decision,” and “[a]n EIS cannot safely ignore clear environmental consequences of the decision...on the ground that another statement will be forthcoming later.”²⁴² These statements may be required “for broad Federal actions such as the adoption of new agency programs or regulations,” including “actions with effects that may be major and...potentially subject to Federal control and responsibility.”²⁴³

An agency is generally not required to prepare an assessment or an impact statement if the action falls under a “categorical exclusion.”²⁴⁴ However, there are numerous exceptions to the categorical exclusions, and the Secretary must implement a “checklist” to evaluate each exception.²⁴⁵ In addition, for actions that normally fall under a categorical exclusion, one must nevertheless ensure that the action has been “subjected to sufficient environmental review,” and, if an exception applies, “further analysis and environmental documents must be prepared.”²⁴⁶

²⁴⁰ 40 C.F.R. § 1502.1.

²⁴¹ *Suffolk County v. Secretary of Interior*, 562 F.2d 1368, 1375 (5th Cir. 1977) (citations omitted).

²⁴² *Id.* at 1377.

²⁴³ 40 C.F.R. § 1502.4; 40 C.F.R. § 1508.18.

²⁴⁴ 40 C.F.R. § 1508.4.

²⁴⁵ 516 DM 10.5; 516 DM 2, Appendix 2.

²⁴⁶ 40 C.F.R. § 1508.4; 516 DM 2.3(A)(3).

NEPA requires “that an agency affirmatively develop a reviewable administrative record supportive of a decision not to file an impact statement.”²⁴⁷

While a short statement of no significant impact may comply with NEPA, it must nevertheless be “grounded on supporting evidence.”²⁴⁸ To that end, NEPA “commands ‘full good faith consideration of the environment,’ not formalistic paper shuffling between agency desks.”²⁴⁹ Further, an agency decision must “‘articulate a satisfactory explanation’ for its action,” rather than stating a mere conclusion.²⁵⁰ According to the “Exception Checklist for BIA Categorical Exclusions,” if any exception on the list applies, the agency must prepare an environmental assessment. Thus, an agency cannot rely on a categorical exclusion if an exception applies, and, even if the agency finds that no exceptions apply, it must still engage in sufficient meaningful review and provide an explanation to support its conclusion.

The Regional Director of the BIA failed to comply with the requirements established under the NEPA, including those outlined in 25 C.F.R. § 151.10(h). Section 151.10(h) requires that the Regional Director consider “[t]he extent to which the applicant has provided information that allows the Secretary to comply” with the provisions of the NEPA. Here, it is unclear what information, if any, the Tribe submitted to the Regional Director in order to permit a meaningful review of potential environmental concerns, nor is it clear what the Regional Director considered, if anything, in relying on a categorical exclusion. Moreover, it was an abuse of

²⁴⁷ *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975) (citing *First National Bank of Chicago v. Richardson*, 484 F.2d 1369, 1381 (7th Cir. 1973); *Scherr v. Volpe*, 466 F.2d 1027, 1032 (7th Cir. 1972)).

²⁴⁸ *Id.* (citing *Hanly v. Mitchell*, 460 F.2d 640, 646 (2nd Cir. 1972), cert. denied, 409 U.S. 990).

²⁴⁹ *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 492 F.2d 1123, 1129 (5th Cir. 1974) (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Commission*, 449 F.2d 1109, 1113 n. 5 (D.C. Cir. 1971)).

²⁵⁰ *Butte County, Cal. v. Hogen*, ___ F.3d ___, *3 (D.C. Cir. 2010) (citing *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)).

discretion for the Regional Director to rely on a categorical exclusion and not require an environmental assessment or environmental impact statement in light of significant environmental concerns. What is more, the reliability of the determination of whether a categorical exclusion applies is cast into question by the fact that the person making the determination on NEPA compliance receives compensation from the Tribe.

- i. **The Regional Director failed to comply with § 151.10(h) by erroneously relying on a categorical exclusion for the Boyea property and by not performing any further environmental assessments.**

In a memorandum dated July 23, 2009, with regard to the former Boyea property, Scott Hebner, Environmental Protection Specialist, and Richard Berg, Regional Archaeologist, concluded that a categorical exclusion applied; they also stated that “the Regional Director has approved the CatEx and no further compliance with NEPA is required.”²⁵¹ A memorandum dated December 9, 2009 on the property concluded the same, and was signed solely by Scott Hebner.²⁵² However, despite those statements, the Regional Director concluded on March 11, 2010 that the proposed action “[did] not qualify” under a categorical exclusion. Based on that conclusion, the Regional Director stated that an “Environmental Assessment (EA) was completed.”²⁵³ However, only a Phase I Environmental Site Assessment (ESA) appears in the record, and the Regional Director later withdrew his first opinion relative to the non-application of a categorical exclusion.

Without explaining his change in position, in his NOD dated March 17, 2010, the Regional Director found that the acquisition of the Boyea land into trust did qualify under a

²⁵¹ U.S. Department of the Interior, Bureau of Indian Affairs Memorandum (dated July 23, 2009). Appendix Exhibit 55

²⁵² U.S. Department of the Interior, Bureau of Indian Affairs Memorandum (dated December 9, 2009). Appendix Exhibit 56

²⁵³ Notice of Decision dated March 11, 2009.

categorical exclusion. However, the Boyea NOD does not state whether the Regional Director considered the exceptions to the categorical exclusions, nor does it state what information he reviewed in arriving at the decision that the categorical exclusion applied. Addressing the latter point first, even if the Regional Director determines that a proposed action may fall within one of the categorical exclusions, he must nonetheless engage in sufficient analysis to determine whether an exception applies.²⁵⁴ If an exception applies, the Regional Director is required to engage in a deeper analysis, which includes the preparation of “environmental documents.” In his NOD, the Regional Director did not include any statement on the extent to which he investigated whether an exception would apply to acquisition of land into trust, nor did he cite anything in the administrative record to support his decision. Thus, the Regional Director failed to comply with § 151.10(h).

There are several exceptions which would trump reliance on a categorical exclusion that the Regional Director failed to consider. First, “[e]xtraordinary circumstances exist” when an action would “[h]ave highly controversial effects or involve unresolved conflicts concerning alternative uses of available resources.”²⁵⁵ A significant unresolved matter exists in that the Tribe has initiated suit against the Village to test the validity of the Village’s stormwater fees on trust land.²⁵⁶ As a corollary of the first exception, the decision to acquire more land in trust would likely “[v]iolate a...local...law or requirement imposed for the protection of the environment.”²⁵⁷ For example, the Village has created a stormwater management program pursuant to federal law and regulations, and has also enacted zoning and building codes pursuant

²⁵⁴ 40 C.F.R. § 1508.4; 516 DM 2.3.

²⁵⁵ 516 DM 2, Appendix 2, 2.3.

²⁵⁶ *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 10-CV-00137 (E.D. Wis.).

²⁵⁷ 516 DM 2, Appendix 2, 2.9.

to state law. Because the trust status of land may impact whether the Village may continue to enforce its regulations, a decision in favor of trust status would undermine local environmental laws and protections. And, to that end, the decision may “[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.”²⁵⁸ Each of these exceptions, taken alone, would outweigh application of a categorical exclusion. And, in the least, the Regional Director must sufficiently analyze each relevant exception, rather than arbitrarily stating that a categorical exclusion eliminates the need for an environmental assessment.

Even if the Regional Director engaged in an analysis of possible exceptions, he erroneously concluded that the acquisition of land into trust would fall under the categorical exclusion on “Land Conveyances and Other Transfers.” This exclusion applies only “where no change in land use is planned.”²⁵⁹ The Boyea property is currently used for agricultural purposes, and is zoned by the Village as agricultural. However, according to the Regional Director’s NOD, “[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.” Moreover, although the Regional Director states that the Boyea property will remain agricultural, under his analysis of the Tribe’s purpose for the property, the Regional Director cites the “critical housing deficit.” By the Regional Director’s own admission, the Tribe has espoused clear plans to develop and change the use of these lands.

²⁵⁸ *Id.* at 2.5.

²⁵⁹ 516 DM 10.5(I).

Based on these circumstances, the Regional Director abused his discretion and improperly concluded that the categorical exclusion applied.²⁶⁰

- ii. **The Regional Director failed to comply with § 151.10(h) by erroneously relying on a categorical exclusion for the Cornish property and by not performing any further environmental assessments.**

The NOD for the Cornish property indicates that it has been historically used for residential purposes; this notation by the Regional Director appears under the section of the decision on compliance with § 151.10(b) on the need for additional land. However, the Regional Director then states under § 151.10(c), the Tribe's purpose for the land, that "[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." This language appears to rely on 25 C.F.R. 151.3(a), in that the secretary may place land in trust "when...necessary to facilitate Tribal self-determination, economic development, or Tribal housing." Later in this same section of the NOD, the Regional Director states that the Cornish property will be used for housing, and the Tribe "does not anticipate any change in land use." To the extent that the Tribe "needs" this land for the purpose of facilitating economic development, or to otherwise develop the land, this undermines the Regional Director's reliance on a categorical exclusion for no change in land use. Further, to argue that the Tribe needs the land to facilitate development, but then state that the Tribe does not anticipate a change in the current land's residential use is completely inconsistent. Any changes or developments to this land would indicate that further environmental assessments are necessary.

²⁶⁰ See 516 DM 10.5(I).

Even if the Regional Director could reasonably rely on the categorical exclusion for no change in land use relative to the Cornish property, like the Boyea property, there are numerous exceptions to the categorical exclusion that the Regional Director failed to consider. There are unresolved controversial matters currently pending between the Tribe and the Village, namely the stormwater litigation, such that extraordinary circumstances exist for performing further environmental assessments.²⁶¹ Moreover, a decision in favor of trust status may “[v]iolate a...local...law or requirement imposed for the protection of the environment,” including the Village’s stormwater program enacted as part of the CWA, as well as local zoning and building regulations.²⁶² Because the trust status of the land may impact whether the Village may continue to enforce its environmental regulations, a decision in favor of trust status would undermine local environmental laws and protections. As a corollary, a decision of this sort would have longstanding implications, including serious implications for the environment and general welfare of the public.²⁶³ Each of these exceptions outweigh application of the categorical exclusion, yet the Regional Director failed to consider them. In the least, the Regional Director must sufficiently analyze each relevant exception, rather than arbitrarily stating that a categorical exclusion eliminates the need for an environmental assessment.

iii. The Regional Director abused his discretion in failing to follow the agency’s own regulations.

In addition to erroneously relying on a categorical exclusion, the Regional Director failed to follow the Department of the Interior’s regulations. Pursuant to 516 DM 1.2(E), the Department of the Interior established its own policy “[t]o *consult, coordinate, and cooperate*

²⁶¹ See 516 DM 2, Appendix 2, 2.3.

²⁶² See *id.* at 2.9.

²⁶³ See *id.* at 2.5.

with other Federal agencies and, *particularly, State, local*, Alaska Native Corporations, and Indian tribal governments in the development and implementation of the Department's plans and programs affecting environmental quality and, in turn, *to give consideration to those activities that succeed in best addressing State and local concerns.*" Where an agency fails to follow its own regulations, its actions are reviewable under the APA.²⁶⁴ Here, the Department of the Interior did not consult or coordinate with the Village on any environmental-related concerns, nor did the Department interview local government officials as part of the Phase I ESA, as discussed below. Moreover, by failing to conduct an environmental assessment or prepare an environmental impact statement, the Regional Director violated the agency policy to "give important weight to environmental factors...in order to achieve a proper balance between the development and utilization of natural, cultural, and human resources and the protection and enhancement of environmental quality."²⁶⁵ Because the Regional Director failed to comply with the Department of the Interior's own regulations, the NODs cannot be upheld.

b. The Regional Director failed to comply with Part 602 of the Interior Department Manual.

Although the BIA declined to perform an environmental assessment claiming a categorical exclusion, it did perform a Phase I Environmental Site Assessment (ESA), pursuant to 602 DM 2. Under 602 DM 2, the Department of Interior must perform a pre-acquisition environmental site assessment with the goal of assessing the "risk of exposing the Department to liability for hazardous substances or other environmental cleanup costs and damages associated with the acquisition of any real property by the Department for the United States." Various

²⁶⁴ *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990) (citing *Service v. Dulles*, 354 U.S. 363 (1957)).

²⁶⁵ See 516 DM 1.2(D).

provisions impact the Department of the Interior's authority to carry out environmental site assessments, including federal laws, the American Society for Testing Materials (ASTM) Standards, and "any other applicable Federal, State, and local requirements."²⁶⁶ At a minimum, in conducting an environmental site assessment, one must comply with ASTM Standards.²⁶⁷

The Phase I ESA revealed significant environmental concerns and raised numerous other concerns as to its reliability, such that the Regional Director could not reasonably rely on this report in satisfying 25 C.F.R. § 151.10(h). For instance, with regard to the Boyea property, a "Level I Land Contaminant Survey Report" indicates that although the Boyea property does not contain any "Leaking Underground Storage Tanks (LUST)," there are at least seven within close proximity.²⁶⁸ In addition, in the BIA's "1st Update" to its Phase I ESA relative to the Boyea property, it found "ten sites...within ½ mile of the subject property" by searching the Wisconsin DNR records.²⁶⁹ While the report noted that all but one of the sites are located in different sub-watersheds, the report states that two of the sites are open, "but have not been reported to have impacted areas away from these properties."²⁷⁰ The report continues, "[i]f they had they could impact Duck Creek which runs along the eastern boundary of the subject property."²⁷¹ Based on these statements, it is clear that further environmental review is necessary.

Additional environmental concerns also appear in the administrative record. For instance, a "Contaminant Survey Checklist" of the former Boyea property notes that a storage

²⁶⁶ 602 DM 2.

²⁶⁷ *Id.*

²⁶⁸ Oneida Tribe of Indians of Wisconsin, Environmental, Health & Safety Area, Level I Land Contaminant Survey Report (dated March 15, 2005). Appendix Exhibit 57

²⁶⁹ Phase I Environmental Site Assessment 1st Update. Appendix Exhibit 58

²⁷⁰ *Id.*

²⁷¹ *Id.*

tank containing "petroleum products, pesticides, etc." exists on the former Boyea property.²⁷² Despite this finding, however, the survey indicates that neither a Level II nor Level III study is recommended, and no further description was provided in the survey, as required under the instructions.²⁷³ Additionally, the Phase I ESA report for the former Boyea property noted that "eleven of the sites (locations) containing 26 findings are located within ½ mile of the subject property," and "[a]lthough there are 11 listed locations (26 findings) within ½ mile of the property, a number much higher than normally encountered on this part of the reservation, only two of these sites (2 findings) could potentially pose an issue for the subject property." (Emphasis added).²⁷⁴ The report states that the two problematic sites are "UST's" and are "upslope of the subject property."²⁷⁵ The report then summarily concludes that these sites are not a recognized environmental condition that would potentially present a liability issue if the land were taken into trust because "[a]s of this time no issues have been reported with the tanks."²⁷⁶ Adding to these numerous environmental concerns, the Phase I environmental site assessment was prepared by Scott Hebner, an employee of the BIA who receives compensation from the Tribe pursuant to a side agreement between the Tribe and the BIA.

The environmental site assessment of the former Cornish property similarly raised significant environmental concerns. For instance, a Level I Land Contaminant Survey Report documented numerous LUST sites, environmental repair program sites, reported spills, and registered tanks within two miles of the property; however, the report then stated that none of

²⁷² Level I Survey: Contaminant Survey Checklist of Proposed Real Estate Acquisitions (dated November 24, 2004). Appendix Exhibit 59

²⁷³ *Id.*

²⁷⁴ Phase I Environmental Site Assessment Report of the Boyea Property, at p. 12-14. Appendix Exhibit 60

²⁷⁵ *Id.* at 13.

²⁷⁶ *Id.*

these nearby sites have been “identified to have impacted the site.”²⁷⁷ The report also concluded that the local topography and local drainage patterns eliminate any potential hazards,²⁷⁸ however, it is unreasonable to rely on land characteristics that are subject to change, especially if the Tribe develops the land for residential purposes, as expressed in its application, or creates its own stormwater program. Moreover, in the Phase I Environmental Site Assessment Report, the preparer noted an emergency repair program site within ½ mile of the property; however, the concern was again summarily dismissed by relying on local drainage patterns.²⁷⁹ Further, the report did not include a section on interviews with local government officials, nor was the Village of Hobart consulted.

Based on the numerous environmental concerns that arose in the Phase I Environmental Site Assessments for both the Boyea and Cornish properties, the lack of further investigation, and the potential bias of the report preparer, the Regional Director failed to adequately assess the environmental risks under 602 DM 2. As a result, the Regional Director did not satisfy the requirements of § 151.10(h). Moreover, based on these significant environmental concerns, several of the exceptions to the categorical exclusion would apply, including possible violations of federal and local laws, adverse effects on rivers, and the “action will...involve unique or unknown environmental risks.”²⁸⁰ Thus, the Regional Director abused his discretion in relying on the site assessments, and also by failing to require further environmental investigation based on a purported categorical exclusion.

²⁷⁷ Oneida Tribe of Indians of Wisconsin, Environmental, Health & Safety Area, Level I Land Contaminant Survey Report (dated March 8, 2005). Appendix Exhibit 61

²⁷⁸ *Id.*

²⁷⁹ Phase I Environmental Site Assessment Report of the Cornish property, at p. 6. Appendix Exhibit 62

²⁸⁰ *See* 516 DM 10.4 (Exception Checklist).

In addition, the Phase I ESA reports contain significant limitations such that they cannot be relied on in place of a more extensive environmental assessment. For instance, the environmental site assessment reports indicate under "limitations and exceptions of assessment" that "[i]ndependent verification of the validity of this information was beyond the proposed scope." Both reports also indicate that they were completed by the BIA and the Tribe, and were "performed for the explicit use of the Secretary and the user." Furthermore, under the section entitled "Interview with Site Manager," the Boyea report states, "[w]e only spoke with the representatives of the owner, the Oneida Tribe of Indians of Wisconsin." And, under the section entitled "Interviews with Local Government Officials," the Boyea report reveals that the preparer only spoke with Jeff Metoxin, the site manager. Consequently, the Phase I ESA reports were not prepared in a neutral and impartial manner, such that the reports constitute mere "formalistic paper shuffling."²⁸¹

The Phase I ESA did not comply with all of the components required under the ASTM E 1527-05 standards for Phase I environmental site assessments. The ASTM standards indicate that a Phase I ESA "shall have four components."²⁸² Under section 7.2.3, the ESA must include interviews, including interviews with local government officials.²⁸³ Pursuant to section 11.5, the ASTM standards indicate that "[a] reasonable attempt shall be made to interview at least one staff member of any one of the following types of state and/or local government agencies," including the local fire department, the state or local health agency, the agency having jurisdiction over hazardous waste, and the local agency "responsible for the issuance of building

²⁸¹ See *Environmental Defense Fund, Inc.*, 492 F.2d at 1129.

²⁸² ASTM E 1527-05 § 7.2.

²⁸³ ASTM E 1527-05 § 7.2.3.1.

permits or groundwater use permits.”²⁸⁴ Despite these requirements, neither of the Phase I ESA’s indicate that the report preparer made any attempt to speak with the Village or its departments about potential environment concerns on the property. Because the ASTM standards require interviews of local government officials, and 602 DM 2 of the Department of the Interior Manual requires that all pre-acquisition site assessments comply with ASTM standards, the Regional Director abused his discretion in relying on the Phase I ESA’s to satisfy § 151.10(h). Further, the Regional Director failed to comply with Interior Department’s own regulations.

Courts have cautioned that “[e]nvironmental impact statements are not confidential or internal documents for agency eyes alone,” and the requirements of NEPA were “intended not only to insure that the appropriate responsible official considered the environmental effects of the project, but also provide Congress...with a sound basis for evaluating the environmental aspects of the particular project or program.”²⁸⁵ Moreover, NEPA requires the agency “to take a ‘hard look’ at environmental consequences,” which includes a requirement to “objectively evaluate[]” environmental projects.²⁸⁶ Because the Tribe participated in the Phase I ESA preparation and the report specifically indicates that it lacks independent verification, the Regional Director failed to fulfill the requirements of 25 C.F.R. § 151.10(h), relevant case law, as well as the Department of the Interior policies requiring consultation with local government officials.

²⁸⁴ ASTM E 1527-05 § 11.5.1.1-1.4.

²⁸⁵ *Id.* at 1140 (citing *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973)).

²⁸⁶ *City of Lincoln City*, 229 F.Supp.2d at 1126 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348, 109 S.Ct. 1835 (1989)).

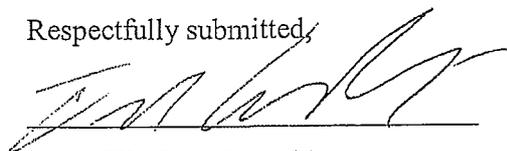
Given all of these concerns, the Regional Director should have required an environmental assessment and an environmental impact statement in compliance with the requirements of NEPA. The Phase I environmental site assessments prepared by the Tribe in conjunction with the BIA are unreliable and do not address significant environmental hazards and concerns. In addition, the Regional Director failed to comply with the Department's own policies, as well as the ASTM Standards on environmental site assessments. Thus, the failure to comply with § 151.10(h) constitutes an abuse of discretion, and the Regional Director's decision was arbitrary and capricious.

IV. CONCLUSION

The historical record could not be more clear. The Oneida Tribe was not under federal jurisdiction in 1934, as required to have land placed into trust under the IRA, as interpreted by *Carciari*. This fact has been confirmed by no less than Commissioner Collier, instrumental in the creation of the IRA, and the 1934 Secretary of the Interior, Harold Ickes. Additionally, even if the Tribe was eligible to utilize the IRA, it is unconstitutional as applied in this case. Placing the land into trust is impermissible in that it removes state and local jurisdiction. Finally, the Regional Director failed to consider the criteria outlined in 25 C.F.R. 151.10, resulting in an arbitrary and capricious decision. For each of these reasons, the Regional Director's decision to accept the land into trust must be vacated.

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Respectfully submitted,



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