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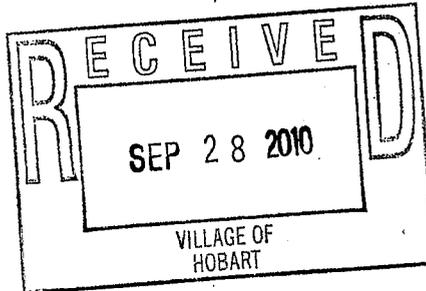
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September 27, 2010

Hon. Steven Linscheid  
Chief Administrative Judge  
Office of Hearings and Appeals  
Interior Board of Indian Appeals  
801 North Quincy Street, MS300QC  
Arlington, Virginia 22203  
ATTN: Administrative Judge Luther



COPY

Re: Village of Hobart v. Midwest Regional Director, Bureau of Indian Affairs  
Docket Nos. IBIA 10-091, IBIA 10-092, IBIA 10-107 (consolidated appeals)

Dear Judge Linscheid:

Enclosed please find the Answer Brief of the Oneida Tribe of Indians of Wisconsin and Certificate of Service in the above-referenced appeals.

Sincerely,

James R. Bittorf

Enclosures

cc: Distribution List

UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS

VILLAGE OF HOBART, WISCONSIN, )  
Appellant, )  
v. )  
MIDWEST REGIONAL DIRECTOR, )  
BUREAU OF INDIAN AFFAIRS, )  
Appellee. )

Docket Nos. IBIA 10-091  
IBIA 10-092  
IBIA 10-107

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ANSWER BRIEF OF ONEIDA TRIBE OF INDIANS OF WISCONSIN

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Respectfully submitted this 27th day of September, 2010.

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## INTRODUCTION

In these consolidated appeals, the Village of Hobart ("Village") challenges three decisions of the Regional Director of the Midwest Area Office ("MRO") of the Bureau of Indian Affairs ("BIA") to take land into trust for the Oneida Tribe of Indians of Wisconsin ("Oneida Tribe" or "Tribe"). The Village argues that the Secretary of the Interior may not take land into trust for the Tribe under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et seq.*, because the Tribe was not "under federal jurisdiction" in 1934, as required by the United States Supreme Court's decision in *Carciari v. Salazar*, 129 S.Ct. 1058 (2009). The crux of the Village's argument is that the Tribe's Reservation was "completely allotted in fee" prior to 1934 and thereby disestablished, with the result that the Tribe was removed from federal jurisdiction. In making this argument, the Village misrepresents the history of the Tribe's Reservation. Some land on the Reservation was never allotted, and some land which was allotted has remained in trust, and has never been patented in fee. The Village also ignores well-established case law regarding reservation disestablishment, and instead relies on two outdated federal district court decisions which are at odds with controlling decisions of the United States Supreme Court regarding the effect of allotment on Indian reservations. In applying the IRA to the Tribe immediately following its enactment, the Secretary of the Interior determined that the Tribe's Reservation continued to exist. This determination has gone unchallenged by the Village for nearly 75 years, and is not subject to the Village's second-guessing at this late date.

The Village's other arguments also lack merit. The Village claims that the Regional Director abused her discretion by failing to consider the relevant regulatory criteria, but the Village's analysis of those regulatory criteria is based solely upon speculation about future uses

of the property, despite the fact that the Tribe intends to maintain the current uses of the property. In order to bolster this speculation, the Village inappropriately seeks to shift the burden of proof to the BIA and the Tribe, and the Village levels unfounded and irresponsible allegations of bias against the staff of the MRO. Finally, the Village presents constitutional challenges to the IRA which are beyond the purview of the Board and are frivolous.

The Village goes to these great lengths because the Village adamantly opposes the policies underlying the enactment of the IRA – restoring land for Indian tribes and fostering tribal self-determination and self-governance. Under the Village's world view, the Tribe and tribal members should fall entirely under state and municipal control. The Village's arguments are not based on existing law, but instead reflect the way the Village would like the law to be. This Board should reject the Village's claims and affirm the Regional Director's decisions.

### **BACKGROUND OF THE APPEALS**

By Resolutions dated April 12, 2006, the Oneida Tribe submitted applications to the MRO for trust acquisition of the former Boyea Property (the "Boyea Property"), consisting of 80.11 acres, more or less, the former Cornish Property ("Cornish Property"), consisting of .852 acres, more or less, and the former Gerbers Property ("Gerbers Property"), consisting of 103.85 acres, more or less.<sup>1</sup> (Boyea Administrative Record ("A.R.") Vol. 1, Tab 46; Cornish A.R. Vol.

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<sup>1</sup>With respect to the Gerbers Property, the Village complains that it is "entirely unclear" what land is to be taken into trust, because of minor inconsistencies in the amount of acreage reflected in the administrative record. (Village's Brief, 10-107, p. 1). The Village notes, for instance, that the Brown County land records indicate that the parcel consists of 100.29 acres. Minor discrepancies in land measurements are not unusual, and acreage totals therefore routinely are qualified by the phrase "more or less." The very Brown County land records upon which the Village relies state, "Note: Legal Acres, as listed in the Property's Legal Description, may differ slightly from the Total Acres, or the sum of the acreage for all land classifications." (Gerbers A.R. Vol. 1, Tab 3).

2, Tab 32; Gerbers A.R. Vol. 1, Tab 53). The Tribe owns fee title to the properties, and they are located within the Tribe's Reservation. The Tribe currently uses the Boyea Property and the Gerbers Property for agricultural purposes and single-family residences, and the Cornish Property for a single-family residence, and the Tribe intends to continue these uses. (Boyea A.R. Vol. 1, Tab 46; Cornish A.R. Vol. 2, Tab 32; Gerbers A.R. Vol. 1, Tab 53).

The Tribe provided notice to the Village of its applications. (Boyea A.R. Vol. 1, Tab 46; Cornish A.R. Vol. 2, Tab 32; Gerbers A.R. Vol. 1, Tab 53). In response, the Village submitted two letters to the MRO objecting to any trust acquisition of property located within the Village. In its first letter, the Village argued that no land should be taken into trust because:

- 1) the Village will lose tax revenues, and the Tribe does not have an agreement with the Village to pay for services provided by the Village;
- 2) the Tribe may refuse to pay storm water assessments imposed by the Village;
- 3) the Tribe does not have a need to have the land taken into trust because the Tribe has successful gaming operations;
- 4) jurisdictional problems will result because the Village will not be able to enforce comprehensive zoning and land use regulations;
- 5) the BIA should follow the gaming checklist for all trust acquisitions;
- 6) the BIA should require environmental impact statements.

(Consolidated A.R. Vol. 3, Tab 17; Gerbers A.R. Vol. 2, Tab 17).

In its second letter, the Village argued that the Tribe was not "under Federal jurisdiction" in 1934, and that the IRA, as interpreted by the United States Supreme Court in *Carcieri*, therefore does not authorize the Secretary to acquire land in trust for the benefit of the Tribe. The Village's theory at that time was that the Tribe's Reservation was "nearly completely

allotted" under the General Allotment Act ("GAA"), 25 U.S.C. § 331, *et seq.*, and thereby disestablished, and that as a consequence the federal government lost all jurisdiction over the Tribe and tribal members. (Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 6; *Gerbers* A.R. Vol. 2, *Carcieri v. Salazar* Log, Tab 6).

The Tribe submitted responses to both of the Village's letters. (Consolidated A.R. Vol. 3, Tab 9; Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 4; *Gerbers* A.R. Vol. 2, Tab 9; *Gerbers* A.R. Vol. 2, *Carcieri v. Salazar* Log, Tab 4). Also, in response to a request from the MRO, the Tribe submitted detailed information demonstrating that the *Carcieri* decision is irrelevant to the Tribe's trust applications. (Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 3; *Gerbers* A.R. Vol. 2, *Carcieri v. Salazar* Log, Tab 3). In particular, the Tribe's submissions demonstrated:

- the Tribe has had continuous treaty relations with the United States since 1784;
- the United States has continuously held land in trust for the Tribe pursuant to the 1838 Treaty with the Oneida;
- the United States has continuously held land in trust for tribal members pursuant to trust patents issued under the GAA, which were extended by Executive Orders, and ultimately were extended indefinitely by the IRA; and
- contemporaneous with the enactment of the IRA, the Secretary of the Interior determined that the Tribe was eligible to organize under the IRA, and that the Tribe's Reservation continued to exist despite allotment under the GAA.

The MRO compiled voluminous records with respect to each application. On the basis of these records, the Regional Director concluded that consideration of the relevant criteria under 25 C.F.R. Part 151 supported the trust acquisitions, and accordingly issued Notices of Decision to take the properties into trust. Specifically, with respect to all three acquisitions, the Regional

Director determined:

- 1) the Tribe has been continuously under federal jurisdiction since at least 1784, and the IRA therefore provides authority for the Secretary to acquire land in trust for the Tribe;
- 2) the Tribe needs the land for agricultural and residential purposes, and trust acquisition will protect the Tribe's investment in the land for future generations by rendering the land inalienable;
- 3) the land will be used for agricultural and residential purposes, which will fulfill the identified need, and is consistent with the overall goals of the Tribe to provide adequate land for future generations to support economic development, adequate housing, and agricultural purposes;
- 4) local municipalities will lose tax revenue, but these losses will be minimal and will be offset by the value of services and infrastructure provided by the Tribe, the Tribe's direct payments to the Brown County under an inter-governmental service agreement, and federal funds available to the local communities and educational agencies;
- 5) the jurisdictional pattern on the Reservation is well-established, the Tribe provides law enforcement services on the Reservation, tribal law enforcement officers are cross-deputized by and have a good working relationship with the Brown County Sheriff, and acceptance of the land in trust likely will not result in new jurisdictional problems;
- 6) the Tribe has assumed responsibilities for programs, services, functions and activities which normally are accomplished by the BIA, and as a result trust acquisition will only require the BIA to provide minimal oversight and technical assistance, and the BIA is equipped to discharge these responsibilities; and
- 7) the acquisitions qualify for a categorical exclusion under the National Environmental Policy Act ("NEPA") because the acquisitions will not result in any changes in the use of the properties, and no environmental or contamination concerns or liabilities were associated with the properties.

(Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol. 1, Tab 2).

The Village appeals, and now claims:

- 1) the Tribe's Reservation was disestablished because it was "completely allotted in fee" under the GAA, the Tribe was therefore no longer "under federal

jurisdiction" in 1934, and the *Carciari* decision now precludes the Secretary from acquiring land in trust for the Tribe pursuant to the IRA;

- 2) the Acting Regional Director did not adequately consider the other relevant criteria for trust acquisitions under 25 C.F.R. 151.10;
- 3) the MRO has exhibited bias against the Village; and
- 4) the trust acquisition provisions of the IRA are unconstitutional.

None of these claims has any merit. In addition, while the Village submitted similar arguments to the MRO regarding the *Carciari* decision and the regulatory criteria set forth in 25 C.F.R. 151.10, the Village did not raise any constitutional claims, and did not accuse the MRO of bias or request that the MRO recuse itself from consideration of the Tribe's trust applications. The Regional Director therefore did not have occasion to address these claims in her decisions.

At every turn in its opening brief, the Village relies upon obviously inapplicable authority or incorrect facts, historical and otherwise, in support of its challenges. For example, the central component of the Village's disestablishment argument is its insistence that "the reservation was fully allotted in fee." (Village's Briefs, 10-091, 10-092, p. 7; 10-107, p. 7). This is wrong and the Village knows it is wrong. The administrative record in this very appeal shows that the trust period for some allotments on the Reservation was extended by Executive Orders so that 35 allotments remained in trust in 1934. This is a fatal error, one that goes to the very core of the Village's theory that allotment disestablished the Reservation. Yet, the Village persists in making this and other assertions it knows to be erroneous. The IBIA should reject not only the Village's appeals but also the Village's willful misstatement of the Tribe's history and status.

## ARGUMENT

### **I. The Regional Director Correctly Determined that Statutory Authority Exists for the Acquisitions, and Considered the Appropriate Regulatory Factors with Respect to Each Acquisition. This Board Should Therefore Affirm the Regional Director's Decisions.**

#### **A. Standard of Review, Appellant's Burden of Proof, and Controlling Law.**

The standard of review and the appellant's burden of proof in trust acquisition cases are well established:

Decisions by BIA officials to take land into trust are discretionary, and the Board does not substitute its judgment in place of the BIA's judgment in such decisions. Instead, the Board reviews discretionary decisions to determine whether the BIA considered the legal prerequisites to the exercise of discretionary authority, including any established limitations on its discretion. Thus, the decision must reflect that the Regional Director considered the appropriate factors set forth in 25 C.F.R. Part 151, but there is no requirement that the BIA reach a particular conclusion with respect to each factor. The factors are not weighed or balanced in any particular way, nor must each factor be exhaustively analyzed.

Appellants bear the burden of establishing that BIA did not properly exercise its discretion. Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review legal issues raised in a trust acquisition case other than issues raising the constitutionality of laws or regulations.

*Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008) (citations omitted).

The Board has "a well established practice of declining to consider arguments...presented for the first time on appeal." *Rio Arriba v. Acting Southwest Regional Director*, 38 IBIA 18, 20 (2002).

25 U.S.C. § 465 grants the Secretary of the Interior discretionary authority to acquire land in trust for Indian tribes. The regulations governing the BIA's land acquisition policy allow for land to be taken into trust "(1) [w]hen the property is located within the exterior boundaries of

the Tribe's reservation or adjacent thereto,... (2) [w]hen the tribe already owns an interest in the land; or (3) [w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R.

151.3(a). In the present case, the proposed acquisitions meet all three criteria. The properties are located within the boundaries of the Tribe's Reservation, the Tribe already owns fee title to the properties, and the Regional Director, on behalf of the Secretary, has determined that trust acquisition will promote tribal self-determination, economic development, and Indian housing.<sup>2</sup>

In evaluating a tribe's trust applications for land located within the tribe's reservation, the BIA must consider the factors set forth in 25 C.F.R. 151.10(a) - (c) and (e) - (f). These factors are:

- (a) The existence of statutory authority for the acquisition and any statutory limitations contained in such authority;
- (b) The need of . . . the tribe for additional land;
- (c) The purposes for which the land will be used;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise;
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status;

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<sup>2</sup>Although the Village claims that the Tribe's Reservation has been disestablished, the Village concedes that the 1838 Treaty with the Oneida established the Reservation, and concedes that the relevant regulations call for reservation land and former reservation land to be treated in the same manner. (Village's Briefs, 10-091, 10-092, p.42; 10-107, p. 41). See 25 C.F.R. 151.2(F).

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. 151.10(a) - (c) and (e) - (f).<sup>3</sup> In the present case, the Regional Director adequately considered each of these factors.

**B. The Regional Director Correctly Determined that Statutory Authority Exists for the Acquisitions.**

The Village claims that the Tribe was not "under federal jurisdiction" for purposes of the IRA, as construed by the Supreme Court in *Carcieri*, but the Village makes only a passing reference to the Tribe's status in 1934.<sup>4</sup> Instead, the Village presents an incomplete and erroneous historical overview of events, all pre-dating the IRA, in support of its major contention that the Reservation was disestablished before 1934. The fallacy in the Village's analysis is that the Supreme Court in *Carcieri* did not hold, or even imply, that a reservation was necessary to place a tribe "under federal jurisdiction" in 1934.<sup>5</sup> Neither did the Court address the disestablishment issue or even make any reference to the distinct line of Supreme Court cases

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<sup>3</sup>Subsection (d) relates only to acquisitions for individual Indians, and is not relevant to the Tribe's applications.

<sup>4</sup> The Village's caption A reads, "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." (Village's Briefs, 10-091, 10-092, p. 4; 10-107, p. 4). The Village then dedicates twenty-five pages of argument to the proposition that the Tribe's Reservation had been disestablished by 1934.

<sup>5</sup> By contrast, the IRA, by its terms and as construed by the Solicitor's office, does require the existence of a reservation for the Secretary to conduct tribal elections on the acceptance of the IRA and the adoption of an IRA constitution. So the continued existence of the Reservation is relevant to the Secretary's authority to apply the IRA to the Tribe; but it is not relevant under *Carcieri*. The problem with the Village's challenge is that the Secretary made this determination in 1936. The Village's much delayed challenge is untimely and erroneous.

that governs that inquiry. Rather, the question in *Carcieri* was whether a tribe which was admittedly brought under federal jurisdiction *after* 1934 fell within the ambit of the IRA. The question raised by the Village here, then, is governed by that separate line of Supreme Court cases addressing disestablishment of reservations, not *Carcieri*.

In the sections that follow, the Tribe demonstrates that the Tribe has been consistently recognized by the United States since at least the 1784 Treaty of Fort Stanwix, 7 Stat. 15; that the Tribe's Reservation was created by the Treaty of 1838, 7 Stat. 566; that the Reservation continues to exist, notwithstanding allotment; and that the Secretary approved an IRA constitution for the Tribe in 1936 based, among other things, on the Secretary's determination that the Reservation continued to exist. The Village's challenge to that decision now is untimely. Even were the Village's challenge timely, the Village's challenge has no basis in law. In short, the Village's disestablishment argument should be rejected and the Regional Director's decision that she has authority to place the subject lands into trust should be affirmed.

1. **The Tribe has had government-to-government relations with the United States since at least the 1784 Treaty of Fort Stanwix and has occupied the Reservation since the 1838 Treaty with the Oneida.**
  - a. **The Treaty of Fort Stanwix and the Treaty of Canandaigua.**

The Tribe is a successor in interest to the aboriginal Oneida Nation, which at the time of white contact occupied approximately five million acres in central, modern-day New York. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 532-533 (N.D.N.Y.), *aff'd* 470 U.S. 226 (1985). Following the Revolutionary War, the United States signed a peace treaty with the member nations of the Six Nations Confederacy, including the Oneida Nation. Because of the Oneidas' alliance with the United States during the Revolution, the Oneidas received a

special assurance from the United States regarding the possession of their lands. Treaty of Fort Stanwix, Art. II, Oct. 22, 1784, 7 Stat. 15; 434 F. Supp. at 533. In 1794, the United States repeated this special assurance for its former ally. Treaty of Canandaigua, Art. II, Nov. 11, 1794, 7 Stat. 44. The United States also committed to an annuity payment of \$4,500 to the Six Nations, including the Oneida Nation. The United States remains obligated to this treaty annuity payment, and has made this payment to the Tribe to the present day.<sup>6</sup> *Id.*

**b. Creation of the Reservation pursuant to the 1838 Treaty with the Oneida.**

Notwithstanding the treaty provisions regarding Oneida land, the State of New York dispossessed the Oneidas of virtually all their land in New York in a series of 27 transactions beginning in 1785, without the expressed consent or approval of the United States. *Oneida Indian Nation v. United States*, Docket No. 301 (claims 1-2) and Docket No. 301 (claims 3-8), 37 Ind. Cl. Comm. 522, and 26 Ind. Cl. Comm. 149, respectively. By 1821, the Oneidas were nearly homeless and, under pressure from New York State and others, parties of the Oneida began to

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<sup>6</sup> In 1950, the Tribe along with the rest of the Six Nations filed a claim against the United States before the Indian Claims Commission for an accounting of the treaty annuity payment. *Six Nations, et al. v. United States*, Docket 84, Ind. Cl. Comm. The United States filed an accounting which showed continuous payment of the annuity from 1845 to 1949, including specifically an appropriation made in 1933 for payment of the 1934 annuity. 47 Stat. 820, 841. Ultimately, the United States was held liable to the tribal plaintiffs for those years in which the payments had not been made. 23 Ind. Cl. Comm. 376, 395. The Department of the Interior devised a distribution plan for this judgment under which the Tribe received 42% of the total judgment. (Consolidated A.R. Vol. 3, *Carcieri v. Salazar Log*, Tab 3, pp. 4, 5; *Gerbers A.R.* Vol. 2, *Carcieri v. Salazar Log*, Tab 3, pp. 4, 5). It should be noted that the Indian Claims Commission could not award judgments in favor of individual Indians. The act creating the Commission extended jurisdiction only over claims made by "any Indian tribe, band, or other identifiable group of American Indians..." Act of August 13, 1946, 60 Stat. 1049, sec. 2. The Commission awarded relief to the Tribe itself, which had a tribal organization recognized by the Secretary of the Interior. 23 Ind. Cl. Comm. at 387-88.

consider removing west. *See generally*, 43 Ind. Cl. Comm. 373.

Ultimately, the United States negotiated a treaty with the Menominee Tribe to acquire approximately 500,000 acres for the settlement of emigrating Oneidas and other tribes from New York. Treaty of February 8, 1831, 7 Stat. 342. The Menominees later objected to the size of the cession to the New York tribes. In the 1838 Treaty with the Oneida, the United States obtained a cession of the 500,000 acre tract, but reserved from the cession for the Oneidas "to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay." Treaty of Feb. 3, 1838, Art. 2. Based on the population at the time, the Treaty resulted in a Reservation comprised of 65,540 acres.<sup>7</sup> From that time until the present, the Reservation and the Oneidas resident thereon have been expressly subject to the jurisdiction of a succession of BIA agencies or superintendencies.<sup>8</sup> In 1934, the Tribe was literally under the federal jurisdiction of the Keshena Agency of the BIA. *See* 1935

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<sup>7</sup> This tract passed directly from the Menominee to the Oneida at the same time that the United States acquired the surrounding territory. As a result, the tract reserved for the Oneidas never became part of the public domain, as alleged by the Village. (Village's Briefs, 10-091, 10-092, p. 5; Village's Brief, 10-107, p5). In addition, the Reservation was obviously set aside before Wisconsin became a state in 1848. The Village's statement to the contrary is simply inexplicable. (Village's Briefs, 10-091, 10-092, p. 33; 10-107, p. 32).

<sup>8</sup> The BIA uses the word "jurisdiction" in its literal sense to refer to tribes that fall under its authority. In the words of the National Archives, "The term 'jurisdiction' as used by the Bureau of Indian Affairs refers to an administrative field unit whether it is an individual agency, school, hospital, or reservation composed of several agencies. The size of a jurisdiction varied greatly; some administered the affairs of several small tribes, while others had charge of a single tribe." Superintendents' Annual Narrative and Statistical reports from Field Jurisdictions of the Bureau of Indian Affairs, 1907-1938, National Archives Trust Fund Board, National Archives and Records Service, GSA (1977), p. 3. Thus, the continuous exercise of BIA jurisdiction over the Tribe's affairs evidences continuous federal jurisdiction for purposes of the IRA, as construed in *Carciari v. Salazar*.

Annual Report, Commissioner of Indian Affairs.<sup>9</sup> (Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 3, p. 4; *Gerbers A.R. Vol. 2, Carcieri v. Salazar* Log, Tab 3, p. 4).

Just a few years after the creation of the Reservation, Congress had occasion to acknowledge its continuous relationship with the Tribe by virtue of the 1794 treaty annuity payments. The First Christian Party of the Oneidas, as the party that had emigrated from New York to Wisconsin was denominated, had since 1830 complained that they had not been paid their full pro rata share of the 1794 treaty annuity payments. After an investigation and report to Congress, Congress authorized the payment of the "arrears due the first Christian and Orchard parties of Oneida Indians in Wisconsin, under the treaty of seventeen hundred and ninety-six [1794]..." [sic]. Act of February 27, 1851, 9 Stat. 574, 586. A congressional committee report on the bill made it plain that the Oneidas in occupation of the 1838 Reservation were the same Oneidas with whom the United States had treated in 1794:

That in the year 1794 the United States, by treaty of that date, stipulated to pay the 'six nations' of New York Indians four thousand five hundred (4,500) dollars annually, which sum was to be divided amongst the said six nations according to their numerical strength. (See Statutes at Large, vol. 7, page 46.) The Oneida Indians composed one of these six nations. The Indians whose petition is the subject of this report are of that tribe or nation, and are styled 'the first Christian party' for the reason that they first embraced the Christian religion. This party, with the approbation of the United States, emigrated to Green Bay; and were entitled under the treaty aforesaid, and by the promise of the government, to their

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<sup>9</sup> The Village makes two objections to this BIA statement. First, it complains that the level of "contact" was extremely limited. (Village's Briefs, 10-091, 10-092, p. 30; 10-107, p 29). While it is true that the BIA at that time generally delivered fewer services than in earlier times, not only to the Tribe but throughout Indian country, the limited nature of federal services is a different matter from the existence of federal jurisdiction. In addition, the Village erroneously compares the federal "contact" with the Tribe to that with the Narragansett Tribe, held not to be under federal jurisdiction in *Carcieri*. But the federal "contact" with Narragansett was not a formal expression of federal jurisdiction over them, as there was by the BIA over the Tribe in the 1935 and other commissioner reports.

proportion of the said annuity according to their numerical strength. *In consequence of the separation of these bands and the inaccurate knowledge of the government as to their relative numbers, and in part to the neglect of the Indian agent and the remissness of the Indian department at Washington, it happened that in the apportionment and distribution of the annuity for and twelve years preceding 1842, the bands or tribes remaining in New York received \$3,934.68 more than their just proportion, and the Oneidas \$4,260 less ...*

House Report No. 18, January 29, 1851, 31<sup>st</sup> Cong., 2d Sess (emphasis added). Thus, when Congress authorized the appropriation for the “arrearages,” Congress explicitly acknowledged its long-standing relationship with the Oneidas on the Reservation as successors to the 1794 Treaty of Canandaigua, as a band, not individual descendants.<sup>10</sup>

**c. Allotment of the Reservation.**

Two years after passage of the GAA, special Indian agent Dana Lamb was instructed to allot the Reservation into trust patents for the Oneidas.<sup>11</sup> On June 13, 1892, 1,519 certificates of allotment were issued, which patents were to be held in trust for twenty-five years. Annual Report of the Commissioner of Indian Affairs, 1899, p. 259-260. However, contrary to the Village’s assertion, not all trust land on the reservation was allotted to tribal members, for various reasons: a 40 acre parcel used as an Episcopal mission was not allotted; 130 acres that

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<sup>10</sup>This congressional report is attached to the Tribe’s letter dated April 28, 2009, which is part of the administrative record in this appeal. (Consolidated A.R. Vol. 3, Carcieri v. Salazar Log, Tab 3, pp. 4-5, Attachment 4; Gerbers A.R. Vol. 2, Carcieri v. Salazar Log, Tab 3, pp. 4-5, Attachment 4). The Village is aware of this congressional action but makes no mention of it.

<sup>11</sup> The Village cites the 1887 Annual Report of the Commissioner in support of its argument that the GAA contemplated the disestablishment of reservations by allotment alone. (Village’s Briefs, 10-091, 10-092, p. 7; 10-107, p. 6). Read in full, though, the 1887 report supports the well-established interpretation of the GAA that allotment alone did not disestablish a reservation: “We do not look for the immediate accomplishment of all this [to abrogate the Indian tribe organization, to abolish the reservation system]. The law is only the seed, whose germination and growth will be a slow process, and we must wait patiently for its mature fruit.” 1887 Annual Report, p. 6.

were subject to a railroad right of way were not allotted,<sup>12</sup> and approximately 51 acres were issued as duplicate allotments to individual members, which were subsequently cancelled by the United States and never re-allotted.<sup>13</sup> There were no “surplus lands” on the Reservation, that is, lands that were either not allotted or not used for tribal purposes. As a result, there was never a surplus lands act opening up the reservation to non-Indian homesteading, which statute might have provided the clear statement of congressional intent necessary for disestablishment.

Annual Reports of the Commissioner of Indian Affairs contemporaneous with the allotment of the Reservation all explicitly acknowledged the continued existence of the Reservation, notwithstanding the issuance of allotments. The first mention of allotment appeared in the 1891 report, as follows: “The Oneida Reservation, situated between the counties of Brown and Outagamie, about 45 or 50 miles in a southeasterly direction from this office, contains a little less than three townships, 65,540 acres, allotted in severalty by Special Agent Lamb, which allotment was completed a little more than a year ago.”<sup>14</sup> The appended map to the report

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<sup>12</sup> In 1870, the Tribe granted an easement for a railroad right-of-way to the Green Bay and Lake Pepin Railway Company. By act of March 3, 1871, 16 Stat. 588, Congress approved the grant of the easement and authorized the company “to build and maintain its railway across the Oneida reservation, in the State of Wisconsin...” *Id.* Consequently, this land was not allotted. The majority of the railroad line has since been abandoned.

<sup>13</sup> The Village is aware of these trust lands remaining after allotment. These facts were set out in an affidavit of Rebecca Webster, Senior Staff Attorney, Oneida Law Office, attached as an exhibit to the Tribe’s letter of April 28, 2009, in response to the Village’s supplemental letter of objection to trust applications. (Consolidated A.R. Vol. 3, Carcieri v. Salazar Log, Tab 4, Attachment 1; Gerbers A.R. Vol. 2, Carcieri v. Salazar Log, Tab 4, Attachment 1).

<sup>14</sup> Inexplicably, the Village cites this report as authority for its erroneous statement that the Reservation was “fully allotted.” (Village’s Briefs, 10-091, 10-092, p. 7; 10-107, p. 7). It does so even though the very excerpt quoted by the Village explicitly acknowledged the “Oneida reservation, situated between the counties of Brown and Outagamie...contains less than three townships, 65,540 acres...” and expressly stated that the allotment excepted “85 acres held for

showed the full extent of the Reservation as established in 1838. (Consolidated A.R. Vol. 3, Carcieri v. Salazar Log, Tab 3, Attachment 2; Gerbers A.R. Vol. 2, Carcieri v. Salazar Log, Tab 3, Attachment 2.) The 1892, 1893, 1897, 1898, and 1899 annual reports all repeat the description of the Oneida Reservation, containing or with a specified number of acres with slight variation in the number, but clearly encompassing the full extent of the 1838 Reservation.<sup>15</sup> The Village simply ignores these reports and the clear statements contained therein regarding the existence of the Oneida Reservation, notwithstanding the issuance of trust patents under the GAA.

In 1906, Congress authorized the Secretary of the Interior, in his discretion, to issue fee patents to any allottee on the "Oneida Reservation in Wisconsin." Act of June 21, 1906, 34 Stat. 182.<sup>16</sup> The Secretary employed this authority liberally. Many Oneida allottees had fee patents

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future Indian allotments if/as needed." Rather than support the Village's revisionist history that the reservation was fully allotted, and thereby disestablished, the report indicates that the Reservation continued to exist and included unallotted parcels.

<sup>15</sup> In the last annual report that included extensive text and tables regarding the status of Indians in 1920, the report shows continued federal jurisdiction over the Oneidas and the Reservation. The report included a table titled "General Data for each Indian Reservation to June 30, 1920." This table listed the Oneida Reservation, with 151 acres unallotted, as established by the 1838 treaty. It also listed 2,657 persons under the Keshena Superintendency, designated as "Oneida Reservation-Oneida". 1920 Annual Report of the Comm. of Indian Affairs, pp. 73, 103.

<sup>16</sup> Again, the Village quotes this very language but ignores the obvious acknowledgment by Congress of the existence of the Oneida Reservation. (Village's Briefs, 10-091, 10-092, p. 7; 10-107, p. 7). The Village also misstates the "same" treatment extended in this act to the Oneida and the Stockbridge-Munsee Reservations. As to Oneida, the act authorized the issuance of fee patents to allottees before the expiration of the trust period. As to Stockbridge-Munsee, the act authorized the issuance of fee patents *immediately without any trust period at all*. It was this distinction from the usual allotment authorized by the GAA, that is, with a twenty five year trust period, that convinced the Seventh Circuit that the 1906 act abolished a portion of the Stockbridge-Munsee Reservation. But as to the usual allotment scheme, the one applied to Oneida, the Seventh Circuit noted that "[t]he Supreme Court has repeatedly held that allotting land to Indians is consistent with continued reservation status..." *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657, 664 (2009) (citations omitted).

issued to them early under the 1906 act, or upon expiration of the twenty-five year trust period. However, the Village is incorrect that the trust period for all Oneida allotments expired before 1934. To the contrary, the trust period on 35 allotments was extended by three executive orders so that approximately 1,100 acres remained in trust for Oneida allottees by 1934. *See* Executive Order of President Wilson, May 19, 1917 (extending trust period on specified Oneida allotments for one year); Executive Order of President Wilson, May 4, 1918 (extending trust period on specified Oneida allotments for nine years); and Executive Order of President Coolidge, March 1, 1927 (extending trust period on specified Oneida allotments for ten years). These executive orders specifically referred to extensions of trust for named individuals on the "Oneida Indian Reservation." The Village did not advise the Board of the existence of these Executive Orders, and persists in representing that the "reservation was fully allotted in fee."<sup>17</sup>

As more Oneida fee patents were issued, the BIA agency with responsibility for the Tribe occasionally expressed the expectation or hope that federal supervision could one day be brought to an end, but nothing in these reports stated that this eventuality had occurred. The 1903 agency report, for example, noted the creation of two townships under state law "on the reservation" but repeated the familiar description of the Reservation as encompassing 65,400 acres. (Village's Briefs, 10-091, 10-092, Exh. 4; 10-107, Exh. 5). Similarly, in 1904 the agency reported a strong feeling among the Oneidas in favor of being relieved from federal government control but did not state that such had taken place. (Village's Briefs, 10-091, 10-092, Exh. 5; 10-107, Exh.6).

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<sup>17</sup> Again, the Village is plainly aware of these Executive Orders since they are discussed in the material the Tribe submitted to the BIA in response to the Village's opposition to these very trust acquisitions. (Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 3, p. 8; *Gerbers* A.R. Vol. 2, *Carcieri v. Salazar* Log, Tab 3, p. 8).

Again, in 1929, the commissioner reported that the federal relationship had been severed except for the payment of annuities (which payments continued) and identified the Oneida Reservation as subject to BIA jurisdiction. (Village's Briefs, 10-091, 10-092, Exh. 13; 10-107, Exh. 14). Finally, there were federal steps taken to suspend certain services to the Oneidas, such as BIA schools, but in each instance the existence of the Oneida Reservation was explicitly acknowledged. (Village's Briefs, 10-091, 10-092, Exh. 9; 10-107, Exh. 10) (1912 suspension of certain agency services at the "Oneida reservation"); (Village's Briefs, 10-091, 10-092, Exh. 10; 10-107, Exh.11) (1924 sale of Oneida school parcel "situated on the Oneida Indian Reservation"); (Village's Briefs, 10-091, 10-092, Exh. 11; 10-107, Exh. 12) (1924 quitclaim to Catholic Diocese of tract on the "Oneida Reserve").<sup>18</sup>

Shortly before the enactment of the IRA, the level of federal services at Oneida was reduced, as it was elsewhere in Indian country.<sup>19</sup> The Village identifies two exhibits from this time period that refer to the "former" Oneida Reservation. (Village's Briefs, 10-091, 10-092, Exh. 15 and 19, 10-107, Exh. 15 and 20). The first of these is a 1931 letter from the

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<sup>18</sup> The Village also cites federal correspondence relating to the status of land and rights over that land of Oneidas who had received patents in fee. (Village's Briefs, 10-091, 10-092, pp. 12-13; 10-107, pp. 12-13 (taxation of personal or fee property of individual Oneida); 10-091, 10-092, pp. 15-16; 10-107, pp. 15-16 (state regulation of hunting and fishing on fee land on the reservation); and 10-091, 10-092, pp. 17-19; 10-107, pp. 17-19 (state taxation of fee patents held by Oneidas). All these events reflected the unremarkable proposition that fee patents, once issued to an allottee, became taxable, and the allottee became subject to state jurisdiction. These events say nothing about the continued existence of the Oneida Reservation, and hence, are irrelevant to the inquiry here.

<sup>19</sup> The general decline in federal services, particularly education and health, was documented in the 1928 Meriam Report, which among other pressures led to the Indian New Deal embodied in the IRA. *See generally*, F.P. Prucha, *The Great Father*, pp. 278-310 (1984 U. of Nebraska Press).

Commissioner of Indian Affairs to an Oneida tribal member, regarding state regulation of hunting and fishing on the Reservation. The Commissioner advised the tribal member that, except for a few parcels, Indian title had been extinguished on the former Oneida Reservation. The second of these is a 1933 letter from the superintendent of the Keshena Agency regarding an application to lease a parcel of un-allotted tribal land on the former Oneida reservation. Neither of these letters contained an analysis of the facts or law in support of the passing reference to the Reservation. Further, both are clearly out of the mainstream of the administrative record, which overwhelmingly reflected the view that the Reservation continued to exist, notwithstanding allotment. Finally, both are flatly contradicted by the considered view of the BIA immediately at and following the enactment of the IRA.<sup>20</sup>

**d. Application of the IRA to the Tribe and the Reservation.**

Approximately two months before the enactment of the IRA, the Department of the Interior published a tabulation of census rolls of all Indian reservations subject to the jurisdiction of the Indian Service. (Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 3, p. 2, Attachment 1; *Gerbers* A.R. Vol. 2, *Carcieri v. Salazar* Log, Tab 3, p. 2, Attachment 1). The census was organized by state; it listed each agency, the reservations located within each agency, and the number of Indians identified by tribe and resident there and elsewhere. Under Wisconsin and the Keshena Agency, this 1934 Indian census included "Oneida Reservation" and identified

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<sup>20</sup> It is unsurprising that there are scattered references in the administrative record which describe the Reservation as the "former reservation" or in the past tense. Oftentimes, federal officials used language loosely without attaching significance to a particular term. The inquiry is whether it was the dominant view of the BIA that the Reservation continued to exist, notwithstanding allotment, and that is clearly the case here. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604, fn.27 (1977).

3,128 Indians under that jurisdiction. *Id.*, p. 153. Immediately after passage of the IRA, these Oneida Indians sought to take advantage of the IRA's provisions authorizing the adoption of a tribal constitution.<sup>21</sup>

Initially, the Tribe organized a non-profit corporation under state law for the expressed purpose "to comply with the act of the Seventy-third Congress known as the Wheeler-Howard Bill Indian Rights approved June 18<sup>th</sup>, 1934." (Village's Brief, 10-107, Exh. 29). The Tomah Superintendent, who had taken over supervision of Oneida affairs from the Keshena Superintendent, notified the Commissioner's office of the Oneida's attempt to organize under the IRA. (Consolidated A.R. Vol. 3, *Carcieri v. Salzar Log*, Tab 3, Attachment 9; *Gerbers A.R.* Vol. 2, *Carcieri v. Salazar Log*, Tab 3, Attachment 9). The Solicitor advised that the state corporation was not the organization contemplated by the IRA.<sup>22</sup> The first necessary step was a vote to determine whether the Tribe would accept the IRA. The Commissioner directed that this vote

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<sup>21</sup> Contemporaneously, the BIA extended services pursuant to statutes other than the IRA to the Reservation because of its continuing status as such. Under the Act of March 31, 1933, 48 Stat. 22, Congress authorized expenditures on "Government reservations." The BIA interpreted this to include Indian reservations and expended authorized funding on reservations, in addition to those generally available elsewhere. In its final report on such expenditures, the BIA noted that the Oneida Reservation was one reservation on which Indian Emergency Conservation Corps - Indian Division - funds were expended in 1934. Contrary to the Village's assertion, these were funds expended by the BIA expressly for Indian reservations, not general funding under the CCC. (Village's Briefs, 10-091, 10-092, p. 28; 10-107, p. 27-28).

<sup>22</sup> The Village claims that the Oneida formed this state corporation "to artificially recreate an Indian tribe." (Village's Briefs, 10-091, 10-092, p. 24; 10-107, p. 24). The Village cites no historical documentation for its interpretation of this event, and the Village's interpretation directly contradicts the stated purpose of the corporation to establish an IRA entity. Certainly, the Village's suggestion that the existence of some formal constitution or corporation before the enactment of the IRA was necessary to make the Tribe eligible for the IRA is nonsensical. If tribes were expected to have adopted either a constitution or corporation before 1934 to be eligible for the IRA, the IRA would not have provided a mechanism for the formation of such entities.

take place and it did on December 15, 1934. The Tribe voted overwhelmingly to accept the IRA. Haas, *Ten Years of Tribal Government under I.R.A.*, U.S. Indian Service (1947), p. 20. Section 18 of the act prohibited application of the act "to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 48 Stat. 984. Thus, this vote was critical to the Tribe's ability to take advantage of the act's benefits.

The Tribe immediately began work on an IRA tribal constitution, working with the Tomah Superintendent, Frank Christie. The draft was forwarded to Washington and Commissioner Zimmerman responded, making two suggested modifications relevant here. First, Zimmerman suggested that the draft clearly state that the Oneida were a recognized tribe:

The preamble to the Constitution does not, as stated, make any reference to the Oneida Indians as a recognized tribe. It is believed that in view of the fact that the Oneida Indians clearly are a recognized tribal group, the preamble should be changed by inserting the words "tribe of" between the words "Oneida" and "Indians", and by adding at the end "for our tribal organization to be known as the Oneida Indians of Wisconsin."

(Consolidated A.R. Vol. 3, *Carcieri v. Salazar Log*, Tab 3, Attachment 8; *Gerbers A.R. Vol. 2, Carcieri v. Salazar Log*, Tab 3, Attachment 8). Second, Zimmerman was concerned that the draft's reference to the 1838 treaty might be confusing since the earlier Menominee treaty had been the original treaty that set aside a tract for Oneidas and other New York Indians. Rather than reference a particular treaty, Zimmerman suggested the following:

In order to avoid confusion, it is suggested that the jurisdiction of the Tribe shall "extend to the territory within the present confines of the Oneida Reservation," and that all reference to various treaties should be omitted.

*Id.* The Tribe made the suggested changes and returned the revised draft constitution to

Washington.

On April 23, 1936, the Commissioner laid out these events in a recommendation to the Secretary of the Interior that the Tomah Agency be directed to conduct a referendum among the Oneidas on the adoption of an IRA constitution. The recommendation set out the legal and factual predicate for the conduct of the election: first, that the Tribe had voted to accept the IRA; second, that the Tribe occupied a Reservation established by treaty in 1838, which Reservation “has been subsequently recognized as such by Executive order of May 19, 1917 and May 4, 1918, extending the trust periods on certain allotments made to Indians on the Oneida Reservation in Wisconsin;” third, that the Oneidas had maintained a tribal organization up until that time; and fourth, that the proposed Oneida Constitution conformed to law and policy governing such documents, specifically referencing the Solicitor’s opinion on twelve issues of construction relating to the IRA, including section 16 extending the right to reorganize to “[a]ny Indian tribe, or tribes, residing on the same reservation. (Consolidated A.R. Vol. 3, Carcieri v. Salazar Log, Tab 3, Attachment 9; Gerbers A.R. Vol. 2, Carcieri v. Salazar Log, Tab 3, Attachment 9).

On October 14, the Secretary of the Interior directed Superintendent Christie to organize an election for November 14, 1936, on the adoption of the constitution by the Tribe. The Tribe approved the constitution by a large majority and on December 21, 1936, the Secretary approved the constitution. Haas, *supra*. The Tribe and its IRA constitution have since been recognized by the United States. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. No. 153, Aug. 11, 2009, at 40220.

**2. The Village's challenge to the Secretary's application of the IRA to the Tribe is time barred.**

After the passage of the IRA and upon request from the Commissioner of Indian Affairs, the Solicitor's Office considered which tribes were eligible to partake of the benefits of the act, including the right to reorganize under tribal constitutions. Section 18 of the act provided that it "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 48 Stat. 984. Similarly, section 16 of the act limited the right to reorganize under the act to "[a]ny Indian tribe, or tribes, residing on the same reservation..." *Id.* One of the questions posed to the Solicitor was which Indians could participate in elections called by the Secretary, both on acceptance of the IRA and on the adoption of a tribal constitution. In a formal opinion, the Solicitor's Office concluded that two groups of Indians were eligible to do so: 1) those tribes with an established tribal affiliation residing on a reservation; and 2) individual Indians who were unaffiliated with a recognized tribe but who resided on a reservation. In the first case, all members of the tribe were eligible to vote, without regard to residence on the reservation. In the second case, only those Indians who resided on the reservation would be eligible to vote. In each instance, however, a reservation was a pre-requisite to conduct a secretarial election under the IRA on acceptance of the act and the adoption of a tribal constitution under the act. M-27810, December 13, 1934, I Sol. Op. 484, 486-487.

Of necessity, then, the Secretary determined that the Tribe resided on a reservation before it allowed the Tribe to vote on the acceptance of the IRA and before it approved the Tribe's IRA constitution. In fact, the historical record is plain that the Secretary made this inquiry with

respect to Oneida, concluded that the Tribe was recognized and resident on a reservation, and conducted a vote on the adoption of an IRA constitution based thereon. The 1936 letter of the Secretary directing that the election on the proposed Oneida Constitution take place laid out this predicate for the Secretary's decision, including an explicit reference to the 1934 Solicitor's Opinion. (Consolidated A.R. Vol. 3, *Carcieri v. Salazar* Log, Tab 3, Attachment 9, *Gerbers* A.R. Vol. 2, *Carcieri v. Salazar* Log, Tab 3, Attachment 9).<sup>23</sup>

As with all final agency actions, the Secretary's approval of the Tribe's IRA constitution in 1936 was subject to challenge under the Administrative Procedures Act ("APA"). However, the statute of limitations on such actions is six years. Because the APA itself is silent on the question, courts have determined that 28 U.S.C. §2401(a) applies so that the action is time barred "unless the complaint is filed within six years after the right of action first accrues." *Nagahi v. I.N.S.*, 210 F.3d 1166, 1171 (10<sup>th</sup> Cir. 2000) ("In the absence of a specific statutory limitations period, a civil action against the United States under the APA is subject to the six year limitations period found in 28 U.S.C. §2401(a)"); *CWWG v. U.S. Department of the Army*, 111 F.3d 1485, 1495 (10<sup>th</sup> Cir. (1997)); *Sierra Club v. Penfold*, 857 F.2d 1307 (9<sup>th</sup> Cir. 1988).

The Village's challenge to the Secretary's decision to apply the IRA to the Tribe is made

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<sup>23</sup> To refute the clear historical record that the BIA deemed the IRA applicable to the Tribe at the time, the Village cites a 1937 letter from Commissioner Collier to Senator Thomas, Chairman of Committee on Indians Affairs in the Senate. (Village's Briefs, 10-091, 10-092, p. 23 and Exh. 26; 10-107, p. 23 and Exh. 28). According to the Village, the omission of the word "tribe" following Oneida and Stockbridge in the list of tribes indicates that those reservations had been disestablished. (Village's Brief, 10-091, 10-092, p. 23; 10-107, p. 23). This interpretation of the 1937 letter is patently absurd. The letter itself refers to the list, which includes the Tribe, as a "List of Indian tribes under the Indian Reorganization Act." (Village's Briefs, 10-091, 10-092, Exh. 26; 10-107, Exh. 28). Many tribes on that list are simply named, without the designation tribe, but it is crystal clear from the letter that the BIA considered those listed, including the Tribe, as recognized and subject to the IRA.

almost seventy-five (75) years after the Secretary's decision.<sup>24</sup> Every legal and factual objection now made by the Village against application of the IRA to the Tribe was known in 1936 when the Secretary approved the Tribe's IRA constitution. The agency's decision was final at that time and no further steps were necessary for an action to accrue in the Village's favor against the Secretary on those facts.<sup>25</sup> This challenge to that determination, including the Village's claim that the Reservation was disestablished before 1934, is now time barred.

The Supreme Court's decision in *Carciari* does not affect the accrual date of the Village's action against the Secretary's decision to apply the IRA to the Tribe. That decision may cast doubt upon determinations made by the Secretary that a tribe recognized after 1934, or a tribe whose reservation was set aside after 1934, was eligible for the IRA. But that is not the case here. The events and circumstances relied upon by the Secretary to apply the IRA to the Tribe all occurred well before 1934. The question here, then, is whether the Secretary correctly determined in 1936 that the Oneida Reservation had existed all along; that inquiry is governed by a body of Supreme Court authority separate and distinct from the *Carciari* decision. And every challenge made now by the Village regarding the Reservation could have and should have been made at that time, not 75 years after the fact. The 2009 decision in *Carciari* may revive challenges to decisions by the Secretary to apply the IRA to tribes based on post-1934 events,

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<sup>24</sup> The APA was enacted in 1946. *See* P.L. 79-404, Act of June 11, 1946. Even if no statute of limitations applied to challenges of final agency actions before enactment of the APA, the Village's claim was barred no later than six year thereafter, or 1952.

<sup>25</sup> As the Village points out, it was created under state law in 1903. (Village's Brief, 10-091, 10-092, p. 8; 10-107, pp. 8-9). There is, then, no reason why the Village did not make the same objections in 1936 to the Secretary's decision to apply to the IRA to the Tribe that the Village makes now.

either recognition or creation of a reservation, but it does not do so for decisions by the Secretary to apply the IRA to tribes already within federal jurisdiction in 1934. The Village's challenge should have been made in 1936 and is now too late.

**3. Even if it were not time barred, there is no legal basis for the Village's challenge to the existence of the Reservation.**

The Village's claim that the Reservation has been disestablished is wrong as a matter of law. Even had the Reservation been fully allotted (which it was not) and even if all allotments had passed out of trust by 1934 (which they had not), these circumstances alone would not disestablish the Reservation. There is a well-established body of law, which the Village simply ignores, indicating that Indian reservations can only be disestablished by Congress and that Congress did not intend to do wholesale by the enactment of the GAA. The only authority to the contrary cited by the Village relied upon principles or cases that have been explicitly rejected or overturned by the Supreme Court.

**a. Legal Principles governing disestablishment of Indian reservations.**

As the 1887 annual commissioner's report noted, the purpose of the GAA was to provide for allotment of reservations, in the expectation that the demise of reservations and the termination of the federal trust relationship with tribes would one day follow. *See* fn. 11, above. However, there is no provision in the GAA that disestablished allotted reservations or terminated affected tribes. The immediate effect of the GAA was only to change the title of land within reservations, and the Supreme Court determined early on and consistently since that this change in title is insufficient to abolish a reservation.

In 1909, the Supreme Court considered the impact of allotment on the Tulalip

Reservation, allotment done pursuant to a special treaty but in terms very nearly identical to the GAA. *United States v. Celestine*, 215 U.S. 278 (1909). The Supreme Court ruled that the change in title did not alter the reservation's status. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. Consequently, neither the allotment of the reservation nor the grant of citizenship to tribal members, whether by special treaty or the GAA, "emancipate[d] the Indians from all [federal] control, or abolish[ed] the reservations." *Id.* at 287.

The Supreme Court has applied this rule since to conclude that reservation status survived allotment, and sometimes even the opening up of a given reservation in accordance with a surplus lands act. In *Seymour v. Superintendent*, 368 U.S. 351 (1962), the Court concluded that neither the allotment of the Colville Reservation nor its opening to non-Indian settlers diminished the reservation, since neither statute so provided. *Id.* at 357-358. In *Mattz v. Arnette*, 412 U.S. 481 (1973), the Court held that the Klamath River Reservation had not been disestablished, even though surplus lands had been opened to non-Indian settlement after allotment of the reservation. *Id.* at 504. The Court noted in both cases that Congress had explicitly provided that Indian reservations are Indian country, notwithstanding the issuance of any patents therein. 368 U.S. at 357; 412 U.S. at 504; *see* 18 U.S.C. §1151(a).<sup>26</sup>

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<sup>26</sup> It is of no moment that Congress enacted the Indian country definition in 1948, or after the events considered by the Supreme Court in *Seymour* and *Mattz*. As the Supreme Court said in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the 1948 Indian country statute did not alter the definition of Indian country but simply codified earlier Supreme Court rulings on the subject. *Id.* at 530. With regard to fee land within a reservation, the Court had ruled that, at least for purposes of the Major Crimes Act of 1885, the reservation included unrestricted lands. *United States v. Thomas*, 151 U.S. 577, 586 (1894). Congress made plain with the enactment of the Indian country statute that this rule applied across the board. *See generally, Cohen's Handbook of Federal Indian Law*, ¶3.04[2][c] (2005).

The seminal case on the subject in modern times is *Solem v. Bartlett*, 465 U.S. 463 (1984). There, the Supreme Court considered the impact of a surplus lands act opening the Cheyenne River Reservation in South Dakota to non-Indian homesteaders after allotment. South Dakota did not claim that allotment alone could or did disestablish the reservation. Indeed, the Court observed that the allotted lands were governed by the principle that:

Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

*Id.* at 470. South Dakota argued that the surplus lands act disestablished the reservation but the Court found no explicit intent by Congress there to do so. *Id.* Significantly, in every case where the Supreme Court has concluded that the reservation had been disestablished or diminished by Congress, it has relied upon a particular surplus lands act that applied to that reservation, not the allotment of the reservation under the GAA. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (Act of Aug. 15, 1894, 28 Stat. 286); *Hagen v. Utah*, 510 U.S. 399 (1994) (Act of May 27, 1902, 32 Stat. 263); *Rosebud Sioux Tribe*, 430 U.S. 584 (Act of Apr. 23, 1904, 33 Stat. 254-258; Act of Mar. 2, 1907, 34 Stat. 1230-1232; Act of May 30, 1910, 36 Stat. 448-452); *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (Act of Mar. 3, 1891, 26 Stat. 1035); see also *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7<sup>th</sup> Cir. 2009) (Act of Feb. 6, 1871, 16 Stat. 404). There is no surplus lands act applicable to the Oneida Reservation.<sup>27</sup>

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<sup>27</sup> There is nothing in *Wisconsin v. Stockbridge-Munsee Tribe* to the contrary. The court relied upon the 1906 act authorizing the allotment of a portion of the original reservation as having abolished the reservation. But the court observed that the usual rule is that allotment is consistent with reservation status, citing *Solem*, *Mattz*, and *Seymour*. 554 F.3d at 664. The allotment of the Stockbridge-Munsee Reservation authorized in the 1906 act was not the usual allotment scheme but one to accomplish a “full and complete settlement of all obligations...due to said tribe...from whatever source the same may have accrued...” 554 F.3d at 661. The Oneida

The principles developed by the Supreme Court in this substantial body of case law eviscerate the Village's theories of disestablishment of the Reservation. First and most obviously, allotment alone cannot accomplish the disestablishment of the Reservation. The GAA simply does not disestablish reservations and the Supreme Court has plainly said so. Second, nothing in state legislation creating the Town of Hobart can disestablish the Reservation. Even accepting the Village's construction of the state legislation as intended to disestablish the Reservation,<sup>28</sup> the State of Wisconsin lacks authority to legislate this result. Only Congress can do so. As a result, the Village's extensive arguments regarding the allotment of the Reservation and the creation of Hobart under state legislation are much ado and many pages of no relevance to the continued existence of the Reservation.

**b. The Village's out-of-date authority.**

The Village ignores the Supreme Court cases on the disestablishment of Indian reservations and relies exclusively on old authority that is no longer reliable - *United States v. Hall*, 171 F. 214 (E.D. Wis. 1909) and *Stevens v. County of Brown*, (E.D. Wis., Unpublished Decision and Order dated Nov. 3, 1933). (Village's Briefs, 10-091, 10-092, pp. 10-12 and 17-18; 10-107, pp. 10-12 and 17-18). Both are flatly inconsistent with the Supreme Court cases discussed above. For this and other reasons, neither is sound authority for the proposition that

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Reservation was allotted pursuant to the GAA, not a special allotment act like that applicable to the Stockbridge-Munsee Reservation.

<sup>28</sup> The Village maintains that the state legislation created towns "in the place of the reservation," (Village's Briefs, 10-091, 10-092, p. 8; 10-107, p. 8), but it did no such thing. The legislation simply provided for the creation of two townships "from the territory now embraced within the Oneida Reservation..." *Id.* Nothing in this language purports to replace the Reservation with the newly created towns.

allotment disestablished the Reservation.

In *United States v. Hall*, members of the Tribe were prosecuted for introducing liquor onto the Reservation. The district court determined that the Congress lacked authority to regulate liquor on the Reservation, reasoning that the Oneidas were emancipated from federal control once they were made citizens by the GAA. *Id.* In reaching this conclusion, the district court relied upon *In Re Heff*, 197 U.S. 488 (1905) and *State v. Doxtator*, 47 Wis. 278 (1879). Both of these decisions have since been expressly overruled.

The Supreme Court reconsidered *In Re Heff* in *United States v. Nice*, 241 U.S. 591 (1916). After examining the terms of the GAA, the Court concluded that even though Congress had granted citizenship and extended state law to Indian allottees, Congress had not expressly terminated federal trusteeship over allottees. In the Court's words, "Citizenship is not incompatible with tribal existence or continued guardianship." *Id.* at 598. The Court went on to overrule the contrary rule in *In Re Heff*:

We recognize that a different construction was placed on the [GAA] in *Re Heff*, 197 U.S. 488, 49 L. Ed. 848, 25 Sup. Ct. Rep. 506, but, after re-examining the question in the light of other provisions of the act, and of the many later enactments, clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled.

*Id.* at 601.

The Wisconsin Supreme Court has since overruled *State v. Doxtator*, as well. In *State v. Rufus*, 205 Wis. 317, 237 N.W. 67 (1931), the court determined that, because of intervening decisions of the Supreme Court, the rule in *State v. Doxtator* was unsound. The *State v. Doxtator* decision "should no longer continue as an authority..." *Id.* 237 N.W. at 75. Because

the issuing courts have repudiated both cases relied upon in *United States v. Hall*, that decision can no longer be considered authoritative.

The second case cited by the Village, *Stevens v. County of Brown*, was also rendered out of date by intervening Supreme Court cases on the GAA. In *Stevens*, the court held that the GAA “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.” *Stevens*, Unpublished Decision and Order, p. 3.<sup>29</sup>

As discussed above, the Supreme Court has squarely rejected the notion that the GAA disestablished reservations upon allotment. *Mattz*, 412 U.S. at 497; *Seymour*, 368 U.S. at 357-58. The Supreme Court has also rejected the notion that the division of a reservation into townships by the federal government was inconsistent with continued reservation status:

Moreover, the State can point to no language in s. 1151's definition of Indian country which lends the slightest support to the idea that by creating a townsite within a reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation.

*Seymour*, at 359. If a federal decision to create townships within a reservation does not disestablish the reservation, it makes no sense that a *state* decision to establish towns within a reservation could or would disestablish the reservation. These Supreme Court decisions

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<sup>29</sup> The precise question in *Stevens* was whether allotments were subject to taxation once the trust period expired. Of course, the GAA expressly subjected those lands to taxation and the Supreme Court has since held that the IRA and other federal policies reversing allotment did not restore immunity from taxation of lands previously released from trust restrictions. See *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *Yakima v. Confederated Tribes*, 502 U.S. 251 (1992). This rule does not implicate reservation status, though, and the Supreme Court did not question the existence of either reservation in the *Cass County* and *Yakima* cases. As a result, the *Stevens* court, which anticipated the later Supreme Court rule on this point, had no reason to even address the reservation status issue.

completely undo the reasoning in *Stevens*.<sup>30</sup>

In the end, the Village has no authority for its central proposition that the allotment of the Reservation, and the creation of towns under state law on the Reservation, either separately or together, had the effect of disestablishing the Oneida Reservation and removing the Tribe from federal jurisdiction. The Village failed to address the substantial body of Supreme Court case law governing the disestablishment of reservations. Instead, the Village relied upon cases that have been overturned and are plainly wrong. The Board should therefore reject the Village's contention that the Secretary lacks authority to acquire land in trust for the Tribe.<sup>31</sup>

**C. The Regional Director Adequately Considered the Other Relevant Regulatory Factors.**

“[I]n reviewing the criteria set out in 25 C.F.R. § 151.10, no single factor is determinative of the outcome. Rather, the BIA's decision should be reasonable in its overall analysis of the factors.” *State of South Dakota and Moody County v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004) (citations omitted). “In challenging BIA discretionary decisions, the

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<sup>30</sup> Wisconsin courts have since completely ignored *Stevens* when they have occasion to adjudicate matters arising on the Reservation. See *State v. King*, 212 Wis.2d 498 (Wis. Ct. App. 1997) (involving fishing of tribal members on the Reservation); *Powless v. Powless*, 264 Wis. 71 (Wis. 1953) (involving a divorce of members resident on the “Oneida Reservation”), with no reference to *Stevens*. Federal courts have also ignored *Stevens*. See *Oneida Tribe of Indians v. State of Wisconsin*, 518 F.Supp. 712, 720 (W.D. Wis. 1981) (holding that state's civil regulatory bingo laws “cannot be enforced on the Oneida Reservation”).

<sup>31</sup> The Village's reservation disestablishment theory lacks not only legal authority but also an integrating principle. It is not clear under the Village's theory whether allotment alone would accomplish disestablishment, or whether it could occur upon the issuance of fee patents. If the issuance of fee patents is necessary to accomplish disestablishment, what is the tipping point for this process? Since not all trust patents on the Reservation expired, something less than 100% must be sufficient under the Village's theory. Where is this trigger found in the GAA? There is no principle in the Village's theory from which to deduce answers to these queries.

appellant bears the burden of proving that BIA did not properly exercise its discretion,” and “disagreement with or bare assertions concerning BIA’s decision are insufficient to carry the appellant’s burden of proof.” *Id.* (citations omitted). “[T]he burden is on Appellants to show that the Regional Director abused his discretion by failing to properly consider the regulatory criteria.” *Cass County v. Midwest Regional Director*, 42 IBIA 2453, 250 (2006)

In the present case, the Regional Director considered the relevant regulatory factors and based her decisions on a reasonable overall analysis of those factors. The Village disagrees with the Regional Directors decisions, but offers no evidence to meet its burden of proving that the BIA did not properly exercise its discretion. Instead, the Village constructs lengthy, repetitive, and misguided arguments based upon speculation about possible future uses of the properties.

**1. The Tribe’s need for the land.**

The BIA has broad discretion in its consideration and determination of a tribe’s need for additional land under 25 C.F.R. 151.10(b):

[W]e note at the outset that BIA has broad leeway in its interpretation or construction of tribal “need” for land. Indeed, it is readily imaginable that that “need” will vary from one tribe to another...such that flexibility in evaluating “need” is an inevitable and necessary aspect of BIA’s discretion. It is not the role of an appellant to determine how that “need” is defined or interpreted by BIA; that role is properly left to BIA.

*County of Sauk v. Midwest Regional Director*, 25 IBIA 201, 209 (2007). It is sufficient for the BIA’s analysis “to express the Tribe’s needs and conclude generally that IRA purposes were served,” and it would be an “unreasonable interpretation of 25 C.F.R. 151.10(b) to require the [BIA] to detail specifically why trust status is more beneficial than fee status in the particular circumstances.” *South Dakota v. United States Dept. of the Interior*, 423 F.3d 790, 801 (2005).

The acquisition of land in trust provides a tribe with greater ability to exercise governmental authority over the land, consistent with the tribe's right to make its own laws and be governed by them, and ensures the permanency of the tribe's land base. *Aitkin County*, 47 IBIA at 109. Fulfillment of these needs directly serves IRA purposes. "Most notably, [the IRA] was enacted 'to safeguard Indian lands against alienation from Indian ownership and against physical deterioration.'" *South Dakota v. United States Dept. of the Interior*, 314 F.Supp.2d 935, 943 (quoting H.R. 7902, 73<sup>rd</sup> Cong., tit. III, § 1 (1934)).

The BIA may consider a tribe's financial status in determining the tribe's need for land, but a tribe's financial status "is not dispositive of whether it needs additional land," and a tribe "need not be landless or suffering financial difficulties to need additional land." *County of Sauk*, 45 IBIA at 210 (citations omitted). "[B]oth [the] Board and the courts have rejected the arguments that a Tribe's gaming revenue, financial security, or economic success disqualifies it from further acquisition of land in trust." *Roberts County v. Acting Great Plains Regional Director*, 51 IBIA 35, 51 (citations omitted). Similarly, the Board has rejected the contention that a tribe "must show that it needs to be protected against its own improvidence or that it is not competent to handle its own affairs." *County of Mille Lacs v. Midwest Regional Director*, 37 IBIA 169, 173 (2002).

In the present case, the Regional Director determined that the Tribe needed the properties for agricultural and residential purposes, that acquisition of the land in trust will ensure that the Tribe's investment in the land will never be lost, and that acquisition in the land was consistent with the Tribe's overall goal of having sufficient land available to support economic development, adequate housing, and agricultural purposes. (Boyea A.R. Vol. 1, Tab 7, Cornish

A.R. Vol. 2, Tab 6, Gerbers A.R. Vol. 1, Tab 2). With respect to the Boyea and Cornish properties, the Regional Director noted that 3,894 tribal members live on the Reservation, out of the total of 16,239 tribal members. By the time the Regional Director considered trust acquisition the Gerbers property, these numbers had increased to 4,208. (Gerbers A.R. Vol. 1, Tab 2). Finally, the Regional Director noted that the many tribal members were on a waiting list for housing or for land on which to build homes. (Boyea A.R. Vol.1, Tab 7, Cornish A.R. Vol. 2, Tab 6, Gerbers A.R. Vol. 1, Tab 2 ).

Instead of presenting evidence that the Regional Director failed to consider the Tribe's need for the land, the Village attempts to shift the burden of proof to the Regional Director and the Tribe, and claims that the Regional Director and the Tribe have not adequately demonstrated that the Tribe needs to have the land placed in trust. The Village's discussion of the Tribe's need for the land presents a litany of claims which the Board has previously rejected in one form or another. Thus, the Village protests that:

- The Tribe's purpose can be accomplished without placing the land in trust;
- The Tribe is a "wealthy casino Tribe" and can afford to pay taxes;
- The Tribe can prevent alienation of its land by refusing to sell the land or placing restrictive covenants on the land;
- The Tribe has a "full-fledged government and business enterprise;"
- The "statement of need does not assert that the land acquisition is necessary for purposes of the Tribe's continued existence;" and
- The Tribe has "only 2,500 members living on the reservation and 21,543 acres of land, which calculates to 116 acres for each Tribal member."

(Village's Briefs, 10-091, 10-092, pp. 49-51; 10-107, pp. 49-51).

The Village amply demonstrates its disagreement with the Regional Director's decisions, but the Village's disagreement is insufficient to carry its burden of proof. *Aitkin County*, 47 IBIA at 104. In addition, the Village's claims which purport to register more than the Village's disagreement with the BIA's exercise of discretion are clearly wrong. For instance, the Village's assertion that the Tribe can prevent alienation of its land by refusing to sell the land or placing restrictive covenants on the land is belied by the fact that the Village possesses the authority to condemn the Tribe's fee land, and the Village surely knows this. See *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F.Supp.2d 908 (2008). In addition, the Village's arithmetic in calculating the amount of tribal land supposedly available for each tribal member is wrong (21,453 divided by 2,500 = 8.58, not 116 as claimed by the Village), and the Village makes no attempt to substantiate its choices for the number of tribal members and the number of acres. This Village's ham-handed calculation also does not take into account that, in addition to residential purposes, the Tribe uses land for agricultural, conservation, recreational, business, and governmental purposes.

## **2. The purposes for which the land will be used.**

Under 25 C.F.R. 151.10 (c), the BIA must consider the purpose for which the land will be used, but the BIA need not entertain speculation or conjecture about possible future uses. "As a general rule, BIA should discuss the facts within its knowledge that have some bearing on the actual or known present or future use of the property." *State of South Dakota, County of Charles Mix, and City of Wagner v. Acting Great Plains Regional Director*, 49 IBIA 84, 105 (2009). In particular, where a tribe has not identified gaming as an intended purpose, and nothing in the record suggests the Tribe contemplates the use of a property for gaming, the BIA need not

consider gaming as a possible use of the property. *Shawano County v. Midwest Regional Director*, 40 IBIA 241, 248-49 (2005); *City of Yreka v. Pacific Regional Director*, 51 IBIA 287, 296-297 (2010). “Appellants’ mere speculation that the land might, at some point in the future, be used for gaming does not require BIA to consider gaming as a possible use of the property in deciding whether to accept the property into trust.” *Id.*, 51 IBIA at 297.

In the present case, with respect to the Boyea Property and the Gerbers Property, the Regional Director determined that the land has historically been used for residential and agricultural purposes, that the Tribe intends to continue these uses, and that acquisition of the properties in trust will expand the Tribe’s land base and further the Tribe’s goals of providing sufficient land for future generations for economic development, adequate housing, and agricultural purposes. (Boyea A.R. Vol. 1, Tab 7; Gerbers A.R. Vol. 1, Tab 2). The Regional Director also noted that the Tribe had entered into a long-term residential lease for the residence located on the Boyea property, and that the Tribe had entered an agricultural lease for the Gerbers Property. *Id.*

With respect to the Cornish Property, the Regional Director noted that the land had historically been used for residential purposes, that the Tribe intended to continue this use, and that this use was consistent with the Tribe’s goal of providing sufficient land for future generations for economic development, adequate housing, and agricultural purposes. (Cornish A.R. Vol. 2, Tab 6) In summation, the Regional Director stated:

The purpose for this particular acquisition is to expand the Oneida Tribal land base and to provide for Indian housing in consideration of use by Tribal Members. Historically, this property has been used for residential purposes. The Oneida Tribe entered into a long-term residential lease on this property on August 16, 2001. The Tribe does not anticipate any change in land use, therefore minimizing

regulatory and land use impacts.

*Id.*

Despite the stated intention of the Tribe to continue the current uses of the properties for agricultural and residential purposes, and the Regional Director's determinations that the properties had historically been used for these purposes and the Tribe has entered into leases effectuating these purposes, the Village engages in wild speculation about possible changes in land use. Some of the Village's conjecture is willfully obtuse. The Village suggests, for instance, that the Tribe's desire to protect its investment in the properties indicates that the Tribe intends to invest in improvements to the properties, and that such investment is inconsistent with maintaining the current uses of the properties. (Village's Briefs, 10-091, 10-092, pp. 49-51; 10-107, pp. 49-51). Similarly, the Village suggests that the Tribe's goal of providing sufficient land for future generations for economic development, adequate housing, and agricultural purposes, is somehow inconsistent with continued use of the properties in question for residential and agricultural purposes. (Village's Briefs, 10-091, 10-092, pp. 49-51; 10-107, pp. 49-51.)

Ultimately, the Village's speculation culminates in two wholly unsupported and unsupportable assertions:

- The Tribe's acquisition of an unrelated golf course property, which the Tribe markets as an amenity to its existing hotel and casino operations, demonstrates that the Tribe "has gaming-related intentions" and the Regional Director therefore "should have considered the potential for gaming and resulting jurisdictional conflicts on this land as well." (Village's Briefs, 10-091, 10-092, p 69; 10-107, p. 69).<sup>32</sup>

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<sup>32</sup>The Village's lengthy discussion of the Indian Gaming Regulatory Act and trust acquisitions for gaming purposes and is misguided, confusing, and irrelevant. The Village is correct, however, that the Tribe has a Class III Gaming Compact with the State of Wisconsin. Under the IGRA, the Tribe may conduct Class III gaming on any land located within the Tribe's Reservation. *See* 25 U.S.C. § 2703(4) (defining "Indian lands" in part as "all lands within the

- "By the Regional Director's own admission, the Tribe has expressed clear plans to develop and change the use of these lands. Based on these circumstances, the Regional Director abused her discretion and improperly concluded that the categorical exclusion applied." (Village's Briefs, 10-091, 10-092, p.79, 80; 10-107, p. 79).

These assertions are absurd on their face, and the Regional Director properly disregarded such speculation in her consideration of the purposes for which the properties will be used.

**3. The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.**

The BIA is required to consider "the loss of taxes actually assessed and paid on the property." *Aitkin County*, 47 IBIA at 111. The BIA is not required, however, to consider the cumulative impact of all land held in trust:

Under 25 C.F.R. § 151.10(e), BIA is directed to consider the impact on the affected jurisdictions of 'removal of *the* land from the tax rolls' (emphasis added). Relying on the plain language of this subsection, the Board has consistently rejected the argument that analysis of the cumulative effects of all tax loss on all lands within the appellant's jurisdictional boundaries is required.

*City of Eagle Butte v. Acting Great Plains Regional Director*, 49 IBIA 75, 81-82 (citations omitted).

At a minimum, the BIA must "discuss whether [the] Appellant has taxing authority; what, if any, taxes were assessed by Appellant in regard to [the] properties, or what, if any, taxes were received by Appellant in regard to each property; and the impact, if any, on [the] Appellant of the

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limits of any Indian reservation"). Under the Tribe's Gaming Compact, the Tribe may conduct Class III gaming on any land owned by the Tribe within the boundaries of the Tribe's Reservation. Thus, trust acquisition is not necessary for the Tribe to conduct gaming on land which the Tribe owns within the Village. The Village therefore lacks standing to complain about the harms which supposedly would result from tribal gaming operations, because the Village cannot demonstrate that such harms would be caused by acquisition of land in trust. *See, e.g., Skagit County v. Northwest Regional Director*, 43 IBIA 62, 71 (2006) (holding that, where a trust decision is challenged based on the alleged impacts of the tribe's intended use, an appellant bears the burden of showing that the intended use is "dependent upon the land being in trust status").

removal of the Property from the tax rolls.” *City of Eagle Butte v. Aberdeen Area Director*, 33 IBIA 246, 248 (1999). However, an appellant which fails to supply tax information may not challenge the BIA’s reliance on other sources of information. *State of Iowa and Board of Supervisors of Pottawattomie County v. Great Plains Regional Director*, 38 IBIA 42, 53 (2002). In addition, an appellant which supplies incorrect information may not complain if the BIA relies on that information. *Rio Arriba v. Acting Southwest Regional Director*, 36 IBIA 14, 23-24 (2001). Generalized arguments about the loss of taxes, without specific information regarding the impact of the loss of taxes, are insufficient to satisfy and Appellant’s burden of proof that the BIA abused its discretion. *City of Timber Lake v. Great Plains Regional Director*, 36 IBIA 188, 189-91 (2001).

In the present case, the Village did not submit specific information regarding the taxes it assessed and collected with respect to the properties. Instead, the Village characterized all of the Tribe’s pending trust applications as a single application encompassing over 2,500 acres, and asserted that the “Village’s portion of the property tax levied on the loss of assessed value due to the trust proposal is \$ 36,148.88. The Village’s budget for 2009 is \$ 2,568,483.” (Consolidated A.R. Vol. 3, Tab 17, p. 11; Gerbers A.R. Vol. 2, Tab 17, p. 11). The Village then argued that it would continue to be obligated to provide services despite the loss of this revenue, and that the BIA should not consider the value of services provided by the Tribe as offsetting the Village’s loss of tax revenue, because the Tribe is not legally mandated to provide services. *Id.*

Based upon the administrative records for the properties in question, the Regional Director appropriately determined, with respect to each property, that the loss of tax revenue to local municipalities would be minimal, and that the loss of revenue would be more than offset by

payments for services made by the Tribe and the value of services provided by the Tribe. To determine the loss of tax revenue, the Regional Director relied on county tax records which indicated: “the total tax levy for 2009 was \$82,125,411.00, and the taxes assessed and collected with respect to the Boyea Property were \$3,783.28 (.0004% of the total tax levy)”<sup>33</sup> (Boyea A.R. Vol. 1, Tab 7); “the taxes assessed and collected with respect to the Cornish Property were \$2,769.40 (.003372% of the total tax levy)” (Cornish A.R. Vol. 2, Tab 6); and “the taxes assessed and collected with respect to the Gerbers Property were \$17,307.03 (.0002 of the total tax levy).”<sup>34</sup> (Gerbers A.R. Vol. 1, Tab 2). The Regional Director noted that the Tribe and the county have entered into a service agreement, and that payments made by the Tribe to the county under this agreement offset the loss of tax revenues occasioned by trust acquisitions. (Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol. 1, Tab 2). The Regional Director also noted that the Tribe provides services for health, education, social welfare, cultural programs, veterans affairs, social or recreational programs, public works, waste and recycling, public safety, law enforcement, utilities, first responder, and environmental programs, and that the total annual cost of these programs is approximately \$107,268,247.00. (Gerbers A.R. Vol. 1, Tab 2). Finally, the Regional Director noted that the Tribe expended \$470,000.00 for infrastructure for municipalities in the year 2007 alone, and that the school district in which the

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<sup>33</sup>This figure appears to represent a typographical or computational error, as \$3,783.28 divided by \$82,125,411.00 equals .004606%. This error does not affect the Regional Director’s conclusion that the taxes assessed against the property are minimal in comparison to the total tax levy.

<sup>34</sup>This figure also appears to represent a typographical or computational error, as \$17,307.03 divided by \$82,125,411.00 equals .02107%. Again, this error does not affect the Regional Director’s conclusion that the taxes assessed against the property are minimal in comparison to the total tax levy.

properties are located received \$14,542.53 in 2009 in federal impact aid. (Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6).

The Regional Director considered that the Village assessed and collected taxes with respect to the properties, but noted that the Village responded to the consultation letters by objecting to fifty-six pending applications, and determined that the Village's response set forth only "unsupported speculations and assertions" and therefore was "unpersuasive." (Boyea A.R., Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol. 1, Tab 2).

The Village now complains that the Regional Director abused her discretion by focusing on information pertaining to the county and by failing to analyze the Village's concerns. (Village's Briefs, 10-091, 10-092, p. 57; 0-107, pp. 57, 58). The Village also asserts that the Regional Director made a mistake of fact in determining that the Tribe attempted to renew its service agreement with the Village, and in determining that the Tribe "has service agreements with all other local governmental entities." (Village's Briefs, 10-091, 10-092, p. 52; 10-107, p. 53). Finally, the Village suggests that the trust acquisitions will at some point in the future destroy the Village's tax base (Village's Briefs, 10-091, 10-092, pp. 54-55; 10-107, p. 55), and that "the Village and other local municipalities will be affected in numerous ways by the loss of tax revenue." (Village's Briefs, 10-091, 10-092, p. 55; 10-107, p. 56).<sup>35</sup>

Even at this late date, the Village has failed to supply specific tax information regarding the three properties in question. Instead, the Village relies on speculative projections regarding the potential impact of trust acquisitions over the next forty (40) years and unsubstantiated claims

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<sup>35</sup>The Village has no standing to assert the interests of other municipalities. *See Aitkin County*, 47 IBIA at 110, fn. 8.

regarding all of the Tribe's pending applications. In addition, even the aggregate information supplied by the Village regarding all of the Tribe's pending applications does not substantiate the Village's dire predictions regarding the erosion of its tax base. According to the Village, the "Village's portion of the property tax" for all of the pending applications was \$ 36,148.88, and the "Village's budget for 2009 is \$ 2,568,483." (Consolidated A.R. Vol. 3, Tab 17, p. 11, Gerbers A.R. Vol. 2, Tab 17, p. 11) In other words, the Village's portions of the property tax for all of the Tribe's pending trust applications represents only 1.4% of the Village's annual budget. Given the Village's failure to supply any specific tax information with respect to the properties, the Regional Director was entitled to rely on the information available to her, and properly concluded that the loss of tax revenue would be minimal, *State of Iowa and Board of Supervisors of Pottawattomie County*, 39 IBIA at 53, and she had no obligation to consider the potential cumulative impact of possible future trust acquisitions. *City of Eagle Butte*, 49 IBIA at 81-82.

Contrary to the Village's assertions, the Regional Director did not determine that the Tribe has entered into service agreements "with all other local governmental entities." Instead, the Regional Director correctly observed that the Tribe "has worked diligently and successfully with the local and state governments in the establishment of cooperative relations and the development of service agreements . . ." (Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol.1, Tab 2).<sup>36</sup> Similarly, the Regional Director noted that the Tribe intended to

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<sup>36</sup>Without offering any evidence, the Village insinuates that the Tribe has problems with other local communities. In particular, the Village asserts that the Village of Ashwaubenon "is suffering the same fate at the hands of the Tribe." (Village's Briefs, 10-091, 10-092, p. 54; 10-107, p. 54). Here again, the Village's claims are false. The Tribe has renewed its service agreement with the Village of Ashwaubenon on a year-to-year basis, and the Tribe and the

renew its service agreement with the Village, but was unable to come to terms with the Village. *Id.* The Village's scorched earth approach to the present appeals is indicative of the reasons for this. Even so, the Tribe has left open the possibility of service agreement negotiations with the Village if the Village Board recognizes the legitimacy of the Tribe's government and abandons its assimilationist rhetoric and its attempts to change federal Indian policy. (Consolidated A.R. Vol. 3, Tab 9, p. 5; Gerbers A.R. Vol. 2, Tab 9, p. 5)

Finally, there is absolutely no authority for the proposition that the Regional Director should ignore the value of services provided by the Tribe simply because the Tribe may not be legally mandated to provide such services. The Village's claims in this regard are nothing more than bare assertions disagreeing with the Regional Director's determinations, and are insufficient to meet the Village's burden of proof. *City of Timber Lake*, 36 IBIA at 189-91.

#### **4. Jurisdictional problems and potential conflicts of land use.**

"Subsection 151.10(f) requires BIA to consider jurisdictional problems and potential conflicts of land use that may arise. The regulations do not require the Regional Director to resolve all possible jurisdictional conflicts prior to acquisition, nor to consider potential future zoning conflicts if the land use changes." *State of South Dakota and Moody County*, 39 IBIA at 298. When the land being taken into trust is located within a tribe's reservation, the BIA may take into consideration an already established "jurisdictional pattern," and an appellant's bare assertions concerning jurisdictional problems are insufficient to show that a trust acquisition would alter that pattern or worsen any existing problems with the pattern. *Ziebach County v. Acting Great Plains Regional Director*, 38 IBIA 227, 231 (2002).

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Village of Ashwaubenon enjoy good relations.

With respect to each of the properties, the Regional Director considered the well-established “jurisdictional pattern” on the Reservation, including the applicability of Public Law 280, the Tribe’s operation of a police department, and the cross-deputization of tribal police officers by the County Sheriff, and tribal members’ receipt of services from the Village. (Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol.1, Tab 2). The Regional Director also noted that the trust acquisitions would not result in any change in land use. *Id.* Based upon these considerations, the Regional Director properly concluded that “no new jurisdictional problems are likely to result” from the transfer of properties into trust. *Id.*

The Village complains that the Regional Director failed to address its concerns, but the Village presents no evidence which demonstrates that acquisition of the properties will cause any new jurisdictional conflicts. Instead, the Village catalogues a list of existing grievances which it harbors against the Tribe, and which largely reflect the Village’s dissatisfaction with existing federal Indian policy and law.<sup>37</sup> The Village’s grievances include:

- There will be a “patchwork of jurisdiction and lack of regulatory coordination” (Village’s Briefs, 10-091, 10-092, p.58; 10-107, p. 59);

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<sup>37</sup>The Village employs Elaine Willman as “Tribal Affairs Director” and legal strategist. Willman is a board member of the Citizens Equal Rights Alliance, an organization dedicated to reversing federal Indian policy. See <http://www.citizensalliance.org>. She equates tribal sovereignty with “tribalism,” and advocates for the elimination of tribal governments: “What would happen if tribalism were no longer an allowable form of government within the borders of the United States?...The loss of tribal governments would be deemed severe by corrupt tribal leaders, undoubtedly. Too bad.” (Consolidated A.R. Vol. 3, Tab 9, Exh. “H”, Gerbers A.R. Vol. 2, Tab 9, Exh. “H”). The Village President endorses Willman’s views: “When we met her face to face, she impressed us with her knowledge and credentials... [W]here we (Hobart and Oneida) start to butt heads is when it leaves the realm of tribal culture and history and enters the realm of tribal government... It’s fair to say our board and Elaine’s views with respect to tribal government are more alike than dissimilar. So call it a signal or an explicit statement, call it what you like.” (Consolidated A.R. Vol. 3, Tab 9, p. 5, Gerbers A.R. Vol. 2, Tab 9, p. 5).

- Tribal zoning, land use planning and regulations will apply to the properties (Village's Briefs, 10-091, 10-092, p. 60; 10-107, p. 61);
- The Tribe has shown an lack of respect for the Village's land use decisions by purchasing certain properties, by establishing a conservation easement, and by not developing certain properties which it owns (Village's Briefs, 10-091, 10-092, pp. 61-62; 10-107, pp.62-63);
- There have been disputes between the Village and the Tribe, and between the Village and tribal members, regarding building permits, well inspections, liquor licensing, and storm water management charges (Village's Briefs, 10-091, 10-092, pp. 63-66; 10-107, pp. 64-66);<sup>38</sup>

The Village also speculates about future uses of the properties and problems which may result:

- The Village "will likely face reduced property values" (Village's Briefs, 10-091, 10-092, p. 59; 10-107, p. 60);
- The Tribe may develop the properties in question in a manner inconsistent with the Village's zoning, such as business development or mobile home park (Village's Briefs, 10-091, 10-092, p. 60; 10-107, p. 61);
- Placing land in trust may cause conflicts between the Village's and the Tribe's "competing police forces" (Village's Briefs, 10-091, 10-092, pp. 67-68; 10-107, pp. 67-68);
- The Tribe may use the properties in question for gaming (Village's Briefs, 10-091, 10-092, pp. 68-73; 10-017, pp. 69-74), and the Tribe "should not be permitted to end run procedures which protect local communities by being equivocal in regard to whether it intends to game on the land." (Village's Briefs, 10-091, 10-092, p. 71; 10-107, p. 71).

The Village's grievances relate to existing jurisdictional disputes, and the Village's and

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<sup>38</sup>The Village description of the existing jurisdictional issues is one-sided and self-serving. The Village claims, for instance, that the Tribe refused to obtain a liquor license from the Village. (Village's Briefs, 10-091, 10-092, p. 64; 10-107, p. 65). The Tribe in fact held liquor licenses from the Village until a change in state law obviated the need for the Tribe to obtain liquor licenses from the Village, and the Tribe now holds liquor licenses issued by the Wisconsin Department of Revenue. The Village's liquor license claim is emblematic of its other jurisdictional claims – it is based on a skewed interpretation of events, it does not relate to the properties in question, and it in no way could be said to be caused by taking the properties in question into trust.

the Tribe's disagreements about the Village's authority over the Tribe and tribal members on the Reservation. Many of these disagreements stem directly from the Village's insistence that the Tribe's Reservation has been disestablished. Similarly, the only actual land use conflict identified by the Village relates to the Tribe's use of the Gerber's Property for agricultural purposes, and the Village's zoning of that property as light industrial. It would be unreasonable to require the Regional Director to resolve all of these existing jurisdictional and land use conflicts prior to acquisition of the properties in trust. Based upon the administrative records, including the Village's objections, the Regional Director understood that the existing differences between the Tribe and the Village are part of the existing jurisdictional pattern, and rationally concluded that acquiring the properties in trust likely would not result in new jurisdictional disputes. In a similar case, the Board determined:

Appellants speculate that taking the parcels into trust will exacerbate existing jurisdictional and land use problems and will create "islands of refuge" where an individual can escape the reach of one jurisdiction; however, they offer no evidence showing that such islands of refuge currently exist on trust lands, or that the taking of the tracts into trust would promote such islands or would intensify already extant jurisdictional and land use problems. In any event, section 151.10(f) requires the Regional Director to *consider* jurisdictional problems or potential conflicts; it does not require her to *resolve* those problems or issues.

*Roberts County*, 51 IBIA at 52 (emphasis in original, footnote and citation omitted). The Board should reach the same result in this case.

**5. Whether the BIA is equipped to discharge additional responsibilities and duties.**

Under 25 C.F.R. 151.10(g), the BIA must consider whether the it is equipped to handle additional responsibilities flowing from trust acquisitions. With respect to each of the properties, the Regional Director noted that the Tribe has assumed many responsibilities under Public Law

638 agreements, and that the properties “will require only limited BIA management assistance, particularly in the oversight through technical assistance and functions that are inherent to the federal government.” (Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol. 1, Tab 2). Based upon these considerations, the Regional director concluded that “any additional responsibilities” resulting from the transactions “are foreseen to be minimal,” and acceptance of the properties in trust “will not impose any significant additional responsibilities upon the BIA beyond those already inherent in the federal trusteeship over the existing reservation.” *Id.*

The Village now complains that the Tribe, in its application for trust acquisition of the Gerbers Property, did not explain the services that it would need from the BIA, and it is therefore “unclear how the Regional Director concluded that the property ‘will require only limited BIA management assistance.’” (Village’s Brief, 10-107, p. 74). The Village did not raise any such objections before the BIA. In addition, the Village offers no evidence that acquisition of the Gerbers Property will impose any additional responsibilities on the BIA, or that the BIA is not equipped to handle those responsibilities. Instead, the Village improperly seeks to shift the burden of proof to the Tribe and the BIA. The Village bare assertion disagreeing with the Regional Director’s determination is insufficient to carry the Village’s burden of proof. In an identical case, the Board determined:

[I]n the absence of any . . . showing [that an acquisition would result in more than minimal administrative functions], we are not convinced that the Regional Director was required to address this factor in more detail. Appellants therefore have not met their burden of showing that the Regional Director’s consideration of this factor was erroneous.

*Roberts County*, 51 IBIA at 53.

**6. NEPA and hazardous substances determinations.**

25 C.F.R. § 151(10)(h) requires the BIA to consider the “extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.” In the present case, the Tribe supplied the information necessary for the BIA to fulfill its responsibilities, and the BIA fulfilled its responsibilities. The Village’s claims to the contrary are based on unfounded speculation, and the Village lacks standing to assert them.

**a. The BIA complied with NEPA, and the Village lacks standing to claim otherwise.**

516 DM 6 concerns compliance with the National Environmental Policy Act (NEPA). The requirements of appendix 4 are now set forth in Chapter 10, Managing the NEPA Process, Bureau of Indian Affairs, which provides in relevant part:

10.5 Categorical Exclusions. In addition to the actions listed in the Department’s categorical exclusions in Appendix 1 of 516 DM2, many of which the BIA also performs, the following BIA actions are hereby designated as categorical exclusions unless the action qualifies as an exception under Appendix 2 of 516 DM 2. These activities are single, independent actions not associated with a larger, existing or proposed, complex or facility. . . .

- I. Land Conveyances and other Transfers.  
Approvals of grants of conveyances and other transfers of interests in land where no change in land use is planned.

In the present case, the Tribe supplied the BIA with the necessary information for the BIA to conclude that the trust acquisitions were categorically excluded from further NEPA compliance, because the Tribe clearly indicated that no change in land use is planned for the

properties. (Boyea A.R. Vol. 1, Tab 46; Cornish A.R. Vol. 2, Tab 32; Gerbers Vol. 1, Tab 2)  
The Regional Director relied on this information in determining that no change in land use is planned for the properties, and that the properties are therefore categorically excluded. (Boyea A.R. Vol. 1, Tab 7; Cornish A.R. Vol. 2, Tab 6; Gerbers A.R. Vol. 1, Tab 2)

The Village constructs elaborate arguments based upon a fiction: according to the Village, “[b]y the Regional Director’s own admission, the Tribe has espoused clear plans to develop and change the use of these lands.” (Village’s Briefs, 10-091, 10-092, p. 79; 10-107, p. 79). As discussed above, the Village bases this fiction on its own fanciful reading of the Regional Director’s Notices of Decision, and the Village’s speculation about future uses of the land is insufficient to meet its burden of proof.

The Village also suggests that categorical exclusions are inappropriate for the properties because there are “exceptions which would trump reliance on a categorical exclusion.” (Village’s Briefs, 10-091, 10-092, p. 78; 10-107, p. 78). The Village then suggests that acquisition of the properties in trust “may impact whether the Village may enforce its regulations,” and equates the loss of Village jurisdiction with “extraordinary circumstances” and the violation of “a...local...law or requirement imposed for the protection of the environment.” (Village’s Briefs, 10-091, 10-092, pp. 78-79; 10-107, pp. 78-79). The Village also insinuates that its loss of jurisdiction may adversely affect the environment, but the Village is unable to identify any particular environmental injury which may result from its loss of jurisdiction.

The Village lacks standing to assert any claims based upon the BIA’s alleged noncompliance with NEPA. The Board applies both traditional and prudential elements of standing analysis:

Although the Board, as an Executive Branch forum, is not limited by the same constitutional and prudential constraints that apply to the exercise of judicial authority, the Board has a well-established practice of adhering to those jurisdictional constraints as a matter of prudence and in the interest of administrative economy. These constraints include the requirement that an appellant demonstrate that it has standing. In particular, an appellant may have standing to raise certain claims, but not others.

The Board adheres to the three traditional elements of standing as described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992): An appellant must show that (1) it has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally-protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision.

*County of Sauk*, 45 IBIA at 218-19.

In addition to the constitutional requirements of standing, prudential principles of standing require that when a plaintiff claims to have been “adversely affected or aggrieved [by agency action] within the meaning” of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effects *upon him*) falls within the “zone of interests” sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

*Id.*, 45 IBIA at 219 (quoting *Lujan v. National Wildlife Federation*, 492 U.S. 871, 883 (1990)).

There is “no authority for the proposition that loss of governmental jurisdiction, standing alone, is within in the zone of interests that NEPA was intended or designed to protect.” *Id.*, 45 IBIA at 220. Similarly, “the deprivation of revenue” does not support standing for NEPA claims. *Id.* The Village therefore lacks standing, because the Village has identified only loss of jurisdiction and loss of revenue as injuries, and the remainder of the Village’s assertions are speculative.

**b. Hazardous substances determinations.**

602 DM 2 relates to the determination of 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,” 602 DM 2(1), and requires a pre-acquisition environmental site assessment. 602 DM 2(6)(A). Following the preparation of the environmental site assessment, real property may be required if “no evidence of hazardous substance or other environmental liability is found.” 602 DM 2(6)(C).

In the present case, the Village admits that the Tribe prepared an environmental site assessments of the properties in conjunction with the BIA. The Village claims, however, that assessments revealed environmental concerns, that they are unreliable, and that the Regional Director abused her discretion by relying on them. (Village’s Briefs, 10-091, 10-092, pp. 83-87; 10-107, pp. 81-84). Although the Village suggests that the BIA should have consulted with representatives of the Village regarding the assessments, even now the Village is unable to identify any evidence of any hazardous substance or other environmental liability associated with the properties. Instead, the Village speculates that potential contamination at sites in the vicinity of the properties may have migrated to the properties, or may in the future migrate to the properties. (Village’s Briefs, 10-091, 10-092, pp. 83-85; 10-107, pp. 81-82). Based upon this speculation, the Village suggests that the Regional Director should have required an environmental assessment and an environmental impact statement.

The record amply demonstrates that the Tribe provided information to allow the BIA to fulfill its responsibilities under 602 DM 2, and that the Regional Director considered this information, as required by 25 C.F.R. § 151.10(h). With respect to each property, the Regional Director noted, “A Phase 1 ESA has been completed for this property and no recognized environmental conditions, contamination related concerns or liabilities were identified.” (Boyea A.R. Vol. 1, Tab 7, Cornish A.R. Vol. 2, Tab 6, Gerbers A.R. Vol. 1, Tab 2) Even if the Village

were able to demonstrate that the BIA was somehow remiss in fulfilling its duties under 602 DM 2, this would not constitute grounds for reversing the Regional Director's decisions. In this regard, the Board has ruled:

The Board finds that BIA may or may not have fulfilled its environmental responsibilities in this case. However, it also finds that the [appellant] has not shown that BIA erred in concluding that [the applicant] complied with the duties placed on her by 25 C.F.R. § 151.10(h), by providing BIA with the information necessary for it to fulfill its environmental responsibilities. In the absence of other problems with the trust acquisition decision, the Board will not vacate the Regional Director's decision solely to require BIA to show that it has fulfilled those responsibilities.

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

Finally, the Village's claim that the Regional Director should have required an environmental assessments and environmental impact statements, based upon the Village's speculation about the environmental site assessments, is nonsensical. Environmental assessments and environmental impact statements are aspects of NEPA compliance, not hazardous substance determinations, and, as demonstrated above, the properties were properly categorically excluded from such NEPA compliance.

## **II. The Village's Claims of Administrative Bias are Unfounded.**

The Village asserts that the Regional Director's decisions should be overturned because the MRO is biased. The Village bases this assertion primarily on the existence of a Memorandum of Understanding between the Tribe and the BIA under which the Tribe reprograms federal self-governance funds in order to fund positions within the MRO to process trust applications. (Village's Briefs, 10-091, 10-092, Ex. 34; 10-107, Ex. 38). Without saying as much, and without demonstrating that the Memorandum of Understanding violates any law,

that any staff member within the MRO has violated any law or regulation, or that any staff member has otherwise engaged in any improper conduct, the Village insinuates that the Tribe has “paid” the staff of the MRO to produce favorable results for the Tribe. The result, according to the Village, is that “there is a clear lack of impartiality at the BIA,” (Village’s Briefs, 10-091, 10-092, p. 46; 10-107, p. 45), and that “the Regional Director could not reasonably rely on the documents included in the record.” (Village’s Briefs, 10-091, 10-092, p. 47; 10-107, p. 46).

To the extent that the Village relies upon alleged structural bias within the BIA, the Village’s claims are unavailing. The Board, citing *South Dakota v. U.S. Dept. of the Interior*, 401 F.Supp.2d 1000 (S.D. 2005), *aff’d*, 487 F.3d 548 (8<sup>th</sup> Cir. 2007), has rejected the claim that “the administrative process has a built-in bias in favor of Indians that negates the impartiality and fairness of the process.” *State of South Dakota and County of Charles Mix*, 49 IBIA at 144. In *South Dakota*, the federal district court explained:

The BIA’s policies of tribal self-determination, Indian self-government, and hiring preference for Indians are policies established by Congress in the IRA. *See* 25 U.S.C. § 465. *See also Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 2478, 41 L.Ed.2d 290 (1974). The United States Supreme Court has found the preference policy is reasonable and rationally designed to further Indian self-government and does not violate due process. *Morton*, 417 U.S. at 555, 94 S.Ct. 2474. Following Congress’s statutory policies does not establish structural bias warranting reversal of the Director’s decision. *See Brooks v. N.H. Sup. Ct.*, 80 F.3d 633, 640 (1st Cir. 1996) (“[A]n entire group of adjudicators cannot be disqualified wholesale solely on the basis of an alleged institutional bias in favor of a rule or policy promulgated by that group.”).

401 F.Supp.2d at 1011.

Instead, the Village must present “clear evidence” in order to overcome the presumption “that public officers have discharged their duties properly.” *Sokoagon Chippewa Community v. Babbitt*, 929 F.Supp.2d 1165, 1176 (W.D. Wis. 1996). In *South Dakota*, the court described the

required showing as a “heavy burden” and ruled that “only a strong, direct interest in the outcome of a case is sufficient to overcome the presumption of evenhandedness.” 401 F.Supp.2d at 1011, 1012 (citations and quotation marks omitted).

Because the Village has no evidence that any official engaged in any improper conduct, the Village attempts to reverse the presumption. In the Village’s telling, the Memorandum of Understanding creates a presumption of bias, because MRO staff are “paid” by the Tribe, and the Village casts ordinary activities in a sinister light. The Village complains, for example, that MRO staff meet with tribal representatives, that the BIA provides notice to the Tribe of FOIA requests which may result in the release of information submitted by the Tribe, and that the BIA denied an overly broad FOIA request made by the Village.<sup>39</sup> This is nothing more than hyperbole, and the Village’s claims of bias based upon this hyperbole are irresponsible and reckless.

The Board has rejected similar claims of bias in the past. In *Roberts County*, for instance, the Board determined:

[Appellant’s] bias claims revolve around the Superintendent’s status as a tribal member and former tribal official; [Appellant], however, has offered no evidence demonstrating that either the Superintendent’s membership in the Tribe or his former service as a tribal official improperly influenced his decision, or that he was acting as a tribal representative, rather than as a BIA official, when he evaluated the trust acquisition requests. Absent such actual evidence, [Appellant’s] bald assumption that the Superintendent’s status necessarily calls into question his impartiality is insufficient to demonstrate either the appearance of bias or actual bias.

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<sup>39</sup>Notification of Indian tribes of FOIA requests which may result in release of information submitted by Tribes is consistent with departmental policy. See 383 DM 15. To the extent that the Village is aggrieved by the denial of its FOIA request, the Village may file an appeal under the FOIA processes established for that purpose. The Village apparently has not done so, perhaps in recognition of the extremely broad nature of its request.

51 IBIA at 49. The Board should likewise reject the Village's bald assumption that the existence of the Memorandum of Understanding calls into question the integrity of the MRO staff.

**III. The Village's Constitutional Claims are Beyond the Purview of the Board and are Frivolous.**

The Village raises six constitutional challenges against the application of the IRA to the Tribe. (Village's Briefs, 10-091, 10-092, pp 31-41; 10-107, pp. 30-40). In the words of the Village, "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." (Village's Briefs, 10-091, 10-092, p. 31; 10-107, p. 30). These arguments are beyond the authority of the Board to consider and are, in any event, frivolous.

**A. The Board lacks authority to consider the Village's constitutional claims.**

The Board directly addressed its limitations with regard to constitutional claims in *County of Mille Lacs*. As the Board explained:

The Board is a quasi-judicial forum within the Executive Branch of government, not a court within the Judicial Branch. After more than two centuries of constitutional interpretation, it is well-settled law that the Judicial Branch, not the Executive Branch, has the authority and responsibility to determine whether laws are constitutional... The Board rejects Appellant's argument and continues to hold that it lacks authority to determine the constitutionality of an Act of Congress.

37 IBIA at 171. The Village's constitutional arguments all posit that the IRA is unconstitutional inasmuch as it places the subject land beyond state and local jurisdiction. These arguments should be dismissed as beyond the jurisdiction of the Board.

**B. The Village's constitutional arguments are frivolous.**

The Village's constitutional challenges are addressed seriatim below, and each can be summarily dismissed for the reasons given.

**1. *Hawaii v. Office of Hawaiian Affairs* is irrelevant.**

Repeating its theme that trust acquisitions present significant problems by diminishing state and local jurisdiction, the Village advises that the Supreme Court weighed in on this issue in *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009). (Village's Briefs, 10-091, 10-092, p. 32; 10-107, p. 31). According to the Village, the Supreme Court held that "once Congress has disposed of territorial land and created the new state, its exclusive power over that land ceases." *Id.* at 33, 32. This is a gross misrepresentation of the Court's decision in *Hawaii v. Office of Hawaiian Affairs*.

The decision has nothing to do with the IRA or trust land. Instead, the question before the Court was whether Congress' Apology Resolution relating to the acquisition of the Hawaiian territory stripped the state of its authority to dispose of lands conveyed to it by the United States until such time as there had been a settlement of the claims of Native Hawaiians. The Court held that the resolution could not be so construed. Toward the end of its opinion, the Court observed that any other construction would present constitutional concerns since "Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." *Id.* at 1445. Thus, the case was a straightforward statutory construction case – one involving a statute other than the IRA – and the passing reference in the end to possible constitutional concerns related to Congress' ability to limit disposition of state fee lands, not to Congress' ability to limit state jurisdiction by creating Indian country. The case

is simply irrelevant to any of the issues presented by this appeal.<sup>40</sup>

## 2. Trust lands do not constitute federal enclaves.

The Village insists that Indian country generally cannot be created without state consent because Indian country constitutes federal enclaves. (Village's Briefs, 10-091, 10-092, p. 34; 10-107, pp. 34-35). This is wrong. Indian country does not constitute federal enclaves, as is clear from the very authority cited by the Village.

The first authority cited by the Village in support of its astounding proposition that the Supreme Court has equated Indian country with federal enclaves is *United States v. Antelope*, 430 U.S. 641 (1977). (Village's Briefs, 10-091, 10-092, p. 34, fn. 85; 10-107, p. 35, fn. 94). It is correct that the Court in *Antelope* noted that Congress has extended criminal statutes to Indian country that apply to federal enclaves, but the Court went on to say:

But as our opinions have recognized that Indian reservations differ in certain respects from other federal enclaves, the statute has been construed as not encompassing crimes on the reservation by non-Indians against non-Indians.

*Id.* at 648, fn.9. Thus, the Court did not hold that the extension to Indian country of federal criminal statutes converted Indian country into federal enclaves; to the contrary, the Court noted the differences between Indian country and federal enclaves.

Similarly, other cases cited by the Village reference the extension to Indian country of criminal statutes that apply to federal enclaves, but do not conclude therefrom that Indian

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<sup>40</sup> The Supreme Court in *Hawaii* had no reason to address, much less overrule, its long-standing rule that Indian country can exist within the borders of a state. See *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (the United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its border, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state").

country constitutes a federal enclave requiring state consent to its creation. See *U.S. v. Goodface*, 835 F.2d 1233, 1237 n.5 (8<sup>th</sup> Cir. 1987); *U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9<sup>th</sup> Cir. 1977). In fact, the Supreme Court has adopted the contrary rule that Indian country is *not* subject to exclusive federal law, as are federal enclaves. *Washington v. Confederated Tribes*, 447 U.S. 134, 160 (1980) (Court has rejected simplistic notion that Indian country is a federal enclave governed by federal law only); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (“Long ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries”).<sup>41</sup> Because of this distinction between Indian country and federal enclaves, “Congress also has the power to create tribal rights within a State without the State’s consent.” *Kansas v. United States*, 249 F.3d 1213, 1229 (10<sup>th</sup> Cir. 2001); *City of Rosedale v. Norton*, 219 F. Supp.2d 130, 150 (D.D.C. 2002) (land taken into trust does not establish a federal enclave).

### 3. The IRA does not violate the Tenth Amendment.

The Village’s argument consists of general principles regarding the Tenth Amendment and a grand leap, without the benefit of any authority, to the following conclusion: “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.” (Village’s Briefs, 10-091, 10-092, p. 37; 10-107, p. 34). The Village cites no authority, because there is no authority for this proposition.

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<sup>41</sup> Of course, it remains true that states have very limited authority over Indians and their property located in Indian country. The Village cites these cases, (Village’s Brief, 10-091, 10-092, p. 35, fn. 90; Village’s Brief, 10-107, p. 36, fn. 99), but they do not stand for the proposition asserted by the Village that tribal immunity from state law on reservations subjects reservations to exclusive federal authority for all purposes.

The Tenth Amendment does no more than reserve to the States or the people those “powers not delegated to the United States...” 10th Amendment, U.S. Const. Plenary authority over Indian affairs *was* expressly delegated to the Congress in the Indian Commerce Clause. Art. I, § 8, cl. 3, U.S. Const. The cases so holding are legion in number. *See generally, Cohen’s Handbook*, ¶ 5.01; *United States v. Lara*, 541 U.S. 193 (2004).

Thus, the federal government has routinely created Indian country in states’ borders without state consent and the Supreme Court has upheld federal authority to do so. *See United States v. John*, 437 U.S. 535 (1978); *U.S. v. McGowan*, 302 U.S. 535, 538 (1938) (Congress’ authority over Indians extended “over all dependent Indian communities within its border, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state”). As a result, every court to consider the matter has rejected the proposition that the acquisition of land in trust under the IRA violates the Tenth Amendment. *Carciari v. Kempthorne*, 497 F.3d 15, 39-40 (1<sup>st</sup> Cir. 2007), *rev’d on other grounds*, 555 U.S. \_\_\_, 129 S. Ct. 1058 (2009); *State of New York v. Salazar*, 2009 WL 3165591 (NDNY 2009); *City of Rosedale v. Norton*, 219 F. Supp.2d 130, 154 (D.D.C. 2002).

#### **4. The Indian Commerce Clause is not limited to mercantile trade.**

In a quixotic attempt to reverse two hundred years of federal Indian law, the Village argues that the Indian Commerce Clause does not authorize Congress to enact the IRA and authorize the Secretary to place lands into trust over the objection of state. (Village’s Briefs, 10-091, 10-092, pp. 37-40; 10-107, p. 37-39). As noted above, there is a legion of cases holding that Congress has broad authority over Indian affairs under the Indian Commerce Clause, and

that authority extends well beyond mercantile trade.<sup>42</sup>

The authority cited by the Village is not to the contrary. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), merely holds that Congress lacks authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity from suit.<sup>43</sup> There is nothing there even remotely indicating that Congress' authority under that clause is limited to mercantile matters. The Village's only authority that actually supports such a cramped interpretation of the clause is an academic article. (Village's Brief, 10-091, 10-092, p. 38; Village's Brief, 10-107, p. 37). See Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Den. U. L. Rev. 217 (2007). This article, though, proposes an interpretation of the clause as the author thinks it should be, not as the courts have actually interpreted it. The introduction makes clear that the Supreme Court has found plenary congressional power over Indian tribes, which the author challenges. *Id.* at 201. Thus there is no actual precedent for the Village's proposed limitation of the Indian Commerce Clause to mercantile trade.

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<sup>42</sup> There is no question that Congress has legislated on all manner of relations with tribes, not just mercantile trade, and courts have upheld these statutes. In the words of the *Handbook of Federal Indian Law*, "The pervasive federal presence in the field has led courts to reject challenges to Indian legislation as invading state sovereignty...Congress may constitutionally enact legislation, execute provisions of a treaty, or ratify agreements with a tribe, even if so doing affects state interests, such as barring the operation of state hunting and fishing laws, regulatory or tax laws, and laws governing such traditional state areas of concern as child welfare." §§ 5.01[1], 5.02[2].

<sup>43</sup> In fact, the Supreme Court observed in *Seminole* that Congress' authority under the Indian Commerce Clause is even broader than under the Interstate Commerce Clause: "This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over *Indian commerce and Indian tribes*." *Id.* at 62 (emphasis added). See also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("central function of the Indian Commerce Clause is to provide Congress with plenary authority to legislate in the field of Indians affairs").

**5. Trust land does not deprive the state of a republican form of government.**

In its most audacious argument, the Village posits that the acquisition of the subject lands would violate the provision of the Constitution guaranteeing the states a republican form of government. In the Village's words, "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." (Village's Briefs, 10-091, 10-092, p. 40; 10-107, p. 39). Again, this is demonstrably wrong, as presumably the Village knows. The Reservation was created in 1838. The enabling act for the State of Wisconsin is dated August 6, 1846, 9 Stat. 56, and the State of Wisconsin was admitted into the Union on May 29, 1848. *State of Wisconsin v. Lane*, 245 U.S. 427 (1918). Obviously, the Reservation existed when Wisconsin became a state and the Village's insistence to the contrary is puzzling, to say the least.<sup>44</sup>

**6. Acquisition of the properties does not violate the Fourteenth Amendment.**

The Village complains that placing the subject lands into trust violates the Fourteenth Amendment because, once set aside for the Tribe, the trust lands are subject to a tribal government in which the Village's citizens cannot participate. (Village's Brief, 10-091, 10-092, p. 41; Village's Brief, 10-107, p. 40). The Supreme Court long ago laid this and related

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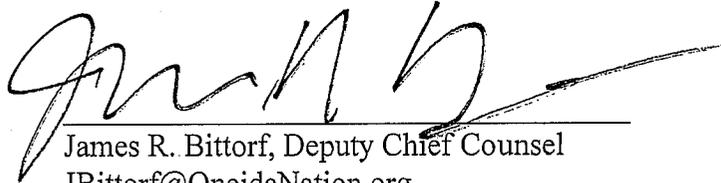
<sup>44</sup> Even if the Village's history were correct, its legal conclusion is still wrong. The Republican form of government protection, which appears in Art. IV, cl. 4, does not apply to Indian tribes. *Cohen's Handbook of Federal Indian Law*, ¶ 4.01[2][a]. And just as the creation of Indian country does not create an exclusive federal enclave requiring state consent, the creation of Indian country does not impair the Republican form of government preserved for states. See *City of Lincoln City v. United States Dept. of Interior*, 229 F.Supp.2d 1109, 1117 (D. Ore. 2002).

arguments to rest, because of the unique status of Indians under the Constitution as a “separate people” that justifies distinct treatment under federal law. *United States v. Antelope*, 430 U.S. at 646; *Morton v. Mancari*, 417 U.S. 535 (1974); see generally *Cohen’s Handbook of Federal Indian Law*, ¶14.03[2][b][ii].

**CONCLUSION**

For all of the foregoing reasons, this honorable Board should affirm the decisions of the Regional Director.

Respectfully submitted this 27th day of September, 2010.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of September, 2010, copies of the foregoing ANSWER BRIEF OF ONEIDA TRIBE OF INDIANS OF WISCONSIN were served on the following parties by first class mail, postage prepaid, in accordance with 43 C.F.R. §4.333:

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